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# A TREATISE

ON THE

# LAW OF INSURANCE

## OF EVERY KIND

By

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In Five Volumes

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# LAW OF INSURANCE

## CHAPTER LX.

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§ 2065. **Iron shutters: fire risk.**[12]—The fact that the building insured is described as being fitted with iron shutters and doors does not imply that they shall be kept closed at any particular time. It is sufficient if it has such shutters and doors, and the insurer is not relieved of responsibility because they are open and the fire is carried through them.[13]

§ 2066. **Lading: dunnage: registered tonnage: marine risk.**[14]—Under a Massachusetts decision if the ship is warranted not to hold more than her registered tonnage, this will be construed to refer to her cargo, and not to necessary and proper dunnage. In such case

[12] See § 1987 herein.
[13] Scott v. Quebec Fire Assur. Co. 1 Stu. (L. C.) 147.
[14] See § 1987 herein.

coal may constitute a suitable article for dunnage if it is used as such in good faith, and in no greater amount than necessary; nor is there a breach of warranty, even though a freight is received for its carriage.[15] It is decided, however, in the Federal Supreme Court, that when merchandise, carried under a bill of lading and paying freight, is put on board by the skipper with knowledge that it would be stowed as dunnage would be stowed, for the purpose of protecting the rest of the cargo from wet, it is cargo and not dunnage; and that a warranty in a ship's policy "not to load more than her registered tonnage," will be broken by carrying more cargo in weight than such tonnage though the excess be used as dunnage; whilst, if such excess had been mere dunnage, and not cargo, there would have been no breach of warranty. In this case Mr. Justice Bradley, states that while the Massachusetts decision "was adverse to the views which we had expressed" still "with all due respect for that intelligent and learned tribunal and after giving full consideration to the views presented in the opinion given in that case we cannot bring ourselves to a different conclusion from that to which we have come." [16] Under a New York decision a warranty that a vessel shall not load more than her registered tonnage refers to her carrying capacity as evidenced by the ship's register under which she is sailing at the date of the policy, and if she sails under a foreign registry, the acts of Congress as to measurement do not apply.[17] In connection with and as somewhat pertinent to the above, as relating to the points of warranty, overloading, excess cargo, and stowage, it is decided that if the vessel is made unseaworthy by excess of cargo actually loaded over the amount stated in the bill of lading then the underwriters would be discharged irrespective of the question whether the statement was made in good faith or not, and whether or not the master knew the fact.[18]

[15] Thwing v. Great Western Ins. Co. 103 Mass. 401, 4 Am. Rep. 567. In this case the court said that coal was shown to be a suitable and proper article to be used for dunnage, it was so used in good faith, and at least as much as the excess above the registered tonnage was reasonably necessary for the dunnage of the ship for her voyage. The mere fact that a freight was paid upon the coal found to have been so used is not necessarily inconsistent with, and cannot control, the finding of the jury.

[16] Great Western Ins. Co. v. Thwing, 13 Wall. (80 U. S.) 672, 678, 20 L. ed. 607, 610; 1 Low. (U. S. D. C.) 444, Fed. Cas. No. 5, 738.

[17] Reck v. Phœnix Ins. Co. 130 N. Y. 160, 29 N. E. 137, 41 N. Y. St. Rep. 250, 45 Alb. L. J. 155.

[18] Granger v. Providence-Washington Ins. Co. 200 Fed. 730, 119 C. C. A. 174, rev'g 192 Fed. 674, *considered* more fully under § 2163a herein.

§ 2067. **Lights: fire risk.**[19]—The fact that one open kerosene lamp is used in the office of a mill which is insured does not falsify a statement that no open lights are used in the mill, such lamp not being in the mill properly so called.[20]

§ 2068. **Location.**[1]—It is said in a Rhode Island case that "there seems to be no doubt that . . . it must be taken as the general rule that all the material statements of the policy of insurance, including statements as to the place in which the insured property is situate, are warranties, and that such warranties must be true, and must continue to be true during the whole life of the policy, as the condition of any recovery thereunder.[2] But some consideration must be given to the nature of the property insured and the uses contemplated; so reference must be had to the voluntary acts of the assured—in fact, all the material circumstances should be considered.[3] This is illustrated by the case where a tank containing oil was carried by a flood four or five hundred feet from its location as set forth in the policy, although it still remained on the assured's premises, and the court held the fact of location to be descriptive only, and if a warranty, then not a continuing one, and if the latter, then at most it was only a warranty against a voluntary change of the tank's location. One of the grounds of this decision was that in case of doubt a construction in favor of assured will be adopted.[4] The above statement also applies where the property is, and is known by assurer to be, of such a character in connection with the business in which it is employed as necessitates its temporary removal and its being kept temporarily in places other than the owner's premises, and where the description of location may be merely intended for identification. It may also, by reason of a statute, become an important factor whether or not the removal relied upon as a defense increased the risk or contributed to the

[19] See § 1987 herein.

[20] Insurance Co. of North America v. McDowell, 50 Ill. 120, 99 Am. Dec. 497.

[1] See § 1987 herein.

On location of movable property as affecting fire insurance thereon, see note in 26 L.R.A. 237.

[2] Lyon v. Providence-Washington Ins. Co. 14 R. I. 109, 110, 51 Am. Rep. 364, per Carpenter, J., *citing:*

*United States.*—Eddy Street Iron Foundry v. Hampden Stock & Mutual Ins. Co. 1 Cliff. (U. S. C. C.) 300, Fed. Cas. No. 4,277.

*Illinois.*—Hartford Fire Ins. Co. v. Farrish, 73 Ill. 166.

*Iowa.*—Harris v. Royal Canadian Ins. Co. 53 Iowa, 236, 5 N. W. 124.

*Maryland.*—Shertzer v. Mutual Fire Ins. Co. 46 Md. 506.

*New York.*—Wall v. East River Mutual Ins. Co. 3 Seld. (7 N. Y.) 370.

[3] See §§ 1742–1750 herein.

[4] Western & Atlantic Pipe Lines v. Home Ins. Co. 145 Pa. St. 346, 27 Am. St. Rep. 703, 21 Ins. L. J. 24, 22 Atl. 665. See also §§ 220 et seq. herein; Soli v. Farmers' Mutual Ins. Co. 51 Minn. 24, 52 N. W. 979; Meadowcraft v. Standard Life Ins. Co. 61 Pa. St. 91.

loss.[5] So a statement in a policy against fire and lightning, describing live stock covered by the policy as being in a certain barn, taken in connection with a clause in the policy providing that the company "shall not be liable for more than the sum or sums insured, nor the interest of the insured, except as hereinafter provided, as specified upon the property described in the places herein set forth, and not elsewhere," is to be construed as mere matter of description for identification of the property insured, and not a promissory stipulation on the part of the insured, or a condition of insurance on the part of the insurer, that such location of property should remain unchanged.[6]

But liability under a form of insurance policy prescribed by statute upon horses while in a designated building, and not elsewhere, does not attach in case they are destroyed while in another building to which they have been temporarily removed while the building designated in the policy is undergoing repairs.[7] So a warranty that property is contained in a dwelling may be availed of as a defense where it is not complied with in that the building was used as a feed store and not as a dwelling.[8] And a policy on chattels, giving permission to move them from their location to a specified building, the policy to cover the property during removal in proportion as the value in each location shall bear to the whole value, will not cover the property while temporarily in another building, although in process of removal.[8a]

It is also declared that nothing is better settled than that the location of the insured property is essentially material in contracts of insurance and enters largely into the matter of fixing the premium rate. Therefore a private garage warranty, based upon a reduced rate of premium, is breached by permanent removal into another state of an automobile from said garage, and recovery on the policy is precluded; nor in such case does the privilege granted of operating the car and housing it temporarily in other places while en route, or while being cleaned and repaired, enable assured to recover by reason of the fact that he placed the car, after said breach, in a shop for repairing; for the policy could not be thereby revived;

[5] E. C. Winsor & Son v. Mutual Fire & Tornado Assoc. 170 Iowa, 521, 153 N. W. 97; Code, sec. 1743. See §§ 1746–1748 herein.

[6] De Graff v. Queen Ins. Co. 38 Minn. 501, 8 Am. St. Rep. 685, 38 N. W. 696.

[7] Rosenthal v. Ins. Co. of North America, 158 Wis. 550, L.R.A.1915B, 361, 149 N. W. 155.

On animal insurance, see note in 44 L.R.A.(N.S.) 569.

[8] Lennox v. Greenwich Ins. Co. 9 Pa. Super. Ct. 171, 43 Wkly. N. C. 398, 29 Pitts. Leg. J. 279.

[8a] Palatine Ins. Co. v. Kehoe, 197 Mass. 354, 15 L.R.A.(N.S.) 1007, 83 N. E. 866.

and he is not aided by a statute making statements representations, and not warranties.[9] But a private garage warranty may be waived by knowledge of and statements by insurer's general agent.[10]

In a policy upon a gasolene launch the warranty was that she should not be engaged in navigation during a certain number of months, and that when laid up, or out of commission, she should be "safely stored at outside" etc. "Privileged to lay up either afloat or ashore." In answer to the question "give location and describe fully the building in which the boat is contained while laid up" it was stated that she was in water at a specified bay. The boat was almost totally destroyed by fire while in assured's boat house, which was a short distance from shore in comparatively deep water, but she was removed therefrom and beached. It was claimed that there was a breach of warranty as to location. It was held that as the only reference to location was in the application, and that was, that while laid up she would be in a building in water at the named bay, and then the words: "shall be safely stored at outside" meant when construed with the application, that she should be stored as she actually was stored "afloat" in the waters of said bay and outside the shore.[11] Again, a provision in a marine policy blank, upon which a fire insurance contract is written, for navigation by the vessel insured, does not so far conflict with a clause in a fire policy blank providing for insurance while the property is "located and contained as described herein" as to be waived by a rider attached to the marine blank waiving all provisions which conflict with the fire blank, although the description in the rider locates the property at a particular place.[12] And payment of the amount due under a fire-insurance policy does not waive fraudulent misrepresentations as to the location of the property at the time of loss, the property having in fact been moved so as to release the liability of the insurer.[13]

[9] Lummus v. Fireman's Fund Ins. Co. 167 N. C. 654, L.R.A.1915D, 239n, 83 S. E. 688, 45 Ins. L. J. 190; Revisal 1905, sec. 4808.

On effect of provision permitting temporary removal of property from place of insurance designated in policy after a permanent removal from that place, see note in L.R.A.1915D, 239.

[10] Commercial Union Assur. Co. of London v. Hill, — Tex. Civ. App. —, 167 S. W. 1095.

On effect of insurance agent's mistake in designating location of property, see note in 2 L.R.A.(N.S.) 548.

[11] Macatawa Transportation Co. v. Fireman's Fund Ins. Co. 168 Mich. 365, 134 N. W. 193, 41 Ins. L. J. 531.

[12] Jackson v. British America Assur. Co. 106 Mich. 47, 30 L.R.A. 636n, 63 N. W. 899.

On effect of riders or slips attached to insurance policies, see note in 30 L.R.A. 636.

[13] Palatine Ins. Co. v. Kehoe, 197 Mass. 354, 15 L.R.A.(N.S.) 1007, 83 N. E. 866.

**§ 2069. Master's certificate: warranty: marine risk.**[14]—A warranty "that the vessel must be commanded by a captain holding a certificate from the American Shipmasters' Association" means a valid and subsisting certificate.[15]

**§ 2070. Medical attendant: medical treatment: life risk.**[16]—(a)—If specific inquiries are made whether the assured has had medical attendance within a stated period of time, the fact is thereby made material, and must be disclosed.[17] A false representation of nonattendance by a physician for any serious illness also avoids the policy;[18] and this applies if the policy provides that it shall be void if assured had before its date been attended by a physician for any serious disease or complaint and he had had before that date any disease of the kidney, it is invalidated where it appears that assured died within two years after the policy was issued, and that he had been afflicted with renal colic, although not within that period, and that he had had gallstones and had undergone an operation therefor.[19] So where assured warrants that he has never been sick or attended by a physician, the warranty is falsified by the fact that he was attended by one about a month prior to issuing the policy.[20] A person would also be attended by a physician if he went to his office telling him he had coughed and spit blood, submitted to a physical examination, obtained a prescription, and paid a fee therefor, and afterwards consulted the physician again and paid a fee.[1] The words of the court in a New York case are perti-

[14] See § 1987 herein.

[15] McLoon v. Commercial Ins. Co. 100 Mass. 472, 1 Am. Rep. 129.

[16] See § 1987 herein.

[17] United Brethren Mutual Aid Soc. v. O'Hara, 120 Pa. St. 256, 13 Atl. 932, 12 Cent. Rep. 682. See O'Hara v. United Brethren Mutual Aid Soc. 134 Pa. St. 417, 19 Atl. 683.

[18] Weintraub v. Metropolitan Life Ins. Co. 58 N. Y. Supp. 295, 27 Misc. 540. See Huebner v. Metropolitan Life Ins. Co. 146 Ill. App. 282 (policy to be void if assured had before its date been attended by a physician for any serious disease or ailment; assured's knowledge whether he had any disease is material; warranty; judgment for insurer).

[19] Weintraub v. Metropolitan Life Ins. Co. 58 N. Y. Supp. 295, 27 Misc. 540.

[20] Sullivan v. Metropolitan Life Ins. Co. 36 N. Y. St. Rep. 38, 12 N. Y. Supp. 923.

See Trudden v. Metropolitan Life Ins. Co. 64 N. Y. Supp. 183, 50 App. Div. 473 (warranty that not attended by physician within two years, false: no recovery), s. c. 74 N. Y. Supp. 1083, 69 App. Div. 392; Roche v. Supreme Lodge Knights & Ladies of Honor, 47 N. Y. Supp. 774, 21 App. Div. 599 (question "How long since you were attended by physician or have professionally consulted one?" Answer, "not for two years;" held a breach of warranty if untrue: judgment for plaintiff reversed).

[1] White v. Providence Savings Life Assur. Soc. 163 Mass. 108, 27 L.R.A. 398, 39 N. E. 771.

On what constitutes a consultation with or attendance by a physician within the meaning of an application for life insurance, see note in 18

nent. They are: "To constitute a medical attendance it is not requisite that a physician should attend the patient at his home; an attendance at his own office is sufficient. Of these three physicians, who was the 'usual medical attendant?' It certainly was not Dr. Greenleaf, who attended him during but one brief illness, and never before or after. Was it Dr. Ormsby, who had attended him on two occasions, visiting him in all probability not over half a dozen times? Or was it Dr. Purdy, the family physician in his father's family, upon whom he called yearly for many years for medical advice or treatment? I think Dr. Purdy could more properly be called the usual medical attendant; or whether this be so or not, it was at least a question for the jury, and there was no error in submitting it to them;" and the court also says of Dr. Purdy: "It is quite evident that he knew more about the health and constitution of the assured than any other doctor." [2]

(b) If the name and address of each physician consulted by, or who has prescribed for, assured during a specified time, is required to be truthfully stated and his answers are warranties, he must comply therewith and a false statement as to the same, forfeits the insurance.[3] And where insured in her application warrants that the statements and answers therein are strictly correct and wholly true and if not the policy shall be void, and the policy is issued in consideration that such answers and statements are warranties it constitutes a suppression of a material fact and a misrepresentation and breach of warranty by insured to state that she had not been attended by any physician other than a certain one who is named, when as a fact she had been attended and treated within two days by another than the named physician for a very serious illness.[4] So where the inquiry was made, "How often has medical attendance been required?" and the answer was, "Two years ago," and the name of the medical attendant being asked, assured gave the name of Dr. R., who had in fact attended him about a year before, but the assured did not disclose the fact that he had had a relapse shortly thereafter, when he was attended by Dr. C., and that three physicians in attendance had despaired of his life; such information was found immaterial by the jury, and that no intentional fraud existed; nevertheless the policy was declared void.[5] But the omission to

L.R.A.(N.S.) 362; on time covered by question or representation as to consultation with physician, note in 45 L.R.A.(N.S.) 162.

[2] Cushman v. United States Life Ins. Co. 70 N. Y. 72, per Earl J. See Cushman v. United States L. Ins. Co. 63 N. Y. 404.

[3] Caruthers v. Kansas Mutual Life Ins. Co. (U. S. C. C.) 108 Fed. 487.

[4] Griffith v. Metropolitan Life Ins. Co. of N. Y. 36 App. D. C. 8.

[5] Cazenove v. British Equitable Assur. Co. 29 L. J. C. P. 160, aff'g 28 L. J. C. P. 259, 6 Com. B. N. S. 437. See also the following cases: Mu-

mention the name of one of the attending physicians during a period of illness, will not avoid the policy unless the omission is material, where the applicant warrants his statements to be full, complete, and true, "without suppression of any fact or circumstance which would tend to influence the company in issuing a policy;" [6] and if the answers to questions requiring the names of physicians consulted and as to mental derangement are not made a part or basis of the contract, nor referred to in the policy, the omission of one physician's name and a negative reply as to the latter question, do not show a nondisclosure of a material fact; and judgment against insurer is proper.[7] Again, if an application is rejected because of the form of policy required and a new application is made, but the answers in the former as to the name and residence of usual medical attendant, consultation with other physicians, etc., are not fully recorded in the latter by the agent and there is no personal interrogation as to the same, and the name is given therein of one physician and the complaint for which the applicant was attended, while in the first application assured states that he has not consulted any physician, and in the second he is made to say that he had not been under the care of any other physician, etc., the answers in the second application cannot be said to be such necessary inferences from those contained in the first as to be regarded as the applicant's statement so as to bind him.[8] So in case the name and residence of a physician "whom you have personally employed or consulted" is asked, and the applicant's reply is: "Have none," no breach of warranty is shown by the fact of consultation with a physician where assured had not "personally employed" one, for a warranty is confined to the answer and even

tual Life Ins. Co. v. Mullen, 107 Md. 457, 69 Atl. 385 (insured had consulted as to diseases two other physicians than the one named as last consulted: held material to risk and policy avoided); Hanna v. Mutual Life Assoc. 42 N. Y. Supp. 228, 11 App. Div. 245 (assured untruthfully named the examining physician as his attending physician: policy avoided); National Life Ins. Co. of U. S. v. Reppond, — Tex. Civ. App. —, 81 S. W. 1012 ("name of each physician consulted or who had prescribed within specified time was required: warranty breached); Talley v. Metropolitan Life Ins. Co. 111 Va. 778, 69 S. E. 936 ("name of every physician who has ever attended you or prescribed for you" was required in conjunction with question as to every illness, etc.: failure to state either the physician consulted shortly before application was made, or the result thereof: no recovery).

[6] Reppond v. National Life Ins. Co. 100 Tex. 519, 11 L.R.A.(N.S.) 981 (annotated on when statements may be regarded as representations although expressly denominated in policy as warranties), 101 S. W. 786.

[7] Joel v. Law Union & Crown (1908) 2 K. B. L. R. 899 (1908) 2 K. B. L. R. 431.

[8] Hewey v. Metropolitan Life Ins. Co. 100 Me. 523, 62 Atl. 600, 35 Ins. L. J. 110.

though the question suggests a fuller reply, still if it is not insisted upon insurer will be limited to that given.[9]

If the name of the family physician is required, this term will include a physician who is consulted professionally by members of the family, and who usually attends assured's wife and children.[10]

Again where assured named his regular family physician for years, but omitted the name of another physician who substituted for him at times, not as his assistant but acting independently for himself, and the illness for which he had consulted the latter was not trivial or so unimportant as to have no relation to assured's general health, the fact that negative answers were given to the questions whether the applicant had consulted any other physician or had any other medical attendant, or had been prescribed "for by any other physician than the above named" are matters manifestly material to the risk, accordingly a judgment for plaintiff was reversed.[11] It is held that assured's failure to fully disclose all the consultations with physicians or all those with whom he had consulted is a ground of reversal of judgment for assured.[12] But it is declared to be well settled that assured is not required to give the name of every physician he has consulted, regardless of the important or unimportant nature of assured's complaint. And where the form of the question is such as to leave some doubt in the ordinary mind whether or not it called for the name of each physician who had attended assured during the same spell of sickness and the short space left for answer in the blank, is of itself an indication that such answer must be brief, it is not an unreasonable inference that in giving the general designation of the ailment, the date and name of the attendant physician, the assured had honestly supposed he had given all the information sought and had fully and completely answered a question asking if he had consulted any physician or physicians in regard to personal ailments during the past seven years and if so to give dates, ailments and physician's name and address; at most the question of good faith and honesty in answering is for the jury.[13] Nor is a warranty untrue that assured had been attended by only a certain named physician where his wife

[9] Haughton v. Aetna Life Ins. Co. 42 Ind. App. 527, 85 N. E. 125. As to inquiries, partial answers, etc., see §§ 487a, 1869 et seq., 1914 et seq., 1916 herein.

[10] Price v. Phoenix Mutual Life Ins. Co. 17 Minn. 497, 10 Am. Rep. 166.

[11] Rigby v. Metropolitan Life Ins. Co. 240 Pa. 332, 87 Atl. 428, 42 Ins. L. J. 1235, act June 23, 1885, Pub. L. 134.

[12] Ætna Life Ins. Co. v. Conway, 11 Ga. App. 557, 75 S. E. 915, 41 Ins. L. J. 1802 (there was also a question of concealment of a previous illness).

[13] Modern Woodmen of America v. Wilson, 76 Neb. 621, 107 N. W. 568, 35 Ins. L. J. 582.

had, against his wishes, called in a physician for a slight ailment, who gave some advice, but it did not appear that assured took any of the medicine prescribed.[14] And when the applicant stated that he had consulted only one physician, and then only for a brief illness of two days, such statement is not falsified by the fact of casual remarks made upon the street when meeting another doctor, nor by the trial, out of curiosity alone, of a new static machine, where there is also evidence of his family in support of the truth of his statements.[15] And if an applicant warrants the truthfulness of his answer to the question, "Have you consulted any other physician?" and agrees that the policy issued in consideration of the warranty shall be void if the answer be false, the liability of the insurer depends upon the truthfulness of the answer.[16]

A statement of nonconsultation with a physician is material and avoids the policy, where the applicant has been treated for different complaints by different physicians and has also had an operation for piles;[17] so where another physician had treated assured a number of times within a brief period for rheumatism, there is a breach of warranty.[18]

(e) It is held that the statement by assured that he has not been prescribed for by a physician is falsified by the fact that a physician has prescribed for a cold.[19] This decision is cited with approval in a Massachusetts case, where a benefit certificate was issued to the assured and he warranted the answers to the questions to be full, complete, and true, and that the answers and application should form the basis of the contract, and that if any misrepresentations or fraudulent or untrue answers were made the policy would be void. The assured was asked whether he had "personally consulted a physician, been prescribed for, or professionally treated within the past ten years," to which he answered "No," which answer the jury found to be false, the court having instructed them that if the as-

[14] Crosby v. Security Mutual Life Ins. Co. 83 N. Y. Supp. 140, 86 App. Div. 89. *Compare* Beard v. Royal Neighbors of America, 53 Oreg. 102, 19 L.R.A.(N.S.) 798, 99 Pac. 83.

[15] Winn v. Modern Woodmen of America, 138 Mo. App. 701, 119 S. W. 536, 146 Mo. App. 69, 123 S. W. 59, 157 Mo. App. 1, 40 Ins. L. J. 1407. See Mutual Life Ins. Co. of N. Y. v. Morgan, 39 Okla. 205, 135 Pac. 279.

[16] Metropolitan Life Ins. Co. v. Brubaker, 78 Kan. 146, 18 L.R.A. (N.S.) 362, 96 Pac. 62.

[17] Grand Fraternity v. Keatley, 27 Del. (4 Boyce) 308, 88 Atl. 553, 42 Ins. L. J. 1715, decided under law and decisions of Pennsylvania, s. c. Keatley v. Grand Fraternity, 2 Boyce (25 Del.) 511, 82 Atl. 294, s. c. 2 Boyce (25 Del.) 267, 78 Atl. 874, s. c. (U. S. D. C.) 198 Fed. 264, 41 Ins. L. J. 1776, 1784.

[18] Fish v. Metropolitan Life Ins. Co. 73 N. J. L. 619, 64 Atl. 109.

[19] Metropolitan Life Ins. Co. v. McTague, 49 N. J. L. 587, 60 Am. Rep. 661, 9 Atl. 766.

sured being, as he supposed, in need of a physician, went to one for the purpose of consulting him as to what was the matter with him, had an interview, answering such inquiries as the physician deemed pertinent, receiving aid, advice, or assistance from him, assured "consulted" a physician within the meaning of the interrogatory, and also that if they found that he went to a physician for the purpose of procuring aid and assistance from the physician as such, and the physician prescribed a remedy or treated him professionally, either by giving him a prescription or by administering hypodermic injections of morphine, of which there was some evidence, then he was professionally "treated" within the meaning of the interrogatory, or professionally "prescribed for," and the court of appeals declared this charge to be correct and it was held that a distinct disease permanently affecting the health of an applicant is not necessary to render untrue his statement that he has not personally consulted a physician or been prescribed for or professionally treated within a certain time. The court also approves the definition, in another case,[20] of "prescription" which we have given in the next following paragraph. So in a Delaware case where the policy was construed according to the law of Pennsylvania the questions as to consultation with physician is declared not to relate to a condition of health, or mean that it was requisite or proper to consult a physician about any particular disorder, but that the question of disease is wholly separate from the question of consultation.[1] It is also

[20] Cobb v. Covenant Mutual Benefit Assoc. 153 Mass. 176, 25 Am. St. Rep. 619, 10 L.R.A. 666, 26 N. E. 230, per Devens, J. See also an instruction per Patvanent, C. J., in Hubbard v. Mutual Reserve Fund Life Assoc. 100 Fed. 719, 40 C. C. A. 665, 29 Ins. L. J. 577, 583 (where the words "consulted," "attended," "prescribed," in connection with "diseases or ailments," are construed; but held under facts that there was a breach of warranty), aff'g 80 Fed. 681, 27 Ins. L. J. 202.

[1] Grand Fraternity v. Keatley, 27 Del. (4 Boyce) 308, 88 Atl. 553, 42 Ins. L. J. 1715, 1718 (for other citations of same case, see note 17 above) *citing:*

*United States.*—Life Asso. of America v. Edwards, 159 Fed. 53, 86 C. C. A. 243; Caruthers v. Kansas Mutual Life Ins. Co. (U. S. C. C.) 108 Fed. 487, 491.

*Arizona.*—Mutual Life Ins. Co. v. Arhelger, 4 Ariz. 271, 36 Pac. 895, 896.

*Kentucky.*—Insurance Co. v. Schmidt, 29 Ky. L. Rep. 255, 93 S. W. 1055.

*Missouri.*—McDermott v. Modern Woodmen of America, 97 Mo. App. 636, 71 S. W. 833, 838.

*New Hampshire.*—Dwyer v. Mutual Life Ins. Co. 72 N. H. 752, 755, 58 Atl. 502.

*New Jersey.*—Metropolitan Life Ins. Co. v. McTague, 49 N. J. L. 587, 592, 60 Am. Rep. 661, 9 Atl. 766.

*New York.*—Roche v. Supreme Lodge, 47 N. Y. Supp. 774, 21 App. Div. 599, 601.

*Oregon.*—Beard v. Royal Neighbors, 53 Oreg. 102, 19 L.R.A.(N.S.) 798, 17 Ann. Cas. 1199, 99 Pac. 83.

*Pennsylvania.* — United Brethren Mutual Aid Soc. v. O'Hara, 120 Pa. 256, 260, 13 Atl. 932; Baldi v. Metro-

decided that an applicant who, for motives of his own, has sought and obtained a professional interview with a physician regarding the state of his health, cannot truthfully answer the question, "Have you consulted any other physician?" in the negative, merely because the interview concerned some temporary ailment or indisposition, slight in character, and not seriously affecting health.[2]

The following definition of a "prescription" is approved by the Court in the Massachusetts case above considered: "If the insured went to a physician for the purpose of getting his aid, advice, or assistance as a physician in a difficulty under which he was then suffering, or supposed himself to be suffering, and the physician hearing what the assured had to say, as a physician, and, for the purpose of relief or cure, or aid, or assistance, gave to the insured medicine, then he prescribed for him."[3] And it is said in a North Carolina case, per Hoke, J., that "It is true that the courts will hold that a prescription given by a physician, in response to a casual inquiry, does not amount to being under such physician's care, within the meaning of this stipulation. A prescription given after more careful examination as an exceptional or isolated occurrence might not be so. No more is it required that a patient should be bedridden to constitute the relationship, and if the insured, being apprehensive as to his condition, though 'up and around' within the time named, consulted" any physician "and intrusted his case to him for regular and continuous treatment, this would come within the representation" that he had not been under the care of a physician within two years "and if false would relieve the defendant from the obligations of the contract."[4] Again, the words, "talked with" and "consulted" are synonymous when applied to seeing a physician and obtaining medicine as a treatment for a personal ailment, and it is not error to refuse to substitute the latter word for the former in a charge to the jury.[5]

In the determination of the above and following points, however, reference should be had to what we have stated concerning health,

politan Ins. Co. 24 Pa. Super. Ct. 275, 290, 292.

See also Brock v. United Moderns, 36 Tex. Civ. App. 12, 81 S. W. 340 (consulted about granulated eyelids: warranty: no recovery, although one physician's testimony was that granulated eyelids was not a condition of health, but only local).

[2] Metropolitan Life Ins. Co. v. Brubaker, 78 Kan. 146, 18 L.R.A.(N.S.) 362 and note, 130 Am. St. Rep. 356, 16 Ann. Cas. 267, 96 Pac. 62.

[3] Cobb v. Covenant Mutual Benefit Assoc. 153 Mass. 176, 25 Am. St. Rep. 619, 10 L.R.A. 666, 26 N. E. 230—Devens, J.

[4] Bryant v. Metropolitan Life Ins. Co. 147 N. C. 181, 60 S. E. 983, 37 Ins. L. J. 354.

[5] Winn v. Modern Woodmen of America, 157 Mo. App. 1, 137 S. W. 292, 40 Ins. L. J. 1407 (judgment affirmed for plaintiff), s. c. 146 Mo. App. 69, 123 S. W. 59, s. c. 138 Mo. App. 701, 119 S. W. 536.

trivial complaints or ailments, and serious illness under preceding sections.[6] So questions and answers as to consultation with, treatment or attendance by, a physician and the nature of the ailment should be given a reasonable construction with reference to what is intended by the contract, and the effect thereon or upon the risk, and, therefore, reasonably construed they do not mean a consultation, treatment, or attendance concerning some trivial or temporary indisposition or feeling which has passed away without affecting the general health, but only such information is required as applies to a consultation, treatment, or attendance concerning some illness or disease of substantial importance or of a serious nature;[7] nor is it necessary to detail every circumstance of occasion of consultations with physicians, nor the names of every physician who has treated the applicant, where the matter concerns only temporary disability or indisposition not constituting a disease or a serious ailment.[8] And the above rule has been applied although the answers as to attendance by a physician and the nature of the ailment are made

[6] See §§ 2003 et seq. herein.

[7] *United States.*—McClain v. Provident Savings Life Assur. Soc. 110 Fed. 80, 49 C. C. A. 31, certiorari denied 184 U. S. 699, 46 L. ed. 765, 23 Sup. Ct. 938; Hubbard v. Mutual Reserve Fund Life Assoc. 100 Fed. 719, 40 C. C. A. 665, 29 Ins. L. J. 577 (rule conceded but held that there was a breach of warranty), aff'g 80 Fed. 681, 27 Ins. L. J. 202.

*Arkansas.*—Franklin Life Ins. Co. v. Halligan, 71 Ark. 295, 100 Am. St. Rep. 73, 73 S. W. 102.

*California.*—Poole v. Grand Circle of Women of Wood Craft, 18 Cal. App. 457, 123 Pac. 349, 41 Ins. L. J. 1148—Shaw, J. (code maxim applies, that law disregards trifles; Civ. Code, sec. 3533).

*Louisiana.*—Cole v. Mutual Life Ins. Co. of N. Y. 129 La. 704, 56 So. 645, 41 Ins. L. J. 227.

*Maryland.*—Mutual Life Ins. Co. v. Mullen, 107 Md. 457, 69 Atl. 385, 37 Ins. L. J. 507 (statements as to treatment by physician material except when for trivial ailment).

*Michigan.*—Blumenthal v. Berkshire Life Ins. Co. 134 Mich. 216, 104 Am. St. Rep. 604, 96 N. W. 17; Brown v. Metropolitan Life Ins. Co. 65 Mich. 306, 8 Am. St. Rep. 894, 32 N. W. 610.

*Missouri.*—Harris v. Knights & Ladies of Honor, 129 Mo. App. 163, 108 S. W. 130. See Winn v. Modern Woodmen of America, 157 Mo. App. 1, 137 S. W. 292, 40 Ins. L. J. 1407, s. c. 146 Mo. App. 69, 123 S. W. 59, s. c. 138 Mo. App. 701, 119 S. W. 536.

*Nebraska.*—Modern Woodmen of America v. Wilson, 76 Neb. 621, 107 N. W. 568, 35 Ins. L. J. 582.

*New York.*—Smith v. Travelers' Ins. Co. 135 N. Y. Supp. 18, 76 Misc. 441, 41 Ins. L. J. 1257, s. c. 135 N. Y. Supp. 1143, 151 App. Div. 885.

*Ohio*—Hunter v. International Fraternal Alliance, 5 Ohio Leg. N. 239, 7 Super. & Com. P. Rep. 289.

*Tennessee.*—Woodward v. Town Mutual Life Ins. Co. 104 Tenn. 49, 56 S. W. 1020.

*Washington.*—Hoeland v. Western Union Life Ins. Co. 58 Wash. 100, 107 Pac. 866 (construction should not lead to absurdities).

[8] Sargent v. Modern Brotherhood of America, 148 Iowa, 600, 127 N. W. 52; Blumenthal v. Berkshire Life Ins. Co. 134 Mich. 216, 10 Det. L. N. 429, 96 N. W. 17; Modern Woodmen of

warranties.[9] So the fact that assured had been attended by a physician for a few days while sick in bed with malaria does not prevent recovery on the policy, although he had stated that he had consulted no physician during the past five years,[10] nor does the taking of a dose of medicine from a doctor for a temporary indisposition, as biliousness, necessarily constitute treatment by a physician.[11] And inasmuch as confinement in childbirth does not constitute a "personal ailment" a single attendance of a physician on such an occasion several years prior to the application for insurance is not a consultation with a physician.[12] And even though assured had stated that he had only consulted one physician still if there had been consultations with others as to slight and temporary ailments the policy is not avoided.[13] So calling at a doctor's office for medicine for a temporary indisposition and receiving two visits from him for a cold, are not a consultation with a physician nor an attendance by a physician for any complaint, at least it is a question for the jury whether statements negativing such consultation are substantially true, where the answers are construed as representations and not as warranties and assured may have honestly interpreted the policy clause to mean treatment for any serious disease,[14] nor need assured disclose the giving to him of a prescription for a temporary ailment while he was visiting at the private residence of a physician, nor the fact that he was again prescribed for upon their meeting casually upon the street.[15] So the failure of the applicant to disclose the fact of his having consulted a physician on the same day that he applied for his policy, is not a fatal concealment where the object of the consultation was merely to procure a prescription to relieve him from a slight disorder of the stomach, which soon passed

America v. Wilson, 76 Neb. 621, 107 N. W. 568, 35 Ins. L. J. 582.

[9] Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 100 Am. St. Rep. 73, 73 S. W. 102; Hoeland v. Western Union Life Ins. Co. 58 Wash. 100, 107 Pac. 866.

[10] Goff v. Mutual Life Ins. Co. of N. Y. 131 La. 98, 59 So. 28, 41 Ins. L. J. 1415. See also Genung v. Metropolitan Life Ins. Co. 69 N. Y. Supp. 1041, 60 App. Div. 424 (no breach of warranty).

[11] Modern Woodmen of America v. Lawson, 110 Va. 81, 135 Am. St. Rep. 927, 65 S. E. 509.

[12] Rasicot v. Royal Neighbors of America, 18 Idaho, 85, 29 L.R.A. (N.S.) 433, 108 Pac. 1048.

[13] Mutual Life Ins. Co. of N. Y. v. Morgan, 39 Okla. 205, 135 Pac. 279 (so held as to law in Indian Territory prior to statehood). See Winn v. Modern Woodmen of America, 138 Mo. App. 701, 119 S. W. 536, s. c. 146 Mo. App. 69, 123 S. W. 59, s. c. 157 Mo. App. 1, 137 S. W. 292, 40 Ins. L. J. 1407; Crosby v. Security Mutual Life Ins. Co. 83 N. Y. Supp. 146, 86 App. Div. 89.

[14] Prudential Ins. Co. of America v. Sellers, 54 Ind. App. 326, 102 N. E. 894, 42 Ins. L. J. 1692.

[15] Mutual Reserve Fund Life Assoc. v. Ogletree, 77 Miss. 7, 25 So. 869.

away.[16] In another case, where the name of the physician who last attended was asked, it was held that this must be construed to mean an attendance for some disease of importance, and not a mere temporary indisposition.[17] Again, if the policy stipulates that unless otherwise stated therein as waived the policy is void if insured, before its date, "has been attended by a physician for any serious disease" and the applicant states that she is in perfect health and has never been treated by any physician for any serious illness, the material question at issue resolves itself under the facts into one of what constitutes a "serious illness" and if the trouble or complaint for which assured has been treated and which it is claimed avoids the policy, does not fall within the meaning of those words and is not one entailing some permanent or material impairment of health, recovery is not precluded.[18]

(d) In those cases where representations by an applicant concerning matters of fact presumably within his knowledge, such as his treatment by a physician or his confinement in a hospital, are treated as warranties, a breach thereof will render the policy void.[19] And in case a policy based on the application of assured stipulates that, if any of its statements prove untrue, it shall be void, the false statements that the applicant's present health was good, and that he had had no occasion to consult a physician, will preclude recovery.[20] So where assured has been treated for carcinoma of the liver by a physician it falsifies her statement that she had never consulted a physician even though she was not advised as to the character of the disease, and this is so held whether such statement be considered a representation or warranty.[1] And the term serious disease, includes heart disease, especially so where death results therefrom, and the policy is avoided where assured knew that she had been treated therefor and states to the contrary.[2] Consultation by an applicant for insurance with a physician, within the meaning of a question in the application, is also shown by the fact that her husband notified the physician that she was indisposed and asked him to attend her, and that, upon his arrival at the house, she advised him of her symptoms and received aid from him.[3] So where assured had raised

[16] Hann v. National Union, 97 Mich. 513, 37 Am. St. Rep. 365, 56 N. W. 834.

[17] Brown v. Metropolitan Life Ins. Co. 65 Mich. 306, 8 Am. St. Rep. 894, 32 N. W. 610.

[18] Metropolitan Life Ins. Co. v. Little, 149 Ky. 717, 149 S. W. 998, 41 Ins. L. J. 1798.

[19] Owen v. Metropolitan Life Ins. Co. 74 N. J. Law, 770, 122 Am. St. Rep. 413, 67 Atl. 25.

[20] Nelson v. Nederland Life Ins. Co. 110 Iowa, 600, 81 N. W. 807.

[1] Germania Life Ins. Co. of N. Y. v. Klein, 25 Colo. App. 326, 137 Pac. 73.

[2] Ripp v. Metropolitan Life Ins. Co. 58 N. Y. Supp. 594.

[3] Beard v. Royal Neighbors of

blood, and a physician had been consulted and had prescribed for him, a nondisclosure thereof avoids the contract.[4] Again, a breach of warranty that assured had not had medical advice during the last five years, avoids the policy.[5]

America, 53 Oreg. 102, 19 L.R.A. (N.S.) 798, 99 Pac. 83. *Compare* Crosby v. Security Mutual Life Ins. Co. 83 N. Y. Supp. 140, 86 App. Div. 89.

[4] Smith v. Ætna Life Ins. Co. 49 N. Y. 211.

On what constitutes "spitting or coughing blood," see note in 23 L.R.A.(N.S.) 917.

[5] National Union v. Kelley, 42 Okla. 98, 140 Pac. 1157.

See also the following cases:

*United States.*—Sladdin v. New York Life Ins. Co. 86 Fed. 102, 29 C. C. A. 596 (had consulted physician and had consumption: held a breach of warranty).

*Arkansas.*—Brotherhood of American Yeomen v. Fordham, 120 Ark. 605, 180 S. W. 206 (answers as to consulting physician and as to specified diseases false: held breach of warranty).

*Iowa.*—Smith v. Supreme Lodge Knights & Ladies of Golden Precept, 123 Iowa, 676, 99 N. W. 553 (statements false that had not consulted physician or been treated by physician, and was in good health: held breach of warranty).

*Kansas.*—Metropolitan Life Ins. Co. v. Brubaker, 78 Kan. 146, 18 L.R.A.(N.S.) 362 and note, 130 Am. St. Rep. 356, 16 Ann. Cas. 267, 96 Pac. 62 (in case of warranty liability depends upon untruthfulness of answer: physician consulted: warranty breached).

*Kentucky.*—Supreme Lodge Knights of Pythias v. Bradley, 141 Ky. 334, 132 S. W. 547, 40 Ins. L. J. 209 (breach of warranty as to consultation, good health, etc.), s. c. 33 Ky. L. Rep. 413, 109 S. W. 1178, s. c. 32 Ky. L. Rep. 743, 107 S. W. 209, s. c. — Ky. —, 117 S. W. 275; Brisou v. Metropolitan Life Ins. Co. — Ky. —, 115 S. W. 785 (had been operated on: no recovery).

*Louisiana.*—Petipain v. Mutual Reserve Fund Life Assoc. 52 La. Ann. 503, 27 So. 113, 29 Ins. L. J. 269 (statements that no physician and never inmate of hospital, were false: policy void).

*Michigan.*—Rathman v. New Amsterdam Casualty Co. 186 Mich. 115, L.R.A.1915E, 980, 152 N. W. 983, 46 Ins. L. J. 373 (accident policy; statements that had not received medical or surgical attendance, etc., in sound condition, etc., held affirmative warranties: no recovery).

*Missouri.*—Aloe v. Mutual Reserve Fund Life Assoc. 147 Mo. 561, 49 S. W. 553, 28 Ins. L. J. 293 (had been frequently treated by physicians: warranty breached); McDermott v. Modern Woodmen of America, 97 Mo. App. 637, 71 S. W. 833 (warranty falsified that had not consulted or been treated by physician within specified time).

*New Hampshire.*—Dwyer v. Mutual Life Ins. Co. 72 N. H. 752, 58 Atl. 502 (held a breach of warranty: had consulted and been treated by physician).

*New York.*—Hoffman v. Metropolitan Life Ins. Co. 126 N. Y. Supp. 436, 141 App. Div. 713 (statement false that not attended by physician and never in hospital: no recovery); Colaneri v. General Accident Assur. Corp. 110 N. Y. Supp. 678, 126 App. Div. 591 (had received medical or surgical treatment for certain diseases; warranty falsified: no recovery).

*Texas.*—Brock v. United Moderns, 36 Tex. Civ. App. 12, 81 S. W. 340 (statement that had not consulted or been advised by any physician within five years; and to question "If not treated within five years, how long

But it is held that false statements as to consultation with a physician although warranties, do not avoid the policy where it is not so stipulated, unless they are fraudulently made.[6] And where it cannot be said that insurer would have rejected the applicant had it known that he had been treated in a dispensary, his statement to the contrary does not constitute such a breach of warranty as to forfeit the insurance;[7] nor is a warranty that assured had not received medical or surgical attendance, nor consulted a physician within a specified time, broken by the fact that assured in an application to a board of education for leave of absence, stated that he was away on account of serious personal illness and that there was attached to said application a physician's certificate that insured had influenza, or tonsilitis, that is, la grippe, or a cold, where it does not appear that he consulted said physician for the purpose of treatment, and that no examination was made, or prescription given; and the rule above stated as to trivial ailments also applies.[8]

(e) If there is no evidence that assured consulted a physician for the purpose of treatment by him, and he was not called in by assured and no examination was made nor any prescription given, and the physician was at assured's house on other professional duties, there is no violation of a warranty that he had not received medical or surgical attention nor consulted a physician within the time specified.[9]

So where the consultation was not for treatment but for the purpose of obtaining a pension the policy is not avoided even though made warranties.[10] And the fact that while assured was in a doctor's office for another purpose he permitted, without requesting it, some wax to be removed from his ears, does not falsify a statement of non-attendance by a physician.[11] Nor is the policy avoided by consultations relating to matters other than his own diseases or illnesses.[12] But although one seeks, or consults a physician for motives of his

since you were under the care of a physician, and for what cause?" assured answered "never," warranty falsified: no recovery).

*Ontario.*—Smith v. Grand Lodge of British America (Ont.) 24 Canadian L. T. 16 (had consulted several physicians, shortly before: warranty breached).

[6] German American Mutual Life Ins. Assoc. v. Farley, 102 Ga. 720, 29 S. E. 15, 27 Ins. L. J. 657.

[7] Diamond v. Metropolitan Life Ins. Co. 116 N. Y. Supp. 619.

[8] Smith v. Travelers Ins. Co. 135 N. Y. Supp. 18, 76 Misc. 441, 41 Ins. L. J. 1257, s. c. 135 N. Y. Supp. 1143, 151 App. Div. 885.

[9] Smith v. Travelers Ins. Co. 135 N. Y. Supp. 18, 76 Misc. 441, 41 Ins. L. J. 1257, s. c. 135 N. Y. Supp. 1143, 151 App. Div. 885.

[10] National American Ins. Co. v. Ritch, 121 Ark. 185, 180 S. W. 488.

[11] Harns v. Knights & Ladies of Honor, 129 Mo. App. 163, 108 S. W. 130.

[12] Billings v. Metropolitan Life Ins. Co. 70 Vt. 477, 41 Atl. 416.

own, it is held to make it none the less a consultation in so far as the truth of his negative statement as to consulting other physicians is concerned.[13]

(f) Questions in an application as to the time since a physician was consulted, the disease, the name of the physician, and the present state of health, are material so that, if the answers are warranted to be true, their falsity will prevent recovery on the policy.[14] So in case of a warranty that assured has not sought medical advice within a specified time, such period has been held to have relation from the date of the application, not from the time the certificate was issued.[15] If, however, it is not contemplated or intended that a statement as to the time of treatment should be literally true, there is no warranty.[16] And in case an applicant states that he has not been under the treatment of a physician for two years, the expression "two years" is understood as an approximate statement.[17] Again, if a question is so worded as to be ambiguous, and it is therefore not apparent which interpretation was placed upon it by the applicant, the policy will not be forfeited as for falsity in answering, as where the answer is "five years" to the question "How long since you have consulted a physician?" for such an inquiry may be construed to refer either to the time "since he last" or "since he first" consulted a physician.[18] It is also held, however, that the inquiry, "How long since you were attended by a physician, or professionally consulted one?" means not when a physician was first consulted, but when he was last consulted.[19] Where the question is whether assured has employed or consulted individually a physician, this is held not to refer to a con-

[13] Metropolitan Life Ins. Co. v. Brubaker, 78 Kan. 146, 18 L.R.A. (N.S.) 363 (annotated on what constitutes a consultation with or attendance by a physician within the meaning of an application for life insurance) 130 Am. St. Rep. 356, 16 Ann. Cas. 267, 96 Pac. 62.

[14] Crosse v. Supreme Lodge Knights & Ladies of Honor, 254 Ill. 80, 45 L.R.A.(N.S.) 162 (annotated on time covered by question or representation as to consultation with physician), 98 N. E. 261.

[15] Catholic Order of Foresters v. Collins, — Ind. App. —, 69 N. E. 745. See Collins v. Catholic Order of Foresters, 43 Ind. App. 549, 88 N. E. 87, 38 Ins. L. J. 737. (In this case the question was "Have you ever had any severe illness or injury or undergone any surgical operation?" Also, "State when, give particulars, and name your attending physician:" also, "when and for what has medical advice been sought within the last three years?" Breaches of warranty were claimed: from a judgment for defendant, plaintiff appealed: reversed and new trial granted).

[16] Provident Savings Life Assur. Soc. of N. Y. v. Oliver, 22 Tex. Civ. App. 8, 53 S. W. 594.

[17] Owen v. Metropolitan Life Ins. Co. 74 N. J. L. 770, 122 Am. St. Rep. 413, 67 Atl. 25.

[18] Stewart v. Equitable Mutual Life Assoc. 110 Iowa, 528, 81 N. W. 782.

[19] Crosse v. Supreme Lodge Knights & Ladies of Honor, 254 Ill. 80, 45 L.R.A.(N.S.) 162n, 98 N. E. 261.

sultation made at any time during the applicant's life, but to an employment or consultation with reference to the application for insurance, so that proof of employment of a physician six months or a year and a half prior thereto need not be disclosed in answer to such a question.[20]

(g) If the inquiry is as to the last medical attendant, the fact is so far rendered material that it must be disclosed or truly stated. The insurer may desire to consult with the medical man who was the last in attendance, since the information possessed by him may have an important bearing upon the risk and influence largely the judgment of the insurer.[1] And there is a breach of warranty as to the last physician who treated assured when a physician testifies that assured had consulted him and assured's evidence also shows such consultation was had.[2] So in case assured had been attended by a physician several times within a shorter period than that specified by him as being the time when he was last so attended, there is a breach of warranty which avoids the policy.[3] In a Massachusetts case it is held that if the application asks, "By what physician were you last attended?" the applicant is held to have been attended by a physician, within the meaning of that question, where it appears that he had called upon a physician and submitted to an examination by him, and had subsequently again called upon the same physician and consulted him professionally.[4] But, although the answers in the application are made warranties, if assured in response to an inquiry for the name of the last physician who attended him, gives the name of one of two who had so attended him it is sufficient where said physician attended him during the latter and greater part of his illness.[5] And if the occasion of attendance by a physician was several years prior to assured's application and was not of sufficient importance to be remembered, his answer "never" in response to a question as to the time when he was last attended by a physician does not invalidate the policy.[6]

If the name of the last medical attendant is asked, it must be given, whether he be a quack or a regular practitioner.[7]

[20] World Mutual Life Ins. Co. v. Schultz, 73 Ill. 586.

[1] Morrison v. Muspratt, 4 Bing. 60, 12 Moore, 231. See Brown v. Metropolitan Life Ins. Co. 65 Mich. 306, 8 Am. St. Rep. 894, 32 N. W. 610.

[2] Life Assoc. of America v. Edwards, 159 Fed. 53, 86 C. C. A. 243.

[3] Wall v. Royal Society of Good Fellows, 179 Pa. 355, 32 Wkly. N. C. 502, 27 Pitts. L. J. (N. S.) 353, 36 Atl. 748.

[4] White v. Providence Savings Life Assur. Soc. 163 Mass. 108, 39 N. E. 771, 27 L.R.A. 398.

[5] Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 100 Am. St. Rep. 73, 73 S. W. 102.

[6] Singleton v. Prudential Ins. Co. 42 N. Y. Supp. 446, 11 App. Div. 403.

[7] Everett v. Desbrough, 5 Bing. 503, 3 M. & P. 190. See also Kaspryzk v. Metropolitan Life Ins. Co.

(h) The actual fraud or moral turpitude of insured is unimportant upon the question of consulting a physician within a specified time, where his negative statement must have been known by assured to have been false in that he had been under such treatment at various times within the period specified.[8] So in case the statement is made a warranty and a material misrepresentation, even though there is no intent to deceive, the recovery is precluded by the untruth of a representation by insured that he had not been treated by or consulted with any physician as to personal ailments.[9] But where untrue statements as to attendance by a physician are representations only, the right to recover depends upon whether they were made in good faith or not, or were knowingly or wilfully made with intent to deceive.[10] And it is held that an untrue answer to a question whether the applicant has been treated by a physician within a specified time does not forfeit the insurance as a matter of law unless the answer is wilfully false, or fraudulently made or material.[11] Again, upon the question of good faith of insured in making a negative answer as to medical attendance, etc., it is immaterial whether or not the physician consulted by him

140 N. Y. Supp. 211, 79 Misc. 263, 42 Ins. L. J. 607.

[8] Schas v. Equitable Life Assur. Soc. 166 N. C. 55, 81 S. E. 1014 (judgment below for plaintiff reversed and new trial granted; jury found for plaintiff however and held no error in 170 N. C. 420, 87 S. E. 222, 47 Ins. L. J. 151).

[9] Van Woert v. Modern Woodmen of America, 29 N. Dak. 441, 151 N. W. 224.

[10] Metropolitan Life Ins. Co. v. Johnson, 105 Ark. 101, 150 S. W. 393, 42 Ins. L. J. 73.

[11] Modern Woodmen of America v. Lawson, 110 Va. 81, 135 Am. St. Rep. 927, 65 S. E. 509.

See the following cases:

*United States.*—McClain v. Provident Savings Life Assur. Soc. 110 Fed. 80, 49 C. C. A. 31 (warranty construed to mean that statements were made in good faith and without fraudulent concealment or intent to deceive and it was so found: consultation with physicians, etc.), certiorari *denied* 184 U. S. 699, 46 L. ed. 765, 23 Sup. Ct. Rep. 938.

*Illinois.*—Metropolitan Life Ins. Co. v. Mitchell, 175 Ill. 322, 51 N. E. 637 (there was evidence of good faith: consultation, etc.: judgment against insurer); Walsh v. John Hancock Mutual Life Ins. Co. — Ill. App. —, 42 National Corp. Rep. 656 (statements were known by assured to be false: consultation, etc.).

*Maryland.*—Mutual Life Ins. Co. v. Mullen, 107 Md. 457, 69 Atl. 385 (bad faith shown where assured must have known of falsity, since he had been treated for diseases: no recovery).

*Massachusetts.* — Kidder v. Supreme Commandery United Order of the Golden Cross, 192 Mass. 326, 78 N. E. 469, 35 Ins. L. J. 778 (presumption of assured's knowledge exists as to her treatment by physicians, etc., but verdict for plaintiff affirmed).

*Nebraska.*—Modern Woodmen of America v. Wilson, 76 Neb. 344, 107 N. W. 568, 35 Ins. L. J. 582 (nothing to show answer not given in good faith where question as to treatment or consultations susceptible of different constructions: judgment for plaintiff).

was licensed, where he had been consulted under the belief that he was qualified and authorized to practise medicine, especially so where proofs of death, signed by said physician as such, show that he had treated assured and this is not disproved.[12]

In all cases, however, where questions are asked as to assured's medical attendant, consultation of physician, medical treatment, and the like, assured should answer in good faith; having in view that the obvious purpose of the inquiry, manifest from the words used, should be considered. If in the light of the evidence presented it is apparent that assured's answer cannot be viewed otherwise than as evasive and incomplete, and as intended to prevent a disclosure as to past health from the physician who could best give information as to the same, or to prevent further inquiry by the assurer, then such evasive or incomplete answer ought to avoid the contract. But courts should not by construction in any case force words out of their ordinary and accepted meaning, and if the answer given is clearly responsive to the question, according to the accepted meaning of the words used, it should be held sufficient. We believe these suggestions fully accord with the decided cases. The question whether the answers have been made in good faith is generally one for the jury.[13]

(i) As to the effect of statutes: A provision as to attendance by a physician is a warranty rather than a condition and within the statute a misrepresentation as to such attendance will not avoid the policy where the risk was not increased.[14] And where a statute, which precludes a defense for a misrepresentation or warranty made in the negotiation of the contract, is in the alternative; that is, unless made with intent to deceive; or unless the matter misrepresented increases the risk of loss, so that the existence of either is sufficient, although both may exist, but one must exist, a misrepresentation as to consulting a physician standing alone is an insufficient defense, for such a misrepresentation does not of itself materially and necessarily show the intent to deceive or increase the

[12] Kaspryzk v. Metropolitan Life Ins. Co. 140 N. Y. Supp. 211, 79 Misc. 263, 42 Ins. L. J. 607. See Everett v. Desbrough, 5 Bing. 503, 3 M. & P. 190.

[13] See cases throughout this section and *examine* Scoles v. Universal L. Ins. Co. 42 Cal. 523; Reid v. Piedmont & Arlington Life Ins. Co. 58 Mo. 421; Gibson v. American Mutual Life Ins. Co. 37 N. Y. 580; Phillips v. New York Life Ins. Co. 9 N. Y. Supp. 836, 839, 56 Hun, 649; Maynard v. Rhode, 1 Car. & P. 360; Lindenau v. Desbrough, 8 Barn. & C. 586; Hutton v. Waterloo Life Assur. Co. 1 Fost. & F. 735; Forbes v. Edinburgh Life Assur. Co. 10 Ct. Sess. Cas. (Scot.) 451; Taylor's Medical Jurisprudence (ed. 1866) 760. See subdiv. (m) this section.

[14] Metropolitan Life Ins. Co. v. Goodman, 10 Ala. App. 446, 65 So. 449; Code 1907, sec. 4572.

risk,[15] so the statement must have been of matter which contributed to the event or contingency upon which payment of the policy is based.[16] In a Delaware case the decision was based upon the construction of the Pennsylvania statute and it was held the common-law rule in case of false answers was modified by the statute and that the answers of assured in his application, as to consultation with a physician, and as to certain ailments or diseases, etc., were warranties, and that misrepresentations or untrue statements as to the same were material and recovery was therefore precluded.[17] Under a New York decision, statements as to insured's prior physical condition, his consultation with physicians, etc., were not contained in the policy either directly or by reference and it was held that the defense that they were known by assured to be false, but were relied on by insurer and induced issuing the policy, could not be availed of by insurer.[18]

[15] Mutual Life Ins. Co. of N. Y. v. Allen, 174 Ala. 519, 56 So. 568, 41 Ins. L. J. 221; Code 1907, sec. 4572.

[16] Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 73 S. W. 102. See § 1916 herein.

[17] Grand Fraternity v. Keatley, 4 Boyce (27 Del.) 308, 88 Atl. 553, 42 Ins. L. J. 1715; Pa. act June 23, 885; P. L. 134, s. c. Keatley v. Grand Fraternity, 2 Boyce (25 Del.) 511, 82 Atl. 294, s. c. 2 Boyce (25 Del.) 267, 78 Atl. 874.

See the following cases:

*United States.*—Paulhamus v. Security Life & Annuity Co. (U. S. C. C.) 163 Fed. 554 (insurer put on inquiry where names of physicians given: act Pa. June 23, 1885, sec. 1; Pub. L. 134, construed); Fidelity Mutual Life Assoc. v. Jeffords, 107 Fed. 402, 46 C. C. A. 377, 53 L.R.A. 193 (if answers in good faith, misstatements or omissions not wilful, do not avoid: all physicians who examined assured within specified time not named: policy not avoided: Ga. Civ. Code 1895, secs. 2095, 2099).

*Georgia.*—Fair v. Metropolitan Life Ins. Co. 5 Ga. App. 708, 63 S. E. 812, 38 Ins. L. J. 412 (assured stated no physician had attended her for any complaint, etc., this was untrue: no recovery under Civ. Code 1895, sec. 2097).

*Missouri.*—Lynch v. Prudential Ins. Co. of America, 150 Mo. App. 461, 131 S. W. 145 (false statement that assured not treated by physician and in sound health is not a warranty: does not preclude recovery unless disease treated contributed to death: Rev. Stat. 1899, sec. 7890, Ann. Stat. 1906, p. 3746).

*New York.*—Aaronson v. New York Life Ins. Co. 142 N. Y. Supp. 568, 81 Misc. 228 (answer as to how long since assured under care of physician held false: N. Y. Ins. L. sec. 58; Consol. L. 1909, c. 28, construed).

*North Carolina.*—Bryant v. Metropolitan Life Ins. Co. 147 N. C. 181, 60 S. E. 983, 37 Ins. L. J. 354 (misrepresentation that not under care of physician within two years is material: no recovery: 22 Revis. 1905, sec. 4808).

*Texas.*—Modern Order of Praetorians v. Hollmig, — Tex. Civ. App. —, 105 S. W. 846 (false warranty as to nonconsultation or nontreatment avoids: Rev. Stat. 1895, art. 3096aa; acts 1908, c. 69, p. 94, not applicable to beneficiary associations), s. c. — Tex. Civ. App. —, 103 S. W. 474.

See § 1916 herein.

[18] Archer v. Equitable Life Assur.

(j) If a contract of insurance is made in, and governed by the laws of another state, wherein representations in an application for insurance as to previous medical attendance are material to the risk, as matter of law, such holding is conclusive as to the materiality of such representations in an action on the policy in another state.[19]

(k) As to renewals: Statements by assured in an application for an accident policy that he had not been disabled nor received medical or surgical attention during the past five years, are material and when attached to and made part of the policy, are affirmative warranties, and when reaffirmed in a renewal certificate are falsified where there have been frequent consultations and attendance by physicians and experts and trips abroad, under serious physical and mental conditions, for treatment.[20]

(l) As to waiver: Where the statute makes statements, representations, and not warranties, and expressly declares that any waiver of its provisions shall be void, an agreement that answers to inquiries are made "inducements to issue of the proposed policy" does avail insurer; and this applies to a statement that assured had not consulted physicians within the past five years.[1]

Soc. of U. S. 218 N. Y. 18, 112 N. E. 433, aff'g 154 N. Y. Supp. 579, 169 App. Div. 43; Ins. L. sec. 58; Consol. Laws, c. 28, sec. 58; Laws 1906, sec. 16.

[19] Fidelity Mutual Life Assoc. v. Harris, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635, 29 Ins. L. J. 769. See Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 73 S. W. 102; McKnelly v. Brotherhood of American Yeomen, 160 Wis. 514, 152 N. W. 169. See §§ 225 et seq. herein.

On conflict of laws as to insurance contracts, see notes in 63 L.R.A. 833; 23 L.R.A.(N.S.) 968; and 52 L.R.A. (N.S.) 275.

[20] Rathman v. New Amsterdam Casualty Co. 186 Mich. 115, L.R.A. 1915E, 980, 152 N. W. 983, 46 Ins. L. J. 373. See Mutual Life Ins. Co. of N. Y. v. Allen, 174 Ala. 511, 56 So. 568, 41 Ins. L. J. 221; Stanyan v. Mutual Life Ins. Co. — Vt. —, L.R.A.1917C, 350, 99 Atl. 417; New York Life Ins. Co. v. Franklin, 118 Va. 418, 87 S. E. 584.

[1] Goff v. Mutual Life Ins. Co. of N. Y. 131 La. 98, 59 So. 28, 41 Ins. L. J. 1415.

As to waiver, see also the following cases:

*United States.*—Caruthers v. Kansas Mutual Life Ins. Co. (U. S. C. C.) 108 Fed. 487 (breach of warranty as to name and address of each physician, etc., knowledge of medical examiner cannot be imputed to insurer).

*Arkansas.*—Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 73 S. W. 102 (estopped by knowledge of examining physician that answers as written down by him are false).

*Iowa.*—Sargent v. Modern Brotherhood of America, 148 Iowa, 600, 127 N. W. 52 (medical examiner informed by applicant as to last attendance of physician and for what complaint he was consulted: insurer estopped).

*Maine.*—Strickland v. Peerless Casualty Co. 112 Me. 100, 90 Atl. 974 (finding sustained, that agent had full knowledge of prior sickness; statement that no medical treatment for five years: plaintiff recovered: Rev. Stat. c. 49, sec. 93).

*New Jersey.*—Fish v. Metropolitan Life Ins. Co. 75 N. J. L. 822, 69 Atl. 176 (breach of warranty that assured

(m) Whether or not insured has misrepresented or falsified concerning medical attendance, consultation with, treatment by, physicians and the like, is ordinarily a question for the jury.[2] So where the question as to attendance by physicians, their names, and the dates, ailments, etc., is so complicated that assured may reasonably believe that he has fully answered the question whether his statements were made honestly in good faith and without intent to deceive, is one for the jury.[3] But it is also held that where negative answers as to consultations with other physicians than the one named, and as to having had other medical attendance, or having been prescribed for by other physicians, are manifestly material and the consultations, etc., did not relate to trivial illnesses, it is the duty of the court to direct a verdict for assured if the testimony of its witnesses is to be believed, unless there is something to take the case out of the rule, but whether the answers were correct was for the jury.[4]

had not been under care of physician, etc.: knowledge of examining physician: no recovery).

*North Dakota.*—Van Woert v. Modern Woodmen of America, 30 N. D. 27, 151 N. W. 224 (warranty as to treatment by or consultation with physician, etc.: not waived by assurer's acts without knowledge).

*South Carolina*—Gambrell v. United States Health & Accident Ins. Co. 83 S. C. 236, 65 S. E. 231 (warranty that no surgical or medical attendance, etc.: no waiver).

[2] *Indiana.*—Collins v. Catholic Order of Foresters, 43 Ind. App. 549, 88 N. E. 87, 38 Ins. L. J. 737 (whether or not assured knew his statements to be false).

*Missouri.*—Winn v. Modern Woodmen of America, 157 Mo. App. 1, 137 S. W. 292, 40 Ins. L. J. 407 (prima facie case entitled to submission), s. c. 146 Mo. App. 69, 123 S. W. 59, s. c. 138 Mo. App. 701, 119 S. W. 536.

*New York.*—Smith v. Travelers' Ins. Co. 135 N. Y. Supp. 18, 41 Ins. L. J. 1257 (for jury whether there has been a violation of warranty that insured had not been disabled nor received medical attention within past five years).

*Oklahoma.*—National Union v. Kelley, 42 Okla. 98, 140 Pac. 1157 (is for jury, but jury waived: medical attendance, etc.).

*Pennsylvania.*—Smith v. Metropolitan Life Ins. Co. 183 Pa. 504, 38 Atl. 1038 (whether bad faith or material omission in failing to disclose any other than named physician).

[3] Modern Woodmen of America v. Wilson, 76 Neb. 344, 107 N. W. 568, 39 Ins. L. J. 582.

[4] Rigby v. Metropolitan Life Ins. Co. 240 Pa. 332, 87 Atl. 428, 42 Ins. L. J. 1235; act June 23, 1885; Pub. L. 134 (*considering* Murphy v. Prudential Ins. Co. 205 Pa. 444, 55 Atl. 19; Lutz v. Mutual Life Ins. Co. 186 Pa. 527, 40 Atl. 1104; United Brethren Mutual Aid Soc. v. O'Hara, 120 Pa. 256, 13 Atl. 932).

See the following cases:

*United States.*—New York Life Ins. Co. v. Moats, 207 Fed. 48, 125 C. C. A. 143, 42 Ins. L. J. 1671.

Life Association of America v. Edwards, 159 Fed. 53, 86 C. C. A. 243 (error not to direct verdict where breach of warranty appears as to last physician consulted).

*Kentucky.*—Brisou v. Metropolitan Life Ins. Co. — Ky. —, 115 S. W. 785 (evidence uncontradicted: not error to direct verdict).

*Minnesota.* — Wheelock v. Home

**§ 2071. Medical examiner: statements to.**[5]—Statements made to the insurer's medical examiner may undoubtedly be made material by stipulation, or they may be warranties, or only representations. In ascertaining under which division they come, reference must be had to the terms of the particular contract, subject largely to those general rules which govern in other cases of representations and warranties. The position which the medical examiner holds as agent of the company, together with his professional character, has not infrequently induced courts to incline to as favorable a construction as possible, consistent with the rules of law, of assured's statements to such medical examiner, where it is evident that assured has exercised good faith and fairness in endeavoring to truthfully answer the questions asked,[6] especially so where the policy provides that such questions will be fully explained by the examiner.[7]

In a Louisiana case the application declared that the statements and representations therein contained, together with the declarations made to the medical examiner, constituted the basis of the contract, and that the same were warranted full, complete, and true, and that the warranty was a condition precedent, and the recitals of the contract contained a substantially similar provision, and referred to the application as a part thereof. Upon the reverse of the policy was indorsed a copy of the application, the medical examination, and the warranty clause of the contract, and the court declared "them one complete and homogeneous whole," and that the representations so made warranties prevented a recovery, there being a breach of said warranty.[8] And if an applicant for a policy warrants in his application that his answers to the medical examiner, on the reverse side of the application, are "true and accurate," and that they constitute the basis for the covenant, such answers become warranties, where the policy recites that it is executed in consideration of the warranties made in the application, and that the application shall be a part of the covenant; and a false statement

Ins. Co. 115 Minn. 177, 131 N. W. 1081 (prima facie case of fraud as to consultations that defendant was entitled to submit to jury, not established).

*New Jersey.*—Brunjes v. Metropolitan Life Ins. Co. 83 N. J. L. 296, 84 Atl. 1062 (breach of warranty as to undisclosed treatment shown as matter of law).

*Oregon.*—Beard v. Royal Neighbors of America, 53 Oreg. 102, 14 L.R.A. (N.S.) 798, 99 Pac. 83 (question one of law).

[5] See § 1987, also § 474a herein.

[6] See Mowry v. Rosendale, 74 N. Y. 360; Miller v. Mutual Benefit Life Ins. Co. 31 Iowa, 216, 235, 7 Am. Rep. 122. See § 412, and chap. XXIV. (§§ 472 et seq.) herein.

[7] Connecticut General Life Ins. Co. v. McCurdy, 89 Pa. St. 363. See § 311 herein.

On medical examiner as agent of insurer or of insured, see note in 41 L.R.A.(N.S.) 506.

[8] Weil v. New York Life Ins. Co. 47 La. Ann. pt. 2, 1405, 17 So. 853.

made therein by the applicant renders the policy void.[9] So an untrue answer written by the medical examiner that an applicant for insurance was not at the time pregnant, although it is his deduction from her answers and believed by her to be true, will avoid the policy where the applicant warrants in the application, the answers to be true, and declares that the answers as written by the examiner are as given by her.[10] And although by construction the answers in the medical examiner's report do not constitute warranties but representations only, still they are material to the risk and must be substantially true to justify recovery.[11]

But it is also decided that declarations of insured to the medical examiner for insurer are not made warranties by a stipulation in the application that the applicant warrants that the statements in it "are true, full, and complete, . . . and are offered to the company, together with those contained in the declaration to the . . . medical examiner as a consideration for, and as the basis of, the contract." [12] Nor will a false statement in an application defeat liability on the policy on the theory that it misled the medical examiner, where he testifies that he made his report on his own examination, and paid no attention to such answers.[13] And statements to the medical examiner will be considered as representations and not warranties where defendant itself has so treated them in his answer in an action on the policy and also by his requested instructions.[14] So where the report of the insurer's medical examiner as to assured's health and condition is alone relied on by the company, rather than the assured's statements, and what is said by him to the physician is not reported to the company, the policy is not avoided by assured's incorrect answers to said examiner.[15]

[9] Eminent Household of Columbian Woodmen v. Prater, 24 Okla. 214, 23 L.R.A.(N.S.) 917, 103 Pac. 558.

On what reference in policy to application will make it part of policy, see notes in 19 L.R.A.(N.S.) 88; 33 L.R.A.(N.S.) 676.

[10] Supreme Lodge Knights & Ladies of Honor v. Payne, 101 Tex. 449, 15 L.R.A.(N.S.) 1277 (annotated on effect of honest mistake in answer as to health of insured warranted by him to be true), 108 S. W. 1160, 37 Ins. L. J. 324. See § 474a herein.

That if warranty of statements to medical examiner breached, recovery may be precluded regardless of good faith, etc., see Supreme Conclave Knights of Damon v. Wood, 120 Ga. 328, 47 S. E. 940.

[11] National Union v. Arnhorst, 74 Ill. App. 482.

[12] Home Life Ins. Co. v. Fisher, 188 U. S. 726, 47 L. ed. 677, 23 Sup. Ct. 380.

[13] Roe v. National Life Assoc. 137 Iowa, 696, 17 L.R.A.(N.S.) 1144, 115 N. W. 500.

[14] Wolfe v. Supreme Lodge Knights & Ladies of Honor, 160 Mo. 675, 61 S. W. 637.

[15] Higbee v. Guardian Life Ins. Co. 66 Barb. (N. Y.) 462; Hogle v. Guardian Life Ins. Co. 4 Abb. Pr. N. S. (N. Y.) 346.

Again, declarations made to the medical examiner are within a statutory provision that no answer shall be deemed material or avoid the policy unless the matter misrepresented shall have actually contributed to the emergency or event on which the loss becomes due and payable.[16] Nor can insurer avail itself by way of a breach of warranty in the application and the medical examiner's report where, contrary to the statute, a copy thereof is not attached to the policy as required.[17]

Knowledge of assured's agent and of its medical examiner that assured was suffering with a certain disease and that his statements as to the same were false, precludes a defense on the ground of falsity of such representations, and the withholding of such fact from assurer by the medical examiner makes the fraud the wilful act of its own agent alone.[18] And in case assurer's medical examiner writes words in the application without insured's knowledge or consent, it is estopped to rely thereon in defense.[19] So where assured truly answers questions and they are erroneously or falsely recorded by the medical examiner, such falsity does not avoid the policy.[20] But it is decided that untrue answers entered by the so-

[16] Keller v. Home Life Ins. Co. 198 Mo. 440, 95 S. W. 903; Rev. Stat. 1899, sec. 7890.

As to representations under statutes, see § 1916 herein.

[17] Paulhamus v. Security Life & Annuity Co. (U. S. C. C.) 163 Fed. 554; under act Pa. May 11, 1881, sec. 1; P. L. 20. *Examine* Dimick v. Metropolitan Life Ins. Co. (Metropolitan Life Ins. Co. v. Dimick) 69 N. J. L. 384, 62 L.R.A. 774, 55 Atl. 291, 33 Ins. L. J. 3. See §§ 190 et seq. herein.

On conflict of laws as to necessity of attaching application or copy thereof to policy, see notes in 63 L.R.A. 867; 23 L.R.A.(N.S.) 982; 52 L.R.A.(N.S.) 285; on failure to attach copy of application to policy as affecting right of insurer to rely on representations or warranties incorporated in the policy itself, note in 19 L.R.A.(N.S.) 102.

[18] Northwestern Mutual Life Ins. Co. v. Farnsworth, 60 Colo. 324, 153 Pac. 699.

See Gallant v. Metropolitan Life Ins. Co. 167 Mass. 79, 44 N. E. 1073, 26 Ins. L. J. 543 (certificate of medical examiner that he found insured in sound health does not preclude it from denying that assured was in "sound health," especially so where policy date is later than that of the certificate).

On effect of knowledge of agent acting in two capacities, see note in 3 L.R.A.(N.S.) 444; on effect of knowledge of insurer's agent of falsety of statements in application, note in 16 L.R.A. 33; bad faith of assured as affecting estoppel of insurer to set up falsity of answers in application because of agent's knowledge of such falsety, note in 14 L.R.A.(N.S.) 279.

[19] Mutual Reserve Fund Life Assoc. v. Farmer, 65 Ark. 581, 47 S. W. 850. See § 474a herein.

[20] Sternaman v. Metropolitan Life Ins. Co. 170 N. Y. 13, 57 L.R.A. 318, 62 N. E. 763; Carmichael v. John Hancock Mutual Life Ins. Co. Ltd. 95 N. Y. Supp. 587, 48 Misc. 386 (medical examiner acts as insurer's agent and it is bound by his knowledge and interpretation of the answers, and his errors in relation thereto, and is estopped accordingly; judgment for

licitor and medical examiner and signed by the applicant bind him and void the policy where such answers are a warranty under the contract and there is a breach.[1] And even though by statute a soliciting agent is insurer's agent his acts amounting to fraudulent conspiracy with assured do not bind it where under a warranty there is a concealment of a known disease from the medical examiner.[2] It is also held that assured will be estopped to deny and to have adopted his statements to the medical examiner, and to be charged with knowledge of the same, where he accepts and retains the contract for a long period of time in a place where it is frequently seen.[3]

Under an Iowa statute[4] in order to constitute the fraud or de-

plaintiff below was, however, reversed and new trial granted); Protected Home Circle v. Winter, 14 Ohio C. C. 194. See Butler v. Michigan Mutual Life Ins. Co. 184 N. Y. 337, 77 N. E. 398, 35 Ins. L. J. 471 (distinction made between knowledge, acts, and duties of soliciting agent and medical examiner, and falsity of statements to latter when warranted avoids the policy, although solicitor was informed of facts), rev'g 87 N. Y. Supp. 1129, 93 App. Div. 619.

On effect of agent's insertion in the application of false answers to questions correctly answered by the insured, see notes in 4 L.R.A.(N.S.) 607; L.R.A.1915A, 273.

[1] Dimick v. Metropolitan Life Ins. Co. (Metropolitan Life Ins. Co. v. Dimick) 69 N. J. L. 384, 62 L.R.A. 774, 55 Atl. 291, 33 Ins. L. J. 3.

[2] Wallen v. National Life Assoc. 168 Mo. App. 503, 153 S. W. 1065, 42 Ins. L. J. 618.

[3] National Union v. Arnhorst, 74 Ill. App. 482.

On retention of policy as waiver of mistake or fraud of insurer or its agent, see note in 67 L.R.A. 705.

[4] "*Physician's certificate.* In any case where the medical examiner or physician acting as such, of any life insurance company or association doing business in the state shall issue a certificate of health or declare the applicant a fit subject for insurance, or so report to the company or association or its agent under the rules and regulations of such company or association, it shall be thereby estopped from setting up in defense of the action on such policy or certificate that the assured was not in the condition of health required by the policy at the time of the issuance or delivery thereof unless the same was procured by or through the fraud or deceit of the assured." Iowa Ann. Code 1897, p. 645, sec. 1812.

"*Medical examination.* Said officials shall decline to approve any such form of policy or contract of insurance unless the same shall, in all respects, conform to the laws of this state applicable thereto, and unless the issuance of the same is based upon a satisfactory medical examination of the applicant by a physician duly authorized to practise medicine or by an osteopathic physician duly authorized to practise osteopathy in the state of Iowa, or the state where examined, and no policy or contract of insurance shall be issued by any insurance company to any individual in this state until such examination shall have been passed and duly approved by the medical examiner or medical board of such company." Supplemental Supp. Code Iowa, p. 144, c. 6, sec. 1783–b. Ann. Code Iowa (1898–1907) Tit. IX. c. 6, sec. 1783b (same as above except that above has words "or by an osteopathic physician duly authorized to practise osteopathy").

ceit necessary to prevent an estoppel against insurer, where the medical examiner, or physician acting as such, has issued a certificate of health or declared the applicant a fit subject for insurance, or so reported to the company, etc., there must have been an intent to deceive, and the false statements, or misrepresentations, must have been relied on by said examiner, or the concealment claimed must have misled him, and where assured, relying upon the agent's assurance that the application is in conformity with insurer's rules and regulations, signs it with knowledge of its contents, assured is estopped to assert falsity of the answers therein.[5] Under the Louisiana statute: "Life, health and accident insurance companies which issue policies or contracts of insurance to insured without a medical examination by a physician, shall waive their rights to claim forfeiture for misrepresentation," etc., under certain conditions.[6] This enactment is binding and enforceable but it does not apply where examinations of insured were made by insurer's physicians prior to issuing a policy.[7] And the Wisconsin statute of estoppel which is

[5] Roe v. National Life Assoc. 137 Iowa, 696, 17 L.R.A.(N.S.) 1144, 115 N. W. 500; Code sec. 1812. See Smith v. Supreme Lodge Knights & Ladies of Golden Precept, 123 Iowa, 676, 99 N. W. 553 (case of association held not subject to provisions of Sec. 1812); Wood v. Farmers' Life Assoc. 121 Iowa, 44, 95 N. W. 226 (certificate of medical examiners is intended by sec. 1812, and not the medical director's approval of his report); Peterson v. Des Moines Life Assoc. 115 Iowa, 668, 87 N. W. 397 (by medical examiner or physician is meant the one upon whom devolves the duty of examining the applicant determining the state of his health and reporting as to desirability of the risk; and as involved in this determination all matters bearing upon said risk being a proper and acceptable one are within the estoppel whether they relate to the time of issuance of the policy or prior thereto; but warranties as to other matters than assured's health are not within the intent of this enactment); Stewart v. Equitable Mutual Life Assoc. 110 Iowa, 528, 81 N. W. 782 (insurer is estopped where the medical examiner has declared the applicant a fit subject for insurance, except in cases of fraud and deceit which has misled said examiner, and it must be alleged that said report was improperly obtained); Nelson v. Nederland Life Ins. Co. Ltd. 110 Iowa, 600, 81 N. W. 807 (must be alleged that report improperly obtained); Weimer v. Economic Life Assoc. 108 Iowa, 451, 79 N. W. 123, 28 Ins. L. J. 659 (the fraud or deceit meant is that used in procuring the certificate; or by which said examiner is misled; and the medical examiner's declaration or assertion that the applicant is a proper risk is sufficient to bring it within the enactment); Welch v. Union Central Life Ins. Co. 108 Iowa, 224, 50 L.R.A. 774, 78 N. W. 853, 31 Ins. L. J. 735 (said certificate is not conclusive if it is procured by fraud resulting in fraudulently procuring the policy; McClain's Code § 1759, s. c. 117 Iowa, 394, 90 N. W. 828).

[6] La. act 1908, p. 139, No. 97.

[7] Hanmore v. Metropolitan Life Ins. Co. 137 La. 137, 63 So. 385, 46 Ins. L. J. 8.

similar to that of Iowa does not apply to a contract made before its enactment.[8]

It rests upon insurer, when it relies thereon as a defense, to plead and prove the untruth or falsity of insured's answers to the medical examiner,[9] but its answer and request for instructions may be of such a character as to limit it to a claim of misrepresentation only.[10] And the medical examiner's confidential report recommending insured as a first class risk is competent evidence in his favor,[11] and admissions against insurer.[12] If the testimony of insured and the medical examiner, is flatly contradictory upon the points of full disclosure and untrue statements, the jury should determine the issue.[13]

§ 2072. **Medical examiner: subject of inquiry.**[14]—It is not possible to give a specific rule concerning what constitutes legitimate subjects of inquiry by the medical examiner. Matter which may seem unimportant may be deemed important by the examiner, and may be actually so, in ascertaining the condition of assured's health, and it is said that the assured's pecuniary circumstances may be inquired into as matter having some relation to the expectancy of life, and it has been held that the medical examiner, as a witness, might be asked whether he made such inquiry and what response was given, and how far he deemed such answer material in deciding to advise the taking of the risk, and that the very point of inquiry was whether the pecuniary circumstances were deemed by him material, and whether he would have advised the acceptance of the risk if it had not appeared that the applicant was a man of means. The court also says, referring to the purposes of a medical examination: "The inquiry involves an examination not only into the present state of the various organs and functions of the body, but into the tendency of those organs and functions to take on diseases as affected by habits of mind, as well as of body, temperament, tendency to disease from

[8] McKnelly v. Brotherhood of American Yeomen, 160 Wis. 514, 152 N. W. 169, St. 1913, sec. 4202s.

[9] Iowa Life Ins. Co. v. Haughton, 46 Ind. App. 467, 87 N. E. 702; Wolfe v. Supreme Lodge Knights & Ladies of Honor, 160 Mo. 675, 61 S. W. 637; Carmichael v. John Hancock Mutual Life Ins. Co. 95 N. Y. Supp. 587, 48 Misc. 386. But held *contra* as to warranty and claim that medical examiner did not correctly transcribe the answers, Hoeland v. Western Union Life Ins. Co. 58 Wash. 100, 107 Pac. 866.

[10] Wolfe v. Supreme Lodge Knights & Ladies of Honor, 160 Mo. 675, 61 S. W. 637.

[11] McKnelly v. Brotherhood of American Yeomen, 160 Wis. 514, 152 N. W. 169.

[12] McGowan v. Supreme Court of Independent Order of Foresters, 104 Wis. 173, 80 N. W. 603.

[13] Sternaman v. Metropolitan Life Ins. Co. 87 N. Y. Supp. 904, 94 App. Div. 610, aff'd 181 N. Y. 514, 73 N. E. 1133.

[14] See § 1987 herein.

hereditary causes, and the occupation and condition in life of the subject." In this case, however, it also appeared that the assured falsely represented to the general agent of the company that he was a moneyed man.[15] We are inclined, however, to the belief that the assured is justified in presuming that the business of the medical examiner is to examine him as to his health and the physical condition of his body, and to report thereon to the company, and that this is the extent of his agency, and therefore, if such examiner inquires about a matter which upon its face bears no apparent relation to his health or physical condition, or which is out of the line of what may be reasonably assumed within the scope of a professional inquiry, that it would be but fair to the assured, before holding him bound by his answers to such questions, to require proof that the scope and bearing upon the risk of such question was explained or otherwise known to the assured, so that a basis may exist for the presumption that he answered understandingly, with a full knowledge of the materiality of his physical condition, to the matter inquired into, and that consequently he actually knew, or ought to have known, that the required information was necessary to be given to enable the medical examiner to make his report.

**§ 2073. Moored safely in certain harbor: warranty: marine risk.**[16] A warranty that the ship is safely moored in a designated harbor does not necessitate that she be kept safely moored in one place in said harbor. The need of repairs and taking in of cargo may justify her removal from one part of the harbor to another, and the warranty is complied with if she is safely moored at each place to which she is so removed.[17]

**§ 2074. Occupation: life and accident risks: representation and warranty: continuing warranty.**[18]—(a) It may be generally stated preliminary to the consideration of, and in connection with, the point of representations and warranties that by occupation is ordinarily meant one's general occupation, the principal business of his life, to which he devotes his time, abilities and energies; that which

[15] Valton v. National Life Fund Assoc. 40 N. Y. (1 Keyes) 21, rev'g 17 Abb. Pr. (N. Y.) 268. See s. c. 20 N. Y. 32, 22 Barb. (N. Y.) 9, 4 Abb. Dec. (N. Y.) 437. See Missouri Valley Life Ins. Co. v. Sturges, 18 Kan. 93, 26 Am. Rep. 764.

On misstatement of income of insured, see note in L.R.A.1917C, 344.

[16] See § 1987 herein.

[17] Clarke v. Westmore, Selw. N. P. 1008. See § 2177a herein.

As to continuance, etc., of risk: moored in good safety, see §§ 1537 et seq. herein, see also §§ 1498, 1500 et seq. herein.

[18] See § 1987 herein.

As to prohibited occupations: hazardous, extra hazardous, etc., see §§ 2236 et seq. herein.

As to special risks and losses: occupation of assured: loss of time: change of occupation: limitation of liability, see §§ 2870, 2870a herein.

As to illegal occupation of assured: life risk, see § 2538 herein.

constitutes his regular vocation, business or calling in contra-distinction to that in which he may be temporarily and independently engaged; a present employment may constitute an occupation but only one of a temporary character; a temporary business in which one is engaged may be widely divergent in its nature from his regular business or calling, or it may be of a similar nature, or it may cover, as it frequently does, acts which are necessarily incidental to and a part of one's principal or regular business or vocation. In all cases, however, the application of the word occupation must depend largely upon the particular circumstances of each case, the terms of the contract, the intent of the parties thereto, and the purposes thereof with reference to the risk insured against, especially so, in those cases where risks are classified, or where the insurance is under a benefit certificate with such constitutional provisions, rules, by-laws, etc., as are a valid binding part of the contract. In addition the question whether a statement is a warranty, or merely a representation must be considered as must also the effect of applicable, controlling statutes.[19] Again, a reasonable construction such as intelligent business men would ordinarily give to the word "occupation" will also be held to be that intended.[20] And it is decided that even under a warranty there is a presumption that a person continues in an occupation within the meaning of that term unless it appears by some act of his that he has abandoned it without intent or ability to re-engage therein.[1] But it is also held that a statement as to occupation

[19] *United States.*—Gotfredson v. German Commercial Accident Co. L.R.A.1915D, 312, 218 Fed. 582, 134 C. C. A. 310, 45 Ins. L. J. 525.

*Alabama.* — Supreme Lodge, Knights & Ladies of Honor v. Baker, 163 Ala. 518, 50 So. 958.

*Massachusetts.*—Everson v. General Fire & Life Assur. Corp. 202 Mass. 169, 88 N. E. 658, 38 Ins. L. J. 923, 929.

*New York.*—Linzee v. Frankfort General Insurance Co. 147 N. Y. Supp. 606, 162 App. Div. 282, 44 Ins. L. J. 83 ("as applied to a person, occupation is the means followed to gain a livelihood, as a business or employment"—Putnam, J.).

*Wisconsin.* — Stevens v. Modern Woodmen of America, 127 Wis. 606, 107 N. W. 8 (some degree of permanency for hire or profit is required).

See also Webster's Universal Dict. (1910, 1911) "occupation;" also cases throughout this section.

We have elsewhere herein fully discussed the principles governing questions of concealment (c. LV. §§ 1844 et seq.); representations and misrepresentations (c. LVI. §§ 1882 et seq.); warranties (c. LVII. §§ 1942 et seq.); and the effect of statutes in connection therewith (1916), and the reader is referred thereto.

[20] Miller v. Missouri State Life Ins. Co. 168 Mo. App. 330, 153 S. W. 1080.

[1] Supreme Lodge Knights & Ladies of Honor v. Baker, 163 Ala. 518, 50 So. 958. See Clemens v. Metropolitan Life Ins. Co. 20 Pa. Super. Ct. 567.

refers to the time when made and is not an admission that the same occupation was that of assured at the time of a future accident.[2]

(b) If the policy is conditioned to be avoided by any untrue or fraudulent answer to the question asked in the application, answers as to assured's occupation are representations, and must be proven affirmatively to have been fraudulently made or material to the risk to avoid the policy.[3] So where in response to an inquiry as to his profession, occupation, residence, etc., the assured wrote, "Esquire Saltley Hall," the policy was held not avoided, though he kept an ironmonger's shop in the shire.[4] Nor does the fact that insured was engaged in shoveling concrete in a tunnel or covered subway excavation already dug, necessarily falsify his representation that his duties in his occupation of laborer are "Digging —not handling explosives; no tunneling."[5] And a statement by assured in an application for an accident policy that his occupation is that of an "earthenware manufacturer" is not falsified by the fact that while on a visit to a farm he had received his death injury while loading hay.[6] So where assured's occupation is stated as that of farmer and real estate agent the statement is not falsified by the fact that shortly prior thereto he was employed for a short time by a photographer, that he was in arrears in payments on his land and that subsequent to the policy date forfeitures were entered against him.[7] It is also decided that representations in answer to inquiries as to occupation are not warranties, but mere representations made material by the contract, and the only question for the jury is whether they were true or false when made.[8] Nor does the fact that assured both makes and peddles soda water constitute a breach of warranty that he is a "soda water maker," where it appears that in addition to said answer the medical examiner reported, as to the effect of the occupation on the risk, that

[2] Providence Life & Accident Ins. Co. v. Black, — Ala. App. —, 73 So. 757. See §§ 1917–1922 herein.

[3] Southern Life Ins. Co. v. Booker, 9 Heisk. (56 Tenn.) 606, 24 Am. Rep. 344. See Hobbs v. Iowa Mutual Benefit Assoc. 82 Iowa, 107, 31 Am. St. Rep. 466, 11 L.R.A. 299, 47 N. W. Rep. 983.

[4] Perrins v. Marine & General Travelers' Ins. Co. 2 El. & E. 317, 324.

[5] Vinginerra v. Commercial Casualty Ins. Co. 156 N. Y. Supp. 573, 47 Ins. L. J. 317.

[6] North American Life & Accident Ins. Co. v. Burrough, 69 Pa. St. 43, 8 Am. Rep. 212.

On temporary pursuit of other activities as change of occupation within meaning of accident insurance policy, see note in 24 L.R.A.(N.S.) 1174.

[7] Fidelity Mutual Life Assoc. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. 662.

[8] Mutual Benefit Life Ins. Co. v. Wise, 34 Md. 582.

assured was "out of doors most of the time selling soda water, in my opinion a healthy occupation."[9] And the occupation of school teacher is not changed by the fact that assured superintends the erection of certain buildings for his own use, and while so doing falls and is killed.[10] In another case an accident policy contained the condition, incorporated therein by express reference, that fraud, misstatement, or concealment of any fact in the application should avoid the contract. One of the defenses was that assured had fraudulently misstated and concealed the fact that he owned and operated a sawmill and personally worked with the saws, etc., when he had stated that he was by occupation a miller. It was held, however, that inasmuch as his statement was true when made there was no false representation where he made his sawmill attachment at or about that time; accordingly the defense of fraud having failed for lack of evidence and the fair construction of the written contract being that, if one steps aside from his given occupation and is injured, he may nevertheless recover something, insured was entitled to judgment.[11] Again, a warranty in an accident policy that assured is a switchman is not continuing in the sense that he thereby contracts not to become a brakeman, or that he will not engage in any other occupation.[12] So supervision may properly include taking an active part in work, and it does not necessarily mean doing no manual labor, nor regulating and directing the work of subordinates alone; this is instanced by a case where assured stated that his occupation was "supervising a dray line only," but a question concerning his duties "as so occupied" was left unanswered, and it appeared that during the dull season he drove and operated the dray himself but had assistants at other times. It was accordingly declared that he in fact supervised the business at all times and his answer was not untruthful.[13]

[9] Grattan v. Metropolitan Life Ins. Co. 80 N. Y. 281, 36 Am. Rep. 617.

[10] Stone v. United States Casualty Ins. Co. 34 N. J. Law, 371.

[11] Denoyer v. First National Accident Co. 145 Wis. 450, 130 N. W. 475, 40 Ins. L. J. 1038.

[12] Provident Life Ins. Co. v. Fennell, 49 Ill. 180.

[13] Peterson v. Time Indemnity Co. 152 Wis. 562, 140 N. W. 286, 42 Ins. L. J. 643.

In the following cases there was also no breach of warranty nor misrepresentation: Pacific Mutual Life Ins. Co. v. Bailey, 25 Ky. L. Rep. 1456, 78 S. W. 119 ("general merchandise, retail, proprietor;" demurrer to defense of other occupations sustained; Ky. Stat. sec. 639); Perrin v. Prudential Ins. Co. 62 N. Y. Supp. 720, 30 Misc. 608 (being employed occasionally as bevel smoother of plate glass, does not falsify statement that occupation is dry goods store keeper), aff'g 61 N. Y. Supp. 249, 29 Misc. 597; Clemens v. Metropolitan Life Ins. Co. 20 Pa. Super. Ct. 567 (statement that only occupation was "laborer in rolling mill" held not untrue where he had quit work several months prior thereto but had not abandoned occupation).

A question as to occupation, in an application for life insurance, does not call for information as to the fact of the applicant being an habitual embezzler.[14]

(c) A warranty by assured that he is a grocer does not, in the absence of evidence of an intent to deceive, avoid the policy where he has not further disclosed the fact that he sells liquor at retail in a part of his store.[15] But one who keeps a restaurant adjacent to a saloon between which there is an archway, allowing free passage, and with whom the saloon-keeper boards, is not, though he sometimes, when the latter is at meals or temporarily absent, waits on customers at the bar, without having any interest in the business, connected with the sale of liquors. His statement, therefore, in an application that he is not in any way connected with the sale of ale, wine, or liquor is, true, and cannot occasion the forfeiture of a policy issued to him.[16] And where there is no warranty by reason of the application not being made a part of the policy, when required by statute, and there was a statement by assured that he had never been engaged in the liquor business but it appeared that quite a number of years prior thereto he had, as owner of a drug store, sold liquors therein in the manner usual to such establishments, a judgment for plaintiff was affirmed, for although considered as a representation it was literally untrue, it did not vary from the truth in any material respect and did not increase the risk, and, as was forcibly stated by the court, per Aldrich, D. J., "It is impossible, as said, to see that such business conditions, which ceased so long before the contract, could in a substantial and material way have enhanced the risk; and it is difficult to see that in a case of alleged misrepresentation, not warranties, a verdict against an insured, based upon such evidence or conditions as

[14] Penn Mutual Life Ins. Co. v. Mechanics' Savings Bank & Trust Co. 72 Fed. 413, 19 C. C. A. 286, 37 U. S. App. 692, 73 Fed. 653, 19 C. C. A. 316, 43 U. S. App. 75, 38 L.R.A. 33.

[15] McGurk v. Metropolitan Life Ins. Co. 56 Conn. 528, 1 L.R.A. 563, 16 Atl. 263. See High Court Independent Order of Foresters v. Schweitzer, 70 Ill. App. 139, 2 Chic. L. J. Wkly. 246, aff'd 171 Ill. 328, 49 N. E. 506; Marzulli v. Metropolitan Life Ins. Co. 81 N. J. L. 166, 78 Atl. 1051 (grocery business and sold liquor incidently therein; warranty that not engaged in sale, etc.: judgment for plaintiff); Malicki v. Chicago Guaranty Fund Life Soc. 119 Mich. 151, 5 Det. Leg. N. 743, 77 N. W. 690, 28 Ins. L. J. 216 (tending bar only occasionally falsifies statement that applicant was in grocery business with bar, but bar was tended exclusively by clerk).

As to prohibited risks: engaging in liquor or saloon business, see § 2236b herein.

On who is engaged in the liquor business within the meaning of an insurance contract, see note in 45 L.R.A.(N.S.) 1144.

[16] Collins v. Metropolitan Life Ins. Co. 32 Mont. 329, 108 Am. St. Rep. 578, 80 Pac. 609.

showing substantial and material misrepresentations, should not be set aside on the ground that it was against the evidence. Suppose this question had been answered: 'Yes! as a druggist, according to the usual course of such establishments. But my connection with that concern ceased more than ten years ago;' is it reasonable to suppose that the assurance company would have refused the risk for that reason?"[17] Again, if the nature of assured's business or occupation is falsely stated, as where he is asked whether he has been connected with the sale of beer, wine, or intoxicating liquors, and he falsely answers "No," there is a breach of warranty as a matter of law, which clearly vitiates the contract, and there is not, in such case, a question for the jury whether there is a breach of warranty, but the answer being false, a verdict must be directed for the insurer.[18] But where a similar question was asked, and the assured answered, "No, keep no bar and sell only at wholesale; have government license and town license," it was held a question for the jury whether the statement was so far false as to constitute a breach of warranty, where it appeared that a liquor store was kept by the assured, wherein he sold liquor by the barrel and in quantities less than five gallons, but not to be drunk on the premises.[19]

[17] Hadley v. Provident Savings Life Assur. Soc. of N. Y. 90 Fed. 390, aff'd Provident Savings Life Assur. Soc. of N. Y. v. Hadley, 102 Fed. 856, 43 C. C. A. 25, 29 Ins. L. J. 998, certiorari denied, 179 U. S. 686, 46 L. ed. 386, 21 Sup. Ct. 919.

[18] Dwight v. Germania Life Ins. Co. 103 N. Y. 341, 57 Am. Rep. 729, 4 Cent. Rep. 529, 8 N. E. 654. In this case the assured had kept a hotel where no bar was maintained, but he had on hand a supply of wines and liquors, and was licensed and had permits to carry on the business of retailing these other liquors, to be drunk on the premises, and he sold to his guests but not to others, although he had not been engaged in the business for about a year and a half before his application. It was also declared that if the proof of a fact is so preponderating that a verdict against it would be set aside as contrary to the evidence, it is the duty of the court to direct a verdict. It is not the rule that if there is a scintilla of evidence in support of a proposition, or if the evidence against it does not amount to a demonstration of its incorrectness, a question is raised which must be left to the jury.

[19] Kenyon v. Knights Templars & Masonic Mutual Aid Assoc. 122 N. Y. 247, 25 N. E. 299, 19 Ins. L. J. 1020.

See further upon the point of occupation and intoxicating liquors, the following cases:

*Illinois.*—Sweeney v. Life Assoc. of America, 152 Ill. App. 173 (connection with real estate department of brewery does not falsify statement that not connected with and no interest in the sale or manufacture of beer); Royal Arcanum v. Coverdale, 93 Ill. App. 373 (false representations as to selling or serving intoxicating liquors voids policy).

*Indiana.*—Supreme Tribe of Ben Hur v. Lennert, — Ind. App. —, 93 N. E. 869 (employment as driver, soliciting orders, delivering, and collecting for brewery is being engaged

(d) If one answers that he is a laborer, when in fact he has not labored for several years, such answer avoids the policy.[20] So a representation by an applicant that his occupation is that of capitalist, when his only occupation is that of professional gambler, making books, and like pursuits of doubtful character, is of such a material matter as to avoid the policy irrespective of whether "capitalist" involves the possession of large wealth or signifies a person having an income from investments.[1] And a false warranty by assured that he was foreman of a railroad yard when his occupation was foreman of a switching crew, a more hazardous occupation, avoids the policy.[2] There is also under an accident policy, a breach of warranty of an occupation as "ice dealer and proprietor of a transportation company: office work only," where insured engaged "off and on" at that time in buying and selling cattle in large numbers and he was injured while attending to the business.[3] And if in an application for accident insurance the applicant makes a misrepresentation as to his occupation, and the policy is conditioned upon the truthfulness of the representation, such misrepresentation will avoid the policy.[4] So a misrepresentation as to occupation avoids the policy even though a statute provides that no misrepresentation shall be material unless it affect the risk.[5] Again the finding of a jury that insured was a carpen-

in sale of intoxicants; but judgment rendered for plaintiff).

*New York.*—Smith v. Chapter General of America, Knights of St. John & Malta, 128 N. Y. Supp. 288, 143 App. Div. 532 ("merchant" held evasive statement when assured actually engaged in saloon business, and insurance is forfeited).

*Texas.* — Blackstone v. Kansas City Life Ins. Co. — Tex. —, 174 S. W. 821 (fact of working about father's still when boy does not falsify warranty by assured that he had never been "engaged in or connected with the manufacture or sale of malt or spirituous liquors"), rev'g Kansas City Life Ins. Co. v. Blackstone, — Tex. Civ. App. —, 143 S. W. 792, 41 Ins. L. J. 683.

*Wisconsin.* — Stevens v. Modern Woodmen of America, 127 Wis. 606, 107 N. W. 8 (a boy is not a saloon bartender where he is employed to do chores and later on does work in his employer's saloon cleaning, etc., for the day's business, and ocasionally waits on customers during the owner's absence).

[20] United Brethern Mutual Aid Soc. v. White, 100 Pa. St. 12, 12 Wkly. Not. Cas. 147.

[1] Elliott v. Frankfort Marine, Accident & Plate Glass Ins. Co. 172 Cal. 261, 156 Pac. 481, L.R.A.1916F, 1026.

[2] Triple Link Mutual Indemnity Co. v. Williams, 121 Ala. 138, 77 Am. St. Rep. 34, 26 So. 19, 28 Ins. L. J. 621.

On what amounts to a breach of warranty as to business, profession, or occupation of the insured in a policy of life or accident insurance, see note in L.R.A.1916F, 1030.

[3] Standard Life & Accident Co. v. Ward, 65 Ark. 295, 45 S. W. 1065, 27 Ins. L. J. 719.

[4] Murphey v. American Mutual Accident Assoc. 90 Wis. 206, 62 N. W. 1057, 24 Ins. L. J. 557.

[5] Hartmann v. National Council of

ter will be contrary to evidence where it appears that his testimony that at the time of the accident he "was framing timbers, framing sets and caps," is impeached by several neighbors, and the uncontradicted testimony of one witness is that he was not a carpenter.[6] In case it is claimed that assured's occupation was more hazardous than that represented as being the one in which he was engaged, his statements made in applications for revival of other policies on his life are held material both upon the question of occupation and also upon the point of misrepresentation.[7] If an insurance company is misled by a false warranty intentionally made by the applicant as to his occupation, the knowledge of the agent of the insurer taking the application of such misrepresentation does not emasculate the warranty of its vitiating quality.[8]

A policy in an accident company wherein the insured's occupation is incorrectly described may be corrected after the occurrence of an accident.[9]

(e) The risk under a policy insuring against loss by burglary theft or larceny from an apartment is increased by habitual public and private use for entertainments or exhibitions of insured's alleged clairvoyant powers and, therefore, a false warranty by assured that he was a mining partner when in fact he was a clairvoyant or mind reader and used his apartment as above stated, avoids the policy.[10] But an answer, which is not responsive in terms to an interrogatory and upon its face does not have any relation thereto in that it does not profess to convey the information sought, cannot form the basis of a warranty. This applies where assured's occupation is stated as "widow" in an application for a burglary policy, and the fact that she has a husband living constitutes a breach of warranty; such statement can have at most only the effect of a representation the untruth of which can only be availed of by properly pleading the same and alleging its materiality and assurer's reliance thereon in issuing the policy.[11]

Knights & Ladies of Security, 190 Mo. App. 92, 175 S. W. 212; Rev. Stat. 1909, sec. 6937.

[6] Murphey v. American Mutual Accident Assn. 90 Wis. 206, 62 N. W. 1057, 24 Ins. L. J. 557.

[7] McManus v. Peerless Casualty Co. 114 Me. 98, 95 Atl. 510, 46 Ins. L. J. 753.

[8] Triple Link Mutual Indemnity Assoc. v. Williams, 121 Ala. 138, 77 Am. St. Rep. 34, 26 So. 19. But see subdiv. (q) next section.

[9] Ford v. United States Mutual Accident Relief Co. 148 Mass. 153, 1 L.R.A. 700, 19 N. E. 169.

[10] Reese v. Fidelity & Deposit Co. of Md. 156 N. Y. Supp. 408, 93 Misc. 31, 47 Ins. L. J. 337.

[11] Linzee v. Frankfort General Ins. Co. 147 N. Y. Supp. 606, 162 App. Div. 282, 44 Ins. L. J. 83.

**§ 2075. Other insurance: refusal of other insurers: prior applications, etc.**[12]—(a) Subject to such qualifications or exceptions as exist by reason of statutes which, by very force of the law, become part of the contract,[13] an insurer has the right to require that an applicant shall truthfully state whether or not he has made prior applications for insurance and been rejected and such statements may properly be made warranties and material without regard to their materiality.[13a] So insurer may reasonably require information of this character, for its action may depend upon it, and it is material. This applies where the question is in effect whether the applicant at the time of the inquiry had any proposition or negotiation for insurance pending with or under consideration by any insurer, on which a policy had not been issued, and where the applicant falsely answers in the negative, and there is a warranty, it will be enforced in the absence of waiver or an estoppel.[14]

(b) These questions are in various forms, but in so far as their main object or purpose is to ascertain the applicant's exact situation with relation to other prior applications or proposals for insurance, whether made, pending, postponed, or rejected, or for insurance not issued and the like, and under the stipulations of the contract such matters so inquired about are a warranty, it is material and enforceable and the breach will avoid the contract.[15]

[12] See § 1987 herein.

[13] See subdiv. (i) under this section and § 1916 herein.

[13a] Bonewell v. North American Ins. Co. 160 Mich. 137, 125 N. W. 59, point also approved on rehearing, 167 Mich. 274, Ann. Cas. 1913A, 132 N. W. 1067, 41 Ins. L. J. 150.

[14] Home Life Ins. Co. v. Myers, 112 Fed. 846, 50 C. C. A. 544, 31 Ins. L. J. 523.

See also Ferris v. Home Life Ins. Co. 118 Mich. 485, 5 Det. L. N. 589, 76 N. W. 1041 (where it is said: "It is a right which insurance companies have, to be truthfully informed whether an applicant for insurance has before then applied for insurance and been rejected, and to know whether a medical examiner has declined to give a favorable opinion upon the application so that the persons whose duty it is to act upon the application, upon the part of the company, may act intelligently).

On effect of false representations as to previous application for insurance, see note in 55 L.R.A. 122.

[15] *United States.*—Home Life Ins. Co. v. Myers, 112 Fed. 846, 50 C. C. A. 544, 31 Ins. L. J. 523 (answer that no proposition or negotiation or examination for insurance "has been made in this or any other company on which a policy has not been issued, or which if issued, was modified in amount, kind, or rates").

*Indiana.*—Supreme Lodge of Modern American Fraternal Order v. Miller, 60 Ind. App. 269, 110 N. E. 556 (statement among others was, that had never applied to any company without obtaining kind of policy applied for).

*Kentucky.*—Western & Southern Life Ins. Co. v. Quinn, 130 Ky. 397, 113 S. W. 456 (had never been rejected or postponed: void irrespective of applicant's knowledge of truth or falsity of answer).

*Michigan.* — Bonewell v. North American Ins. Co. 160 Mich. 137,

And if assured is asked whether an application has been made to other companies and with what result, and he answers, "Yes, and always successful," and "Yes, accepted," which is false, in that the medical examiner declined to recommend another and prior application, the policy is void.[16] Recovery is also precluded in case of a false warranty that no physician had ever given an unfavorable opinion on assured's life.[17] So where upon the first examination of the applicant he gives negative answer to a question whether he

125 N. W. 59 (statement that had not been previously declined or acceptance postponed; also that no policy or certificate canceled or refused), aff'd 167 Mich. 274, Ann. Cas. 1913A, 847, 132 N. W. 1067, 41 Ins. L. J. 150; Genrow v. Modern Woodmen of America, 151 Mich. 250, 114 N. W. 1009 (answered that had never been rejected); Moore v. Mutual Reserve Fund Life Assoc. 133 Mich. 526, 10 Det. L. N. 263, 95 N. W. 573, 32 Ins. L. J. 816 (statement was that no proposal to insure his life had ever been postponed or declined; that no proposal or application to insure his life or for membership had ever been made to any company, association or agent upon which a policy or certificate had not been received in person for the full amount and kind and at the rate applied for; that he had no insurance on his life, or membership, etc.; and that no physician had given an unfavorable opinion, etc.).

*Missouri.* — Aloe v. Mutual Reserve Fund Life Assoc. 147 Mo. 561, 49 S. W. 553, 28 Ins. L. J. 293 (there were a number of questions concerning other life insurance; whether applications had been postponed or declined; whether any proposal or application to insure had been made on which no policy or certificate had not been received; and whether any physician had given an unfavorable opinion on assured's life); Cundiff v. Royal Neighbors of America, 162 Mo. App. 117, 144 S. W. 128 (warranty that had not been examined by any physician for life insurance and recommendation for policy declined).

*New Jersey.*—Finn v. Metropolitan Life Ins. Co. 70 N. J. L. 255, 57 Atl. 438, 33 Ins. L. J. 472 ("no proposal or application to insure my life has ever been made to any company or agent upon which a policy has not been issued of the amount applied for").

*New York.*—Fletcher v. Bankers' Life Ins. Co. of N. Y. 119 N. Y. Supp. 801, 135 App. Div. 295, rev'g 116 N. Y. Supp. 1105, 62 Misc. 546 (answered that had never "made an application on which a policy was not issued, or if issued, on a different plan than the one applied for;" applicant was postponed for another examination; answer false).

*Pennsylvania.* — Meyer-Bruns v. Pennsylvania Life Ins. Co. 189 Pa. 579, 42 Atl. 297, 28 Ins. L. J. 377 (negative answer to question whether assured was ever rejected, declined or postponed—referring to applications for insurance on his life—and he knew that he had been rejected).

*Tennessee.*—Mutual Life Ins. Co. v. Dibbrell, 137 Tenn. 528, L.R.A. 1917E, 554, 194 S. W. 581 (*considered* under subdv. [i] of this section).

[16] Edington v. Ætna Life Ins. Co. 100 N. Y. 536, 3 N. E. 315; New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742. See also Anderson v. Fitzgerald, 4 H. of L. Cas. 484, 17 Jur. 995.

On misrepresentation as to previous rejection as increasing risk, see note in L.R.A.1917E, 558.

[17] Ferris v. Home Life Ins. Co. 119 Mich. 485, 5 Det. L. N. 589, 76 N. W. 1041.

had any proposition or negotiation or examination pending for insurance upon which a policy had not been issued, and it appears that in making out a required second application the answers were transposed so that another answer manifestly inapplicable and irresponsive appears to the above question, and the circumstances make it merely a clerical error, the second examination paper will not be held a new or modified application, but the negative answer will be deemed to have been intended to apply as originally made in the first application, and when it is false and a warranty the policy will be avoided; and in such case, even if the second application stood with its transposed answer, its falsity would be equally fatal to recovery.[18] Again, if a person makes a proposal for insurance and offers himself for an examination such as assurer may choose to make before it accepts the risk, it is none the less a proposal merely because after insured has so submitted himself he refuses or neglects to proceed with the examination or to submit to some requirement by the medical examiner, and negotiations are broken off; and in such case a statement by assured in an application to another insurer, that he had never made any proposal for life insurance to any company, association or agent upon which a policy had not been issued, is false, and where it is a warranty the policy is avoided.[19] In a New York case the applicant stated that he had never before applied for membership in the association to which he was then applying, and it appeared that he, with a number of others, petitioned the proper authorities of the order for leave to establish a subordinate council and assured applied for membership, but whether at that time or not did not appear, and he was subsequently examined and informed by the examiner that he could not pass or recommend him for membership, but the application and medical examination were pigeonholed by the doctor and so remained at least until after assured had become a member of another council of the same order. The reason for not reporting said examination was that the application was for charter membership, but a verbal report of the rejection was made to the secretary of the local council when instituted. It was held that these acts of assured constituted an application, and assuming that his statement was a warranty of fact, a finding that there had been no previous application for membership was held error.[20] So in

[18] Home Life Ins. Co. v. Myers, 112 Fed. 846, 50 C. C. A. 544, 31 Ins. L. J. 523.

[19] Security Mutual Life Ins. Co. v. Webb, 106 Fed. 808, 45 C. C. A. 648, 55 L.R.A. 122, 30 Ins. L. J. 613, verdict for defendant directed on second trial and aff'd in Webb v. Security Mutual Life Ins. Co. 126 Fed. 636, 61 C. C. A. 383.

[20] Jennings v. Supreme Council of The Loyal Additional Benefit Assoc. 81 N. Y. Supp. 90, 81 App. Div. 76, aff'd (mem.) 95 N. Y. Supp. 1138,

case assured's unqualified answer that he had never been rejected or postponed, is untrue and it was made with an actual intent to deceive the policy is avoided by the misrepresentation.[1]

(c) Warranties by assured in an accident policy that no application ever made by him for insurance had been declined, and no accident policy issued to him had been canceled; that he had no accident insurance and had not applied for any, "in this or any other company," are material and a breach thereof authorizes judgment for assurer.[2] So a policy is void or voidable at insurer's option where statements, which are warranties and upon which the contract is based, are false; and this applies where an applicant had stated that no accident, sickness, or life policy issued to him had ever been canceled or renewal refused—"no exceptions," and it clearly appears that there was, upon notice and request, a voluntary surrender of the policy for the purpose of cancelation and it was canceled. There is in such case a cancelation as distinguished from a voluntary surrender of the policy, and although such surrender, apart from an intent to cancel, would not be material, still when the statement as to noncancelation was wilfully false there can be no recovery.[3] And although the policy does not declare the statements warranties, still if applicant's misrepresentations that no accident policy of insurance had been canceled or renewal refused is falsified, as where he had received notice of cancelation and had endeavored to obtain insurance to replace that canceled, in such case the materiality is apparent as a matter of law and as the misrepresentation was also intentional, recovery was precluded.[4]

But there is no such sufficient notice of cancelation as to falsify a statement by insured that no company had canceled any liability insurance to him during a stated period of time, if no unconditional distinct and peremptory notice of cancelation of a policy is given assured, especially so where the claimed false representation

aff'd (mem.) 186 N. Y. 571, 79 N. E. 1108.

[1] Langdeau v. John Hancock Mutual Life Ins. Co. 194 Mass. 56, 18 L.R.A.(N.S.) 1190 and note, 80 N. E. 452, 36 Ins. L. J. 432.

[2] Wyss-Thalman v. Maryland Casualty Co. of Balt. (U. S. C. C.) 193 Fed. 55, 41 Ins. L. J. 982, error dismissed, 193 Fed. 53, 113 C. C. A. 383.

[3] Wells v. Great Eastern Casualty Co. — R. I. —, 100 Atl. 395.

[4] Maryland Casualty Co. v. Eddy, 239 Fed. 477, 152 C. C. A. 355. Although this case was a Michigan one it arose before Pub. acts Mich. 1913, p. 501, Art. 264, sec. 6, went into effect on January 1, 1914, said statute provided that: "The falsity of any statement in the application for any policy covered by this act shall not bar the right to recover thereunder unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer."

does not come within the requirements that a concealment must be a designed and fraudulent concealment, or, if not designed, then it must very materially affect the object of the policy and change the risk; and this applies where the agent's insurer wrote assured that they found it necessary to retire his policy for certain reasons, but advised rewriting the risk at a higher rate and should this suggestion be acceptable insured should advise them immediately, "or otherwise" they would be obliged to give notice, etc. As the words "or" and "otherwise" in this connection have substantially the same meaning, suggesting, "on the other hand," and their joint use, strictly speaking only amounts to "emphasizing by redundance the thought conveyed, they serve to so disjunctively coordinate the two propositions, that each in turn excludes the other, and obscures certainty as to either." And in addition it was apparent that said notice should not be final and conclusive.[5]

(d) A policy is not avoided where an application has been made to another company, but has not been finally passed upon, although the applicant makes a negative answer to a question whether any other application has been made upon which a policy has not been issued.[6] And if a policy is not delivered by assurer's agent it is not "issued" in such a sense as to falsify insured's representation that he had never applied for a policy which had not been issued.[7] Nor is a breach of warranty, that no company had recently declined or canceled insurance on assured's property, shown by the fact that an agent had declined the insurance because the property was located outside the territorial limits of his agency, nor is it shown by the fact that another agent had stated that he could not write his insurance and had declined doing so.[8] And the fact that assured had applied to another insurer for a policy, is not of itself sufficient proof to breach a warranty negativing any proposal or application to any insurer which had not been granted, nor a policy or certificate issued for a different amount.[9] Again, a statement by an applicant for life insurance, that no physician had ever given an unfavorable opinion upon his life with reference

[5] American Fidelity Co. v. R. L. Ginsburg Sons Co. 187 Mich. 264, 153 N. W. 709, 46 Ins. L. J. 542. (The leading case of Carter v. Boehm, 3 Burr. 1905, 1 Wm. Black. 593, 13 Eng. Rul. Cas. 501, which is *quoted* from and *relied* on by the court in the above case is *considered* fully under § 1845 herein.

As to cancelation and notice, see §§ 1665 et seq. herein; and as to notice of cancelation to agent or broker, see §§ 637 et seq. herein.

[6] Langdon v. Union Mutual Life Ins. Co. 14 Fed. 272.

[7] Kansas Mutual Life Ins. Co. v. Coalson, 22 Tex. Civ. App. 64, 54 S. W. 388.

[8] Capital Fire Ins. Co. v. King, 89 Ark. 346, 116 S. W. 894.

[9] Haughton v. Ætna Life Ins. Co. 42 Ind. App. 527, 85 N. E. 125.

to insurance, cannot be held to be false because of a confidential communication from a medical examiner to the medical director, of which he had no knowledge, stating that he could not recommend applicant without further examination.[10] And although statements including that of rejection by other insurers are warranties, still if it is not stipulated that the policy shall be void if they are untrue, it is not avoided merely for that reason, they must be fraudulently false.[11]

(e) *Effect of incorporating or using rejected application as basis of another application.*—It is decided that a statement as to non-rejection by other insurers, made in a rejected application, may be so far incorporated in, reaffirmed and made a part of an application to another assurer and a warranty that its falsity will avoid the contract. This is instanced where assured's application for membership has been rejected and he applies to an insurer of "rejected risks" and attaches to his proposal a copy of the rejected application whereby the statements, answers, and representations in both are made warranties and the basis of the contract and are declared to be full, complete and true. In such case the policy is avoided, where, after said rejection and before making his application as a "rejected risk" assured had been examined by physicians at that time of said last insurer who had rejected him as an unsound risk, but assured had suppressed that fact; and this constitutes a breach of warranty in the rejected application, reaffirmed as above stated, that no proposal or application to insure his life had ever been made to any company or agent upon which he had been rejected or upon which a policy had not been issued or received by him.[12] In another case, however, the rules of the insurer permitted the

[10] Security Mutual Life Ins. Co. v. Webb, 106 Fed. 808, 45 C. C. A. 648, 55 L.R.A. 122, 30 Ins. L. J. 613 but the action of the trial court as to this defense was not the only error complained of, and the case turned upon a false warranty whereby the policy was avoided) at the second trial the court directed a verdict for defendant which was aff'd in Webb v. Security Mutual Life Ins. Co. 126 Fed. 636, 61 C. C. A. 383.

On false representations as to previous applications for insurance, see note in 55 L.R.A. 122.

[11] German American Mutual Life Assoc. v. Farley, 102 Ga. 720, 29 S. E. 615, 27 Ins. L. J. 657. ("We are in the present case relieved of the difficulty which sometimes occurs in policies of insurance in which it is stipulated that the policy shall be void if any fact covenanted to be true should prove to be untrue; for in the present case, while the covenants of warranty extend to the truth of the facts, there is nothing in the policy itself which provides that a breach of such covenants should result in avoiding the policy. There was no express contract contained in the policy to the effect that it should be void if the facts warranted to be true should prove untrue"—Atkinson, J.).

[12] National Life Ins. Co. v. Hopkins, 97 Va. 167, 33 S. E. 539, 28 Ins. L. J. 717.

use of a copy of a rejected application made to any other insurer, as it was seeking such applications, since its business was that of insuring sub-standard risks, which included persons with physical imperfections, extra-hazardous occupations, rejected risks, etc. Accordingly it was held that if such an insurer uses a rejected application it cannot reasonably urge that a statement therein that there had been no previous rejection of the applicant was false and fraudulent where such statement was true when made.[13]

(f) *Classification of insurance as affecting scope of inquiry and answer as to rejection of applicant, etc.* If assurer's plan of doing business is such that it lacks the essential elements to bring it within the meaning of an assessment company and it is not therefore exempt from the general insurance law, and the alleged misrepresentations as to previous nonrejection, or the not giving of any unfavorable opinion by any physician are not material to the risk, and the matters claimed to have been misrepresented had nothing to do with assured's death, and the company has not offered to return the premiums paid with interest as a condition precedent, by statute, to a defense, it is precluded from availing itself of the above defense of misrepresentations.[14]

It would seem that questions as to rejection and the like ought to be considered with reference to the subject-matter of the contract, that is, they ought to sustain at least some degree of relevancy thereto and if the application and question clearly concern one particular class of insurance it might be reasonably assumed that insured in making his answer had that class in mind about which he was interrogated; so where an applicant for accident and health insurance is asked whether or not "any company, society or association" has ever rejected his application, canceled his policy or declined to renew the same, or refused compensation for disability, and he makes an unconditional negative answer it does not constitute such a false representation as to avoid his policy although prior to the date of his statement he had applied for a policy on his life and had been rejected.[15] So certificates in mu-

[13] Security Trust Co. v. Tarpey, 182 Ill. 52, 54 N. E. 1041, aff'g 80 Ill. App. 378.

[14] Aloe v. Fidelity Mutual Life Ins. Co. 164 Mo. 675, 55 S. W. 993, 29 Ins. L. J. 679; acts 1874, p. 89; Rev. Stat. 1879, sec. 5849, see Aloe v. Mutual Reserve Fund Life Assoc. 147 Mo. 561, 49 S. W. 553, 28 Ins. L. J. 293.

*Examine* Elliott v. Des Moines Life Assoc. 163 Mo. 132, 63 S. W. 400, 30 Ins. L. J. 769. See § 1916 subd. (l) herein, also pp. 3114 et seq., also subd. (k) of this section.

[15] Wright v. Fraternities Health & Accident Assoc. 107 Me. 418, 32 L.R.A.(N.S.) 461, 78 Atl. 475, 40 Ins. L. J. 551, three judges dissented. But *compare* Alden v. Supreme Tent of Knights of Maccabees, 178 N. Y. 535, 71 N. E. 104; McCollum v. Mu-

tual aid societies do not constitute insurance within the meaning of a question in an application blank of an insurance company as to "existing insurance" in this or any other company.[16] And a printed statement in an application for accident insurance making the applicant assert that no application made by him for insurance had been declined, and no accident, disease, or health policy had been canceled or renewal refused, does not include life policies, where the word "policy" is uniformly used elsewhere in the application as referring to accident or health policies.[17] Nor is a beneficial association issuing death benefit certificates within the meaning of a question whether or not applicant has ever been rejected by any company.[18] And this applies where a fraternal association, such as the Woodmen of the World, is not a "company" within the meaning of a question to an applicant for a benefit certificate, "Has any proposal or application to insure your life ever been made to any company upon which a policy has not issued?"[19]

But under a Minnesota decision, however, it is held error to refuse admission of evidence of assured's application to and rejection by a fraternal association such as the Royal Arcanum where he had stated that no other company or association had ever refused to issue a policy to him and that no person had ever been consulted as to his insurability.[20] Nor does the fact that as-

tual Life Ins. Co. of N. Y. 55 Hun (N. Y.) 103, 8 N. Y. Supp. 249.

On character of insurance or company covered by question in application for life or accident insurance as to other insurance, or as to previous rejection of application, see note in 32 L.R.A.(N.S.) 461.

See §§ 336d et seq., 344–344k, 345 et seq. herein.

[16] Penn Mutual Life Ins. Co. v. Mechanics' Savings Bank & Trust Co. 72 Fed. 413, 19 C. C. A. 286, 37 U. S. App. 692; 73 Fed. 653, 19 C. C. A. 316, 43 U. S. App. 75, 38 L.R.A. 33. *Cited* in Pacific Mutual Life Ins. Co. v. Van Fleet, 47 Colo. 401, 107 Pac. 1087 (but court stated in the citing case that it did not base its decision upon such distinction). See also Newton v. Southwestern Mutual Life Assoc. 116 Iowa, 311, 90 N. W. 73.

[17] Mays v. New Amsterdam Casualty Co. 40 App. D. C. 24, 46 L.R.A.(N.S.) 1108.

On failure to disclose accident policies in reply to question as to other life insurance as breach of warranty, see note in 1 B. R. C. 305.

[18] Lyon v. United Moderns, 148 Cal. 470, 4 L.R.A.(N.S.) 247n, 113 Am. St. Rep. 291, 7 Ann. Cas. 672n, 83 Pac. 804. See Peterson v. Manhattan Life Ins. Co. 244 Ill. 329, 18 Ann. Cas. 96, 91 N. E. 466; White v. National Life Ins. Co. 11 Ohio Dec. 857.

On previous rejection by benefit association as declination or refusal of insurance within meaning of application for life insurance, see note in 4 L.R.A.(N.S.) 247.

[19] Lyon v. United Moderns, 148 Cal. 470, 113 Am. St. Rep. 291, 7 Ann. Cas. 672n, 4 L.R.A.(N.S.) 247n, 83 Pac. 804.

[20] Bruce v. Connecticut Mutual Life Ins. Co. 74 Minn. 310, 77 N. W.

sured had applied for a second certificate in the Endowment Bank of the Knights of Pythias, a fraternal order excluded from the statutory definition of "insurance company, association or society," and that said certificate had been rejected, qualify his answers in an application for life insurance that he had never applied to any agent, or company for insurance, or for restoration of a lapsed policy without having received a policy of the exact kind and amount applied for, and that no company or association had ever declined or postponed his application for insurance, or offered him a policy different from the one applied for.[1]

(g) A warranty that assured has no burglary insurance, has never been refused any and has applied for none "other than is herein stated," and that the policy shall be void if assured in any way attempts to defraud the company is especially material and binding upon assured; and even though said statement was true when made and assured had no knowledge that it was false when the policy was issued, nevertheless such falsity avoids the policy, for the rule that a warranty must be strictly true and exactly and literally fulfilled applies, and want of knowledge on assured's part does not aid him; nor is he the less bound by the fact that the policy was obtained by a broker employed by him for that purpose.[2]

(h) *As to good faith: qualified statements: nonrejection, etc.*—The circumstances may be such as to show that the representation was immaterial and also that the applicant's answer, that he had never made an application on which a policy had not been issued, was made in good faith, in which case a judgment for plaintiff may be justified under the contract and the facts.[3] If, however, answers are warranties, good faith or intention are immaterial,[4] but in case of representations, assured should exercise the same good faith toward insurer which he demands of it.[5] In a Wiscon-

210. As to evidence in rebuttal to show knowledge of or waiver by assured, see subd. (r) of this section.

[1] Shawnee Life Ins. Co. v. Watkins, — Okla. —, 156 Pac. 181.

[2] Wolowitch v. National Surety Co. of N. Y. 136 N. Y. Supp. 793, 152 App. Div. 14, 41 Ins. L. J. 1677, s. c. 134 N. Y. Supp. 1150, 149 App. Div. 947. See §§ 1964, 1970 herein.

[3] Fidelity Mutual Life Assoc. v. Miller, 92 Fed. 63, 34 C. C. A. 211.

[4] Jennings v. Supreme Council of the Loyal Additional Benefit Assoc. 81 N. Y. Supp. 90, 81 App. Div. 76, aff'd (mem.) 95 N. Y. Supp. 1138, aff'd (mem.) 186 N. Y. 571, 79 N. E. 1108. See also Clemans v. Supreme Assembly Royal Society of Good Fellows, 131 N. Y. 485, 16 L.R.A. 33, 30 N. E. 496 (*considered* under subd. (q) of this section). See § 1964 herein.

[5] Mutual Life Ins. Co. v. Hilton-Green, 241 U. S. 613, 60 L. ed. 1202, 30 Sup. Ct. 676, rev'g 211 Fed. 31, 127 C. C. A. 467, 43 Ins. L. J. 685 (*considered* fully under subd. (q), this section.

As to rule in Kentucky as to good faith, see Blenke v. Citizens Life Ins. Co. 145 Ky. 332, 140 S. W. 561, 41 Ins. L. J. 94.

sin case assured answered in the negative that he had no application for accident or health or benefit life insurance pending, "no exceptions," but the last two words were inserted by the agent and were based by the latter on the assured's answer "no," and it was declared by the court, per Kerwin, J., that assured did not intend to include the instant policy and that he was most likely to understand that the question, in conjunction with another of like import, had reference to policies or applications completed and in existence at the time of the inquiry. "It was very easy to have so framed the question as to leave no room for misunderstanding. The construction claimed by defendant is a forced construction, and should not be adopted to avoid a policy made in good faith without any intention on the part of the applicant to misrepresent. . . . We think it was not established that any false representation was made," accordingly a judgment for plaintiff was affirmed.[6] Again, where the question was specifically asked whether the insured had been rejected by the medical examiner of any other lodge or society, it was held that the absolute truth of his answer was not warranted; that assured was only requested not to suppress known facts, but to answer according to his knowledge or reasonable means of belief.[7] But if a policy has in fact been refused by another company a representation that no company has, to the applicant's best belief, refused him a policy avoids the contract where the statements are made warranties, whether known to be false or not.[8]

(i) *As to effect of statutes: nonrejection, etc.*—Under a Tennessee decision a negative answer by the applicant to the question whether he had ever been examined for a policy in any company or associations which was not issued as applied for, is material, and when false increases the risk of loss and makes the policy voidable;

[6] Pagel v. United States Casualty Co. 158 Wis. 278, 148 N. W. 878, 44 Ins. L. J. 698 (a case of action upon an accident indemnity policy for a death benefit. The effect of the statute as to misrepresentations was also involved, another point, was also closely involved with that stated in the above text, related to weekly earnings).

[7] Senn v. Supreme Lodge Knights of Honor, 29 Fed. 895; Fowkes v. Marine & Life Ins. Co. 3 Fost. & F. 440. See §§ 1846 et seq. (concealment); §§ 1904 et seq. (representations); §§ 1964, 1970 (warranties) herein.

[8] Kemp v. Good Templars Mutual Benefit Assoc. 64 Hun (N. Y.) 437, 19 N. Y. Supp. 435. See also Wolowitch v. National Surety Co. of N. Y. 136 N. Y. Supp. 793. 152 App. Div. 14, 41 Ins. L. J. 1677, s. c. 134 N. Y. Supp. 1150, 149 App. Div. 947; Travelers' Ins. Co. v. Thorne, 180 Fed. 82, 103 C. C. A. 436, 38 L.R.A.(N.S.) 626, 39 Ins. L. J. 1638, s. c. (but point was warranty as to physical condition); Lynch v. Travelers' Ins. Co. 200 Fed. 193, 118 C. C. A. 379, 42 Ins. L. J. 453.

See §§ 1915 et seq. herein.

and it is also held that it is not necessary under the statute of that state that the matter falsely stated should have contributed to insured's death in order to render the policy voidable under the clause "unless the matter represented increases the risk of loss," it being sufficient that it increased the risk.[9] And a claim, that a false statement as to noncancelation of any prior policy will not render a policy void or voidable, unless such cancelation actually contributed to assured's death, as provided by statute, will not be sustained as the statute does not apply to relief from warranties and fraud.[10]

(j) *As to other insurance.*—If the contract does not require a disclosure as to other insurance, a nondisclosure is not fatal.[11] And

[9] Mutual Life Ins. Co. v. Dibrell, 137 Tenn. 528, L.R.A.1917E, 554, (annotated on misrepresentation as to previous rejection as increasing risk), 194 S. W. 581.

[10] Wells v. Great Eastern Casualty Co. — R. I. —, 100 Atl. 395.

See further the following cases: Masonic Life Assoc. of Western N. Y. v. Robinson, 149 Ky. 80, 147 S. W. 882, 41 L.R.A.(N.S.) 505, 41 Ins. L. J. 1271 (negative answers by applicant to questions whether any physician had ever given an unfavorable opinion upon his life, as to insurance or otherwise, and whether application for insurance had ever been rejected: answers false: no recovery regardless of good faith of applicant: under Ky. Stat. sec. 639); Blenke v. Citizens' Life Ins. Co. 145 Ky. 332, 140 S. W. 561, 41 Ins. L. J. 94 (negative answers to questions whether applicant had ever applied to any company or agent without receiving a policy of the exact amount and kind applied for; whether he had ever applied to any agent without receiving a policy within thirty days; whether he had ever been rejected by any company or association "[this is important];" whether any physician had ever given an unfavorable opinion upon his life in reference to assurance, formally or informally; judgment for defendant was affirmed; other questions were also involved. Ky. Stat. sec. 639. Russell's Stat. sec. 4286); Pacific Mutual Life Ins. Co. v. Glaser, 245 Mo. 377, 150 S. W. 549, 45 L.R.A.(N.S.) 222 (statement that no other company had refused insurance is warranty and not representation and falsity renders policy voidable: Rev. Stat. 1900, sec. 6937); March v. Metropolitan Life Ins. Co. 186 Pa. 629, 65 Am. St. Rep. 887, 40 Atl. 1100, 28 Ins. L. J. 30 (negative answer to questions whether applicant had made application and been rejected, or whether any insurance company had declined orally or in writing to insure him; statements material; judgment for defendant; act of June 23, 1885; P. L. 134; other misrepresentations as to disease, etc., also involved); Pagel v. United States Casualty Co. 158 Wis. 278, 148 S. W. 878, 44 Ins. L. J. 698 (negative answer in application for accident and health insurance that no application pending for accident or health or benefit life insurance: not avoided; Stat. 1913, sec. 4202m; point of representations as to weekly earning was also involved. See this case under subd. [h] of this section). See § 1916 herein.

[11] Agricultural Ins. Co. v. Bemiller, 70 Md. 400, 17 Atl. 380; Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612.

As to representations and concealment: conditions voiding policy, other insurance, see § 2462 herein.

As to want of knowledge of other insurance, see § 2462a herein.

the contract will not be set aside for nondisclosure of a second policy effected by another insurer.[12] So a failure to disclose a prior insurance on a tenement house is not fatal, where insurer had subsequently included said insurance in the policy for its own convenience.[13] Nor does it constitute a breach of warranty of the truth of statements in an application for life insurance to fail to disclose policies insuring against death or injury or from accident, in response to questions in such application as to the amount of insurance carried by the applicant on his life, and whether he had any other insurance in force on his life.[14] And the materiality of a concealment of other insurance, upon a life risk, cannot be presumed from the fact that such concealment was made by the applicant in applications to other companies.[15] It is held, however, that recovery is precluded where there is no disclosure of prohibited concurrent insurance.[16]

(k) If the evident intent of the inquiry is, that only information is called for as to life insurance in regular insurance companies, and that it was not intended to include fraternal or accident insurance, then a failure to specify the latter is not fatal; in case, however, it is clearly intended that the latter should be included, then the fact of insurance in such companies must be disclosed or the contract is avoided.[17]

As to concealment of same facts from other insurers, see § 1874 herein.

As to misrepresentations to other insurers, see § 1926 herein.

What does and does not constitute other, etc., insurance: conditions voiding policy, see c. LVII. (§§ 2455 et seq.) herein.

[12] Fiset v. LaCompagnie Equitable D'Assurance Mutuelle Contre LeFeu, 31 Super. Ct. (Queb. O. L. R.) 334.

[13] Mutual Fire Ins. Co. v. Ward, 95 Va. 231, 28 S. E. 209.

[14] Metropolitan Life Ins. Co. v. Montreal Coal & Towing Co. 35 Can. S. C. 266, 25 Canadian L. T. Occ. N. 4n, 1 B. R. C. 298.

[15] Penn. Mutual Life Ins. Co. v. Mechanics Savings Bank & Trust Co. 72 Fed. 413, 19 C. C. A. 286, 38 L.R.A. 33, 37 U. S. App. 692; 73 Fed. 653, 19 C. C. A. 316, 43 U. S. App. 75.

[16] Roper v. National Fire Ins. Co. 161 N. C. 151, 76 S. E. 869.

Double insurance and concurrent insurance, distinct, see Lawver v. Globe Mutual Ins. Co. 25 S. Dak. 549, 127 N. W. 615, 39 Ins. L. J. 1588, 1596.

Concurrent insurance defined, see § 2480 herein.

On what is concurrent insurance, see note in 49 L.R.A.(N.S.) 374.

[17] Mutual Life Ins. Co. v. Ford (Ford v. Mutual Life Ins. Co.) 61 Tex. Civ. App. 412, 130 S. W. 769, aff'd 103 Tex. 522, 131 S. W. 406 (assured warranted that he was insured in specified "other companies and associations" and "no others"). See Penn Mutual Life Ins. Co. v. Mechanics' Savings Bank & Trust Co. 72 Fed. 413, 19 C. C. A. 286, 37 U. S. App. 75, 38 L.R.A. 33. See subd. (f) of this section, also § 2482 herein.

On failure to disclose accident policies in reply to question as to other life insurance as breach of warranty, see note in 1 B. R. C. 305.

(l) If a partial or incomplete answer as to other insurance is true to the extent of the answer, and is permitted to stand without any attempt to elicit further information, or the right to have the question answered concerning the matter is waived, there is no breach of warranty for a partial answer, in case of a warranty, cannot be extended beyond what it fairly imports without the ascertained intent of the parties.[18] But it is also decided that omission of a part of the insurance carried, from an answer to a question in an application as to policies in other companies, with directions to state companies and amount, will render the answer false.[19]

(m) It is held that if the original policy of fire insurance was void for nondisclosure of prior insurance, a renewal thereof is likewise a nullity, although the prior insurance has ceased to exist in the interval.[20]

(n) If there is warranty by assured that he has no insurance in other companies, a breach thereof avoids the policy.[1] But a distinction is made between a promissory warranty, and a warranty, false representation or statement as to additional insurance which relates to then existing conditions.[2] Again, in Missouri, a stipulation restricting concurrent insurance, whether considered as a condition precedent or subsequent, is a warranty presumed in law to be material to the risk, and any substantial breach of such warranty ipso facto works a forfeiture; and the statute does not prevent such breach from avoiding the policy for said enactment is construed in that state as having the effect only of converting into a mere representation a stipulation relating to existing facts which before had been treated by the courts as a condition precedent, but not as affecting the construction of promissory warranties, that is the word "condition" in the statute refers to facts supposed to exist at the time the policy was made.[3] And a warranty in a fire

[18] Triple Link Mutual Indemnity Assoc. v. Froebe, 90 Ill. App. 299. See § 1969 herein. See also Robinson v. Supreme Commandery, United Order of the Golden Cross of the World, 77 N. Y. Supp. 111, 38 Misc. 97, aff'd 79 N. Y. Supp. 13, 77 App. Div. 215, aff'd 177 N. Y. 564, 69 N. E. 1130.

[19] Penn Mutual Life Ins. Co. v. Mechanics' Savings Bank & Trust Co. 72 Fed. 413, 19 C. C. A. 286, 37 U. S. App. 692, 73 Fed. 653, 19 C. C. A. 316, 43 U. S. App. 75, 38 L.R.A. 33.

[20] Liverpool & London & Globe Ins. Co. v. Agricultural Savings & Loan Co. 33 Can. S. C. 94, 1 B. R. C. 593 (annotated on effect upon renewal of fire insurance of circumstance invalidating original policy but which in the meantime has ceased to exist).

As to renewals: other insurance, see § 2479 herein.

[1] Floyd v. Metropolitan Life Ins. Co. 5 Boyce (Del.) 51, 90 Atl. 404.

[2] Scottish Union & National Ins. Co. v. Wade, 59 Tex. Civ. App. 631, 127 S. W. 1186.

[3] Harwood v. National Union Fire Ins. Co. 170 Mo. App. 298, 156 S. W. 475, 42 Ins. L. J. 1002; Rev. Stat. 1909, secs. 7024, 7025 (act

policy that assured has a certain amount of insurance in another company, constitutes a condition precedent to liability, and where said amount is actually less than that stated there is a breach and the policy containing the warranty cannot be enforced.[4]

(o) A material, knowingly false statement as to other insurance avoids the policy;[5] and answers as to other insurance are material.[6] So false answers as to applications for other insurance may be such a variation from the truth as to change the nature, extent, and character of the risk and so avoid the policy.[7] And where in answer to an inquiry at the time of making a proposal for accident insurance insured stated that he was not insured or proposing to insure against accident or disease with any other office or offices, and at the time the statement was made it was true but before the policy was issued it became untrue such declarations are continuing declarations to the issue of the policy and it is not necessary for the insurance office to show that they would not have granted the policy had the disclosure been made. They are entitled to the information in order to enable them to make up their minds and it is then material and important. The policy was held void.[8] So where assured covenants that his representations in his application are a full and true exposition of all the facts, and his statements are not a full and true exposition of all the facts, in that he stated that certain other insurance would expire on a certain date prior to the date of the policy issued to him, and he had, after so stating and before the acceptance and issuing of the policy, procured, without insurer's knowledge or consent, other valid insurance on the same property, the minds of the parties did not meet and recovery is precluded.[9] In a Georgia case, where it appeared that a

1887). See Gross v. Colonial Assur. Co. 56 Tex. Civ. App. 627, 121 S. W. 517; Rev. Stat. 1895, Art. 3096aa; acts 28th Leg. 1903, p. 94, c. 69, sec. 1. See § 1916 herein.

[4] Bancroft v. Heath, 5 Coml. Cas. 110. See Kenyon Paper Co. v. Nederlandsche Lloyds, 109 N. Y. Supp. 311, 124 App. Div. 886 (where there was a warranty as to the amount of other insurance and a reformation and enforcement of a renewal of the policy was sought and judgment was rendered for insurer).

[5] March v. Metropolitan Life Ins. Co. 186 Pa. 629, 65 Am. St. Rep. 887, 40 Atl. 1100, 28 Ins. L. J. 30.

[6] March v. Metropolitan Life Ins. Co. 186 Pa. 629, 40 Atl. 1100, 65 Am. St. Rep. 887, 28 Ins. L. J. 30; Dolan v. Missouri Town Mutual Fire Ins. Co. 88 Mo. App. 666.

[7] Prudential Ins. Co. v. Moore, 231 U. S. 560, 58 L. ed. 367, 34 Sup. Ct. 191, 43 Ins. L. J. 321; Ætna Life Ins. Co. v. Moore, 231 U. S. 543, 58 L. ed. 356, 34 Sup. Ct. 186, 43 Ins. L. J. 311; under Ga. Code secs. 2479, 2480.

[8] Marshall & Scottish Employers' Liability General Ins. Co. Ltd. Re Arbitration, 85 L. T. Rep. N. S. 757. See §§ 1921–3 herein.

[9] Carleton v. Patrons Androscoggin Mutual Fire Ins. Co. 109 Me. 70, 39 L.R.A.(N.S.) 951 (annotated on duty to notify insurer of facts which develop after submission of applica-

person who was a member of a benefit society, subsequently obtained two other certificates from the same society upon two separate applications, stating in each that he was not a member of the society, and each certificate provided upon its face that if the statements in the application upon which it was issued were not true the certificate should be void, it was held that both certificates should be considered void, and of no effect, unless it appeared that at some time before receiving the last dues upon these certificates the company had notice that this identical person was a member at the time of his application for each or both of the insurances.[10]

(p) But if a person in good faith applies for insurance, and in the application states that there is no application for insurance pending in another company, and subsequent to the application and prior to the issuance of the policy thereon, application for insurance is made to another company without informing the first company, the policy subsequently issued by the first company is not avoided thereby, where it contains no requirement that the condition that no application to another company is pending should continue until the policy is issued.[11] Again, if assured states that he has another policy in a named company, but the name given only corresponds in part with that of the insurer with whom his policy, which was void because of nonpayment of premium, was actually placed, there is no breach of warranty in the absence of some pleading or proof showing both companies to be the same.[12]

(q) *As to knowledge of assurer or its agent: waiver or estoppel.* —The rule as to waiver or estoppel especially applies where assurer with other principal life insurance companies maintain a common agency of which, through their medical boards, they are members, the purpose of said agency or bureau being to make, keep and preserve a record of the names of rejected applicants, such records being always accessible to the members, so that if assurer to whom the application was made, might have learned, or did ascertain

tion, but before delivery of policy or certificate), 82 Atl. 649, 41 Ins. L. J. 1067.

[10] Home Friendly Soc. v. Berry, 94 Ga. 606, 21 S. E. 583.

On effect of condition against other insurance in same company, see note in 5 L.R.A.(N.S.) 759.

[11] Smith v. Prudential Ins. Co. 83 N. J. Law 719, 43 L.R.A.(N.S.) 431, 85 Atl. 190.

See also as to oral application and oral contract to deliver policy for other insurance. Mutual Life Ins. Co. v. Summers, 19 Wyo. 441, 120 Pac. 185, 41 Ins. L. J. 340.

[12] Kansas Mutual Life Ins. Co. v. Coalson, 22 Tex. Civ. App. 64, 54 S. W. 388.

On effect of other insurance which ceased before loss under general provisions against other insurance, see note in 10 L.R.A.(N.S.) 305; on void or inoperative policies of insurance as breach of a condition against other or additional insurance on property, see note in 1 B. R. C. 40.

through its agency, that the applicant's statements as to nonrejection, etc., were false, the matter becomes one peculiarly within its knowledge and it cannot be heard to repudiate its obligation on the ground of breach of warranty in this respect, particularly so where it continues the contract in force without disaffirmance or repudiation within a reasonable time after discovery of said breach.[13] And if it is warranted in an application for insurance on a minor's life that the insurer applied to has never refused to issue a policy on said life and said insurer has rejected and retained an application where not only the applicant's name, but the date of his birth, age, town, occupation, and parents' names were the same as in the instant application, and an examination of its files would have disclosed said facts, it is estopped to defeat a recovery on the ground that said warranty was false as it is bound by the knowledge which appears upon its own records, especially so where ample time is afforded between the application and policy dates in which to examine such records, and it does make such examination immediately after assured's death.[14] So where the members of an order are orally informed by assured that he had been a member thereof, and he is admitted upon the basis of a suspended member and not with the ceremonies necessary in case of a novitiate, the society cannot successfully urge in defense that it was misled by his statement that he had never been expelled or suspended from any lodge of the order.[15] Nor is a benefit certificate avoided by a misstatement in an application therefor; that applicant is a member of the fraternal association with which the benefit association is connected where the facts are known to the agent soliciting the application, and applicant becomes a member of the association before any obligation accrues upon the certificate.[16] But a waiver

[13] Union National Bank v. Manhattan Life Ins. Co. 52 La. Ann. 36, 26 So. 800, 30 Ins. L. J. 50 (applicant stated that he had never applied to any company for insurance on his life, without receiving a policy of the exact kind and amount applied for, and had never been declined or postponed by any company and statements were warranties and were false.)

[14] O'Rourke v. John Hancock Mutual Life Ins. Co. 23 R. I. 457, 57 L.R.A. 496, 91 Am. St. Rep. 643, 50 Atl. 834, 31 Ins. L. J. 230.

[15] McRaith v. Grand Lodge Ancient Order United Workmen, 149 Iowa, 148, 126 N. W. 321.

[16] Delaney v. Modern Accident Club, 121 Iowa, 528, 63 L.R.A. 603, 97 N. W. 91.

*When there is a waiver or estoppel,* see also the following cases:

*Kentucky.*—Masonic Life Assoc. of Western N. Y. v. Robinson, 149 Ky. 80, 147 S. W. 882, 41 L.R.A.(N.S.) 505, 41 Ins. L. J. 1271 (negative answers as to no unfavorable opinion of physicians and nonrejection, induced by advice of solicitor and medical examiner; knowledge of insurer binds if policy not repudiated after knowledge).

*Missouri.*—Cundiff v. Royal Neighbors of America, 162 Mo. App. 117, 144 S. W. 128 (warranty that no phy-

of false statements as to nonrejection by other insurers does not extend the waiver to a breach of other warranties.[17]

Under a Federal decision it was stipulated that representations should, in the absence of fraud, be deemed representations and not warranties, and it was held that as to this point, insurer, in order to avoid the policies for false representations, must establish their falsity, materiality and the knowledge of assured, actual or imputed, of their falsity, but that, with regard to a representation of assured that there had been no previous application for insurance made by him and rejected or not passed upon favorably by the insurance company, the fact that said statement was untrue, must have been known to have been untrue by assured when he made it, and that it was material, would be sufficient to avoid the policies in suit unless assurer was estopped to rely upon it by reason of its knowledge of its falsity, and that it had such knowledge because of the knowledge of its agents or examiners who handled the matter for it, and a judgment for plaintiff was affirmed, especially so in view of the Florida statute, which was involved and which made persons, etc., acting in certain capacities the agents of in-

sician had ever declined to recommend applicant: insurer had had prior application of applicant rejected for that reason).

*New York.*—Lynch v. Germania Fire Ins. Co. 116 N. Y. Supp. 998, 132 App. Div. 571 (life insurer's knowledge of previous rejection precludes reliance on breach of warranty); Stage v. Home Ins. Co. of N. Y. 78 N. Y. Supp. 555, 76 App. Div. 509 (local agent had knowledge of other insurance when policy issued); Jacobs v. Northwestern Life Assur. Co. 51 N. Y. Supp. 967, 30 App. Div. 285 (agent fully informed as to rejection of other applications but inserted only one rejected; insurer bound), aff'd 164 N. Y. 582, 58 N. E. 1088; Kelley v. Metropolitan Life Ins. Co. 44 N. Y. Supp. 179, 15 App. Div. 220 (waived by issuing application to rejected applicant).

*Oklahoma.*—Supreme Tribe of Ben Hur v. Owens, — Okla. —, 151 Pac. 198 (application for beneficial membership in fraternal order; breach of warranty that no prior application made for such membership: prior application on file in head office of order: insurer charged with knowledge and estopped to avoid liability).

*Texas.*—Hartford Fire Ins. Co. v. Walker, — Tex. Civ. App. —, 60 S. W. 820 (persons acting in certain capacities agents of insurer under Rev. Stat. 1895, art. 3093: such agents' knowledge of previous rejection of applicant waives warranty, notwithstanding policy inhibition, so also where agent inserts false answers as to nonrejection).

On waiver of false forfeiture because of false representations as to previous applications, see note in 55 L.R.A. 132; on notice from taking previous application as waiver of false representations with respect to previous applications for life and mutual benefit insurance, see note in L.R.A.1916A, 982; on effect of insurance broker's knowledge as to other insurance, see note in 38 L.R.A. (N.S.) 638.

[17] Moore v. Mutual Reserve Fund Life Assoc. 133 Mich. 526, 10 Det. L. N. 263, 95 N. W. 573, 32 Ins. L. J. 816. See § 1931 herein.

surer. In the Federal Supreme Court, to which the case was taken, it was expressly declared, as it was in the lower court, that said statements in the application were material, and nothing else appearing, if known to be untrue by assured when made, the policy was invalidated, but the Supreme Court further decided that the policy was avoided without further proof of actual conscious design to defraud, and although it was also declared that the general rule which imputes an agent's knowledge to the principal is well established, still it was not applicable in this case and accordingly the lower court was reversed.[18] So a false warranty by an applicant

[18] Mutual Life Ins. Co. of N. Y. v. Hilton-Green, 241 U. S. 613, 60 L. ed. 1202, 30 Sup. Ct. 676, rev'g 211 Fed. 31. 127 C. C. A. 467, 43 Ins. L. J. 685; Fla. Gen. Stat. 1906, sec. 2765. Mr. Justice McReynolds said upon the last point: "The general rule which imputes an agent's knowledge to the principal is well established. The underlying reason for it is that an innocent third party may properly presume the agent will perform his duty and report all facts which affect the principal's interest. But this general rule does not apply when the third party knows there is no foundation for the ordinary presumption—when he is acquainted with circumstances plainly indicating that the agent will not advise his principal. The rule is intended to protect those who exercise good faith and not as a shield for unfair dealing. The Distilled Spirits, 11 Wall. (78 U. S.) 356, 367, 20 L. ed. 167; American Surety Co. v. Pauly, 170 U. S. 133, 156, 42 L. ed. 977, 18 Sup. Ct. 552; American National Bank v. Miller, 229 U. S. 517, 521, 522, 57 L. ed. 1310, 1312, 33 Sup. Ct. 517; Meachem on Agency, 2d ed. sec. 1815.

"Section 2765 of the Florida statute ante, undertakes to designate as agents certain persons who in fact act for an insurance company in some particular; but it does not fix the scope of their authority as between the company and third persons and certainly does not raise special agents with limited authority into general ones possessing unlimited power. We assume Hogue, Torrey and the medical examiners were in fact designated agents of the company with power to bind it within their apparent authority; and in such circumstances the statute does not affect their true relationship to the parties. See Continental Ins. Co. v. Chamberlain, 132 U. S. 304, 310, 33 L. ed. 341, 10 Sup. Ct. 87; New York Life Ins. Co. v. Russel, 77 Fed. 94, 103, 23 C. C. A. 43; Wood v. Firemen's Ins. Co. 126 Mass. 316, 319; John R. Davis Lumber Co. v. Hartford Fire Ins. Co. 95 Wis. 226, 234, 235, 37 L.R.A. 131, 70 N. W. 84.

"The assured at the least consciously permitted an application containing material misrepresentations to be presented by subordinate agents to officers of the insurance company under circumstances which he knew negatived any probability that the actual facts would be revealed; and later he accepted policies which he must have understood were issued in reliance upon statements both false and material. He could claim nothing because of such information in the keeping of unfaithful subordinates. Moreover, the false representations accompanied and were essential parts of the policies finally accepted. He did not repudiate, and therefore adopted and approved, the representations upon which they were based. Beyond doubt an applicant for insurance should exercise toward the company the same good faith which may be rightly demanded of it. The rela-

for life insurance, that he has not been rejected by any other company, avoids a contract of which it becomes a part, although he

tionship demands fair dealing by both parties. New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 529, 533, 29 L. ed. 934, 6 Sup. Ct. 837; Northern Assur. Co. v. Grand View Building Assoc. 183 U. S. 308, 361, 46 L. ed. 213, 22 Sup. Ct. 133; United States Life Ins. Co. v. Smith, 92 Fed. 503, 34 C. C. A. 506.

"Considered with proper understanding of the law, there is no evidence to support a verdict against petitioner and the trial court should have directed one in its favor.

"Judgment of the Circuit Court of Appeals is reversed and the cause remanded to the United States District Court, Northern District of Florida, for further proceedings in accordance with this opinion." Mr. Justice Pitney dissented.

See § 515f herein where an excerpt from the opinion in the above case in the lower court (211 Fed. 31) is given and, notwithstanding, said decision is reversed, a peculiar phase of the case is the different construction placed upon, or application made of, the same authorities cited in the opinions of both courts in support of their different conclusions, and in addition the fact that Mr. Justice Pitney dissented as above stated, is also noteworthy in connection with the opinion below. It is proper to state here, however, that inasmuch as the Supreme Court decision was not reported at the time § 515f herein was written the fact of reversal was not noted therein. *Compare* Pacific Mutual Life Ins. Co. v. Van Fleet, 47 Colo. 401, 107 Pac. 1087, 39 Ins. L. J. 951 (where some of the same cases are considered as are discussed under both the above Federal decisions). *Examine* as to burden of proof, subd. (r) this section, also § 3790 herein.

The Supreme Court case above *considered* (241 U. S. 623) is *distinguished* in Maryland Casualty v. Eddy, 239 Fed. 477, 480, 482, 152 C. C. A. 355, as to the point that in the citing case there was no statute raising special agents with limited authority into general ones possessing unlimited power; and it is also *cited* to the point that "in this disposition of the matter, the conclusion seems necessarily involved, although not spelled out, that is to say, that the company is estopped to rely upon such a false answer because its agent had knowledge; is to say that the terms of the contract are to be changed."—Dennison, Cir. J., *construing* Comp. L. Mich. 1897, sec. 1946, as to agents as applying only to fire and marine insurance and holding that accident insurance was governed by sections 5110–5115.

*When no waiver or estoppel,* see also the following cases: Travelers' Ins. Co. v. Thorne, 180 Fed. 82, 103 C. C. A. 436, 38 L.R.A.(N.S.) 626, 39 Ins. L. J. 1638 (warranty that to applicant's knowledge no application ever made by him for life, health, or accident insurance had ever been declined, nor any policy ever issued to him ever canceled; nor any renewal ever refused "by this or any other company or association:" broker was held assured's agent; other points also involved: s. c. [but on point as to warranty of physical condition] Lynch v. Travelers' Ins. Co. 200 Fed. 193, 118 C. C. A. 379, 42 Ins. L. J. 453); United States Life Ins. Co. v. Smith, 92 Fed. 503, 34 C. C. A. 506, 28 Ins. L. J. 412 (negative answer that no application made on which policy was not issued, etc.; knowledge and advice of local agent unimportant); Bonewell v. North American Accident Co. 160 Mich. 137, 125 N. W. 59, aff'd 167 Mich. 274, Ann. Cas. 1913A, 847, 132 N. W. 1067, 41 Ins. L. J. 150 (warranty as to nonrejection made on advice of agents' procuring accident insurance, but they were then acting as brokers,'

believed it to be true, while the agent of the insurer knew it to be false, having received and forwarded the former application and been notified of its rejection, if the agent did not fraudulently conceal the fact from the applicant.[19]

Where the assured is asked whether applications have been made to other companies for insurance and with what result, and also as to the amounts insured in other companies, and an answer is given which is true as to part of the questions, but does not purport to be an answer as to other applications and the result, the company cannot defend on the ground that assured has not disclosed the fact that other applications have been made and rejected, for by issuing the policy it has waived the answer, and this even though the omission to answer is intentional.[20]

although they subsequently became insurer's general agents: knowledge of or notice to them not binding on assurer); Wolowitch v. National Surety Co. of N. Y. 136 N. Y. Supp. 793, 152 App. Div. 14, 41 Ins. L. J. 1677 (warranty that assured had no burglary insurance, had never been refused any and had applied for none "other than as herein stated:" knowledge of broker procuring insurance for assured not binding on assurer as waiver); Desmond v. Supreme Council Catholic Benevolent Legion, 64 N. Y. Supp. 406, 51 App. Div. 91 (fraternal association: false warranty that applicant had never applied for membership in order nor been rejected; knowledge of medical examiner no estoppel); Brotherhood of Railroad Trainmen v. Roberts, 48 Tex. Civ. App. 325, 107 S. W. 626 (false statement that not prior member of order; notice of facts putting ordinarily prudent person on inquiry insufficient to constitute waiver; actual and not constructive knowledge necessary).

[19] Clemans v. Supreme Assembly Royal Society of Good Fellows, 131 N. Y. 485, 16 L.R.A. 33, 30 N. E. 496. See citations under case preceding note herein.

[20] Phœnix Mutual Life Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. 500.

*When there is a waiver or estoppel: misstatements as to other prior insurance.*

*Arkansas.*—Merchants Fire Ins. Co. v. McAdams, 88 Ark. 550, 115 S. W. 175 (agent informed and policy issued with full knowledge of facts).

*Maryland.*—Monahan v. Mutual Life Ins. Co. of Balt. 103 Md. 145, 5 L.R.A.(N.S.) 759, 63 Atl. 211 (false answer innocently made; warranty: contract continued in force by assurer: *rule as to necessity of actual knowledge by assurer held inapplicable.*

*New Hampshire.*—Spalding v. New Hampshire Fire Ins. Co. 71 N. H. 441, 52 Atl. 858 (agent was informed by applicant of existence of other insurance).

*Texas.*—Standard Life & Accident Ins. Co. v. Davis, — Tex. Civ. App. —, 45 S. W. 826 (insurer had knowledge at time of issuing policy of existence of other insurance).

*Virginia.*—Mutual Fire Ins. Co. v. Ward, 95 Va. 231, 28 S. E. 209 (agent's and insurer's knowledge of existence of other insurance when policy was issued estops even though conditions requires indorsement of consent therefor).

But see Carleton v. Patrons' Androscoggin Mutual Fire Ins. Co. 109 Me. 70, 39 L.R.A.(N.S.) 951n, 82 Atl. 649, 41 Ins. L. J. 1067 (statements of agent to insured: other

(r) The burden of proof is upon assurer to establish the facts relied on where it sets up as a ground of forfeiture the falsity of assured's statement that he had never been rejected; accordingly where it is shown that assured had informed assurer's agent that he had applied for insurance and had been rejected and said agent stated that it would make no difference in the order applied to, and altered assured's answer to a negative, it was held that assurer must establish the fact that the answer as written in the application was made by assured, that it was intentionally false and material in some particular, and that assurer was induced thereby to act in reliance thereon.[1] Under a Texas decision an applicant stated that he had never had any application for insurance rejected, and it was untrue in that an application for membership in a mutual benefit society had been rejected. It was held competent evidence in behalf of the plaintiff that insured's agent informed assured that such societies were not regarded as life insurance companies and need not be considered as such by him.[2] And it is held error to refuse an offer of an application of a prior date as evidence, where the identity of the subscribed name with that of assured raised the presumption of identity of persons and it is claimed that a warranty is falsified, that assured had had no proposal to insure his life declined and that no application had been made by him without receiving a policy.[3] In a Pennsylvania case, however, error was claimed on the ground that the court overruled and rejected evidence offered by plaintiff to prove that insured's physician was told by insured that his application for membership in a certain order had been rejected and the doctor informed him that it was a beneficial insurance and not an old line company and it would not affect it, said evidence being offered for the purpose of rebutting a statement in the application that assured was not rejected by an insurance company, but it was held that said testimony was rightly excluded as incompetent for the purpose stated, or for any other legitimate purpose in the case.[4] In Oklahoma, under the statute

prior insurance; insurer not estopped).

[1] Higgens v. Supreme Castle of Highland Nobles, 83 Neb. 504, 120 N. W. 137. See § 3790 herein.

[2] Equitable Life Assur. Soc. v. Hazlewood, 75 Tex. 338, 7 L.R.A. 217, 12 S. W. 621. See also Alden v. Supreme Tent of Knights of Maccabees of the World, 79 N. Y. Supp. 89, 78 App. Div. 18.

[3] Spiegel v. Empire Life Ins. Co. 96 N. Y. Supp. 201.

[4] Meyer-Bruns v. Pennsylvania Life Ins. Co. 189 Pa. 579, 42 Atl. 297, 28 Ins. L. J. 377. See also Wyss-Thalman v. Maryland Casualty Co. of Balt. (U. S. C. C.) 193 Fed. 55, 41 Ins. L. J. 982, error dismissed, 193 Fed. 53, 113 C. C. A. 383; O'Rourke v. John Hancock Mutual Life Ins. Co. 23 R. I. 457, 57 L.R.A. 296, 91 Am. St. Rep. 643, 50 Atl. 834, 31 Ins. L. J. 230, but solicitor held agent of assured).

of that state, it is held that the burden of proof to establish the materiality of a misrepresentation or concealment, as well as insured's fraudulent intent, is upon insurer and the burden is not shifted where it is shown that insured made an untrue answer as to other insurance, for if there be a presumption that his failure to mention it was intentional this is met by the presumption that a man does not make a fraudulent misstatement. The court, per Kane, J., also said: "In this jurisdiction, where fraud is alleged in the procuring of a written instrument, the proof must sustain the allegations by a preponderance of evidence so great as to overcome all opposing evidence and repel all opposing presumptions of good faith;" and that to merely show that another policy was issued "does not, to our mind, sustain the charge of fraud" within said rule.[5] Upon the question of intent in omitting existing policies from the answer to a question in an application as to the amount of other insurance, evidence of similar omissions by the applicant in answer to similar questions by other companies is relevant and competent.[6]

(s) It is ordinarily a question for the jury to determine under proper instructions, whether an answer as to previous rejections or prior insurance was untrue and made with an actual intent to deceive or was knowingly misrepresented.[7] So it is for the jury to determine under all the circumstances whether assured, an ignorant foreigner with an imperfect knowledge of the English language, in applying for membership in an association, had answered truly or falsely when stating that he had not been previously rejected by any other company, and whether he might not have understood the inquiry as meaning prior applications for life insurance only. It is also a question for the jury whether under the facts the lodge knew, or should in the exercise of reasonable diligence, have known that an application had been made to another lodge of the order by assured, wherein the same questions were answered in the affirmative and that both applications had been passed upon by the grand lodge and in addition whether there had been any fraud or whether there had been a waiver of

[5] Owen v. United States Surety Co. 38 Okla. 123, 131 Pac. 1091, 42 Ins. L. J. 1068; Comp. L. 1909, sec. 3784. *Compare* Mutual Life Ins. Co. of N. Y. v. Hilton-Green, 241 U. S. 613, 60 L. ed. 1202, 39 Sup. Ct. 676, rev'g 211 Fed. 31, 127 C. C. A. 467 (*considered* under subd. [q] of this section).

[6] Penn Mutual Life Ins. Co. v. Mechanics' Savings Bank & Trust Co. 72 Fed. 413, 19 C. C. A. 286, 37 U. S. App. 692; 73 Fed. 653, 19 C. C. A. 316, 43 U. S. App. 75, 33 L.R.A. 33.

As to evidence of other insurance see § 3778 herein.

[7] Langdeau v. John Hancock Mutual Life Ins. Co. 194 Mass. 56, 18 L.R.A.(N.S.) 1190, 80 N. E. 452, 36 Ins. L. J. 432.

false answers if any had been made, where the association with all the papers in their possession had continued to receive dues from the assured as a recognized member.[8] It is decided, however, that a false denial by an applicant for life insurance, of rejection by other companies, avoids the policy as matter of law, if it would not have been issued had the insurer known of such rejection, although the statute provides that no misrepresentation shall prevent a recovery on the policy unless material and fraudulent.[9] And it is also held that when a statement or representation contained in an application for life insurance relates to the applicant being insured in any other company or to his having made an application for insurance and been rejected or as to particulars of his having had ailments, such statement or representation must be adjudged material to the risk as a matter of law, and its materiality should not be submitted to the jury for decision.[10] Where certain questions and answers thereto appear in an application for a life insurance, and such answers are shown to be false, it is error for the court to instruct the jury that such answers are a fraud upon the company, "if those questions were asked." [11]

[8] Dubcich v. Grand Lodge Ancient Order United Workmen, 33 Wash. 651, 74 Pac. 832.

[9] Masonic Life Assoc. v. Robinson, 149 Ky. 80, 41 L.R.A.(N.S.) 505, 147 S. W. 882.

[10] March v. Metropolitan Life Ins. Co. 186 Pa. St. 629, 65 Am. St. Rep. 887, 40 Atl. 1100; Lutz v. Metropolitan Life Ins. Co. 186 Pa. 527, 40 Atl. 1104. See Meyer-Bruns v. Pennsylvania Life Ins. Co. 189 Pa. 579, 42 Atl. 297, 28 Ins. L. J. 377 (held not error to direct verdict for insurer; answer that no application rejected, etc.).

See further the following cases:

*Michigan.*—Ferris v. Home Life Ins. Co. 118 Mich. 485, 76 N. W. 1041, 5 Det. Leg. N. 589 (verdict directed for insurer; warranty that no physician had ever given unfavorable opinion).

*Mississippi.*—Miller v. Phenix Ins. Co. 105 Mass. 4, 61 So. 983 (whether insured should in good faith have disclosed other insurance is for jury).

*New York.*—Seidenspinner v. Metropolitan Life Ins. Co. 74 N. Y. Supp. 1108, 70 App. Div. 476 (whether failure to disclose, in answer to inquiries, membership in fraternal, funeral expense societies without certificates, is breach of warranty, is for jury).

*Oklahoma.*—Owen v. United States Surety Co. 38 Okla. 123, 131 Pac. 1001, 42 Ins. L. J. 1068 (jury to determine under all the circumstances and under proper instructions, truth of statements as to not having other insurance and materiality of misrepresentations).

*Tennessee.*—Mutual Life Ins. Co. v. Dibrell, 137 Tenn. 528, L.R.A. 1917E, 554, 194 S. W. 580 (whether a misrepresentation when found to be false by the jury, be material, increasing the risk, was after Shannon's Code, sec. 3306, acts 1895, c. 160, as it had been before one of law for the court.—Williams, J.).

On misrepresentation as to previous rejection as increasing risk, see note in L.R.A.1917E, 558.

[11] March v. Metropolitan Life Ins Co. 186 Pa. St. 629, 65 Am. St. Rep. 887, 40 Atl. 1100.

**§ 2076. Opium habit: life risk.**[12]—Where the assured has been in the habit of eating opium and using laudanum to a dangerous extent, the fact should be disclosed; at least such a rule may fairly be implied from a decision where such facts existed, and it was represented that the assured was in perfect health and his general health had been good, and it was held that a full disclosure of every fact material to the risk should have been made.[13] But a man is not addicted to the exercise or intemperate use of opium unless he habitually uses it daily or often.[14] And although this rule applies to the use of narcotics, still if a statement as to their nonuser is a warranty and it is false, the policy is avoided notwithstanding mistake and good faith.[15]

The burden of proving alleged misrepresentations and fraud on the part of assured is upon assurer; nor is such burden sustained by evidence which is doubtful or circumstances amounting merely to suspicion, and it is proper, upon the question whether assured had ever used opium contrary to his statement negativing such use, to exclude the testimony of a physician that he had, at a time subsequent to the completion of the insurance contract, seen assured under the influence of that drug and that the latter had then stated that he could take two or three bottles a day of laudanum and had done so for several years.[16] And it constitutes error to refuse an instruction that if the jury believes that the answer "No" to the question "Do you now use, or have you ever used, opium, chloral, cocaine, or any other narcotic drug?" was knowingly false and untrue, then the verdict must be for defendant.[17] So an instruction in the language of the statute may properly be given whereby answers of an applicant must be wilfully false or fraudulently made, etc., in order to bar recovery.[18]

**§ 2077. Personal, accidental, or serious injury: wounds: hurts: prior losses: prior indemnity.**[19]—(a) Where a policy was issued

[12] See § 1987 herein.

As to excepted risks and losses: use of drugs, narcotics, etc., see §§ 2613a, 2613b, 2615 herein.

[13] See Forbes v. Edinburgh Life Assur. Co. 10 Shaw & D. 451, 4 Scot. Jur. 385.

[14] Ætna Life Ins. Co. v. Davey, 123 U. S. 739, 31 L. ed. 315, 8 Sup. Ct. 331, s. c. 20 Fed. 482. See National Fraternity v. Karnes, 24 Tex. Civ. App. 607, 60 S. W. 576, 28 Ins. L. J. 1157 (where same rule is applied to use of narcotics).

[15] National Fraternity v. Karnes, 24 Tex. Civ. App. 607, 60 S. W. 576, 28 Ins. L. J. 157.

On morphinism of insuerd as affecting policy, see note in 39 L.R.A. 265.

[16] Life Ins. Co. of Virginia v. Hairston, 108 Va. 832, 62 S. E. 1057.

[17] Elliott v. Des Moines Life Assoc. 163 Mo. 132, 63 S. W. 400, 30 Ins. L. J. 769.

[18] Life Ins. Co. of Virginia v. Hairston, 108 Va. 832, 62 S. E. 1057.

[19] See § 1987 herein.

"upon the faith of the statements in the application, under a stipulation that if they" should be found in any respect untrue the policy should be void, it was held that although under the policy the answers to questions contained in the application must be construed as warranties that they were true in every particular, yet a negative answer to a question, "Has the party ever met with an accidental or serious personal injury?" will not bar a recovery when insured had actually met with an accidental injury, such injury, however, being slight, and not affecting the future health or longevity of the insured.[20] Nor has a person received "any wound, hurt, or serious bodily injury," within the meaning of those words in an application for a life policy, although while fencing he has received a blow upon the throat by a foil, causing him to raise blood, and which produces an abrasion or hurt on the inside of the windpipe, necessitating his being confined to his bed for three days and the attendance of a physician, but from which he recovers fully without any lasting or serious results.[1] So a gunshot wound in the back of the head which does not affect assured's general health, which is uniformly good, does not falsify a warranty by him that he had never had any bodily or mental infirmity; and where the only evidence upon which to base a breach of said warranty is the pension record, it constitutes error to direct a verdict for assurer.[2] And a policy is not avoided by falsely stating the date of an injury unless as provided by statute it contributed to the happening of the contingency on which the policy is to become due.[3] Again, if one is asked whether he has received any serious personal injury, and the defense is that he has answered falsely, the burden of proof is upon insurer to show such fact. In such case evidence is held inadmissible that the deceased had told the attending physician in his last sickness that he had heard that his skull had been fractured when a child. So also is evidence inadmissible of the existence of a scar on the head where it might have been produced in other ways.[4]

As to "accident" and "accidental:" special risks and losses, see §§ 2862 et seq. herein.

As to excepted risks and losses: accident policies, see §§ 2617 et seq. herein.

[20] Wilkinson v. Connecticut Mutual Life Ins. Co. 30 Iowa, 119, 6 Am. Rep. 657; aff'd Insurance Co. v. Wilkinson, 13 Wall. (80 U. S.) 222, 20 L. ed. 617.

[1] Bancroft v. Home Benefit Assoc. 120 N. Y. 14, 8 L.R.A. 68, 23 N. E. 997, 30 N. Y. St. Rep. 175, 19 Ins. L. J. 468. And see §§ 1808, 1809 herein.

"Wounds" defined: excepted risks and losses, see § 2617a herein.

[2] Black v. Travelers Ins. Co. 121 Fed. 732, 58 C. C. A. 14, 61 L.R.A. 500.

[3] Jacobs v. Omaha Life Assoc. 142 Mo. 49, 43 S. W. 375, s. c. 146 Mo. 523, 48 S. W. 462.

[4] Granger Life Ins. Co. v. Brown, 57 Miss. 308, 39 Am. Rep. 446.

(b) Under English law where assurer's agent at request of the applicant for a policy against driving accidents filled out the proposal form without asking for answers and the applicant signed it without reading, it was held that a misstatement to the effect that no accident had happened to the horses or vehicle avoided the policy as the agent in such case acted for the assured, and the policy provided that misstatements in the proposal should render the contract void.[5]

(c) In case a false negative answer to the inquiry whether assured had ever had property burned or had lost property by fire, is made by the advice of assurer's agent who had knowledge of the facts, assurer is estopped to defend on the ground of misrepresentation unless it appears that assured had knowledge of said restrictions upon agent's powers.[6]

(d) A claim that assured had procured a policy of burglary insurance through fraud and misrepresentation, by stating in his application that he had never suffered loss through burglary, is not sustained by evidence that several years prior thereto a money order form book was mislaid or stolen, where it is not shown that said book was taken from the safe, or as a result of burglary, or that the store or safe was ever burglarized.[7] But a breach of a warranty that assured had never suffered loss from burglary, nor ever received indemnity for any loss therefrom, is not waived by continuing, after knowledge of the breach, an examination of assured after loss under a policy of burglary insurance, where nothing further was done to induce the belief that advantage would not be taken of such breach.[8]

(e) Assurer has the right to stipulate that answers as to previous indemnity, etc., shall be warranties regardless of their materiality.[9] So where one of the warranties by assured, is that he had never received sick benefits from any other society, is falsified, recovery is precluded regardless of whether such misstatements are innocently made or otherwise, nor is assurer liable, in the absence of waiver or estoppel, where such material misrepresentations are not

[5] Life & Health Assur. Assoc. v. Yule (Ct. of Sess. Cas.) 6 F. 537, 41 Scottish L. Rep. 316.

[6] Farmers' & Mechanics' Benevolent Assoc. v. Williams, 95 Va. 248, 28 S. E. 214.

[7] General Accident, Fire & Life Assurance Corp. Ltd. v. Stratton, 165 Ky. 754, 178 S. W. 1060, 46 Ins. L. J. 767.

[8] Bacouby v. United States Fidelity & Guaranty Co. 113 N. Y. Supp. 20.

On condition as to other applications or losses in policy insuring against burglary or theft, see note in 46 L.R.A.(N.S.) 565.

[9] Bonewell v. North American Accident Ins. Co. 160 Mich. 137, 125 N. W. 59; 167 Mich. 274, Ann. Cas. 1913A, 132 N. W. 1067, 41 Ins. L. J. 150.

warranties and they induced assurer in reliance thereon to issue the policy.[10]

But the statement that the applicant has never received compensation for any accident except as herein stated without any exceptions being specified, does not avoid the policy even though he had received such compensation from the assurer itself as well as from other insurers, but assurer's authorized agents who had full knowledge of the facts had not filled out the blank with the exceptions as they had not deemed it necessary.[11] And the word "compensation" in an application for an accident policy requiring a statement as to the amount of compensation previously received for accidents, does not include "indemnity" where the latter word is used exclusively with reference to weekly payments to be made as indemnity during total disability to prosecute business as the result of an accident, and never with reference to payments to be made for loss of life, limb, or eye.[12]

If it is admitted that assured had received indemnity under another accident policy and his warranty to the contrary is thereby falsified as well as in regard to other statements, such matters are material precluding recovery; and in such case evidence is held inadmissible to show that such false representations were inserted by assurer's agent in assured's absence and without his knowledge or consent.[13] But where an answer is written in the application by insurer's agent, who is fully informed of the facts, and by said answer assured states that he has "never received or been refused compensation for accidental injuries or sickness, except as herein stated," but the proof is that he had previously had a policy in a mutual benefit association, been injured, and received compensation, such statement is imperfect and incomplete in that it suggests that compensation might have been received, and assurer cannot avoid its liability under a policy issued by it under such facts even though the statement is made a warranty, for if it was dissatisfied with such incomplete answer, it should have made further inquiries before issuing the policy, otherwise the imperfection was waived; and in addition its agent's knowledge of the facts, his act in writing in or inserting the false

[10] Supreme Lodge of Modern Fraternal Order v. Miller, 60 Ind. App. 269, 110 N. E. 556.

[11] Bayley v. Employers' Liability Assur. Corp. 125 Cal. 345, 58 Pac. 7, s. c. — Cal. —, 56 Pac. 638.

[12] Bayley v. Employers' Liability Assur. Co. 125 Cal. 345, 58 Pac. 7, s. c. — Cal. —, 56 Pac. 638.

[13] Wyss-Thalman v. Maryland Casualty Co. (U. S. C. C.) 193 Fed. 55, 41 Ins. L. J. 982, error dismissed, 193 Fed. 53, 113 C. C. A. 383. See § 2075, subd. (r) herein.

answer precludes insurer by estoppel from availing itself of the alleged breach of warranty.[14]

The burden of proof of materiality is, however, upon assurer under a statute requiring the matter to be material to the risk in order to avoid a policy for breach of warranty.[15] And, for the purpose of showing an alleged breach of warranty evidence is admissible that prior to making the application other insurers had paid assured sick benefits. It is also competent to show that assured's own association had made such payments to him and it constitutes an admission of sickness.[16] And the question whether a breach of warranty as to prior indemnity for an accident is material is held to be one for the jury.[17] So where under an accident policy it was warranted by assured that he had never received indemnity for any accident or illness "except as herein stated" from "this company" for sprained ankle, it was held that whether said warranty was falsified by the fact that he had had his appendix removed about six years prior thereto and also the question of good faith and materiality were for the jury, and although a warranty the effect thereof was limited by the statute.[18]

**§ 2078. Pumps: water: tanks filled, etc.: fire risk: continuing warranty.**[19]—A mere representation that a force pump is connected with the building is not falsified by the fact that the pump is without hose.[20] A stipulation that there is water on each floor of a building with hose is also fully satisfied by proof that hose is attached to couplings connected with waterpipes in the first and second stories, that the attic story has pipes so constructed as to overflow the same, and that the basement can be flooded with water by a steam pump.[1] And where a cotton factory was insured, and it was represented that the works were in good condition, and that there was a force pump thereon worked by a waterwheel ready and designed for use in case of fire, the fact that there is a diversion of the water, thereby disabling the pump for several

[14] Pacific Mutual Life Ins. Co. v. Van Fleet, 47 Colo. 401, 107 Pac. 1087, 39 Ins. L. J. 951.

[15] Maryland Casualty Co. v. Gehrmann, 96 Md. 634, 54 Atl. 678; acts 1894, p. 1059, c. 662; Poe's Supp. Code Pub. Gen. Laws 1900, art. 23, sec. 142a.

[16] Seidenspinner v. Metropolitan Life Ins. Co. 175 N. Y. 95, 67 N. E. 123, rev'g 74 N. Y. Supp. 1108, 70 App. Div. 476.

[17] Maryland Casualty Co. v. Gehrmann, 96 Md. 634, 54 Atl. 678 (warranty here was connected with one as to physical soundness).

[18] Miller v. Maryland Casualty Co. 193 Fed. 343, 113 C. C. A. 267, 41 Ins. L. J. 990; act Pa. June 23, 1885, P. L. 134.

[19] See § 1987 herein.

As to automatic sprinkler system, see § 1995a herein.

[20] Peoria Marine & Fire Ins. Co. v. Lewis, 18 Ill. 553.

[1] New York Belting & Packing Co. v. Washington Fire Ins. Co. 10 Bosw. (23 N. Y. Super. Ct.) 428.

days, for the purpose of substituting a new bulkhead for the old and decayed one does not constitute a breach of warranty if such repairs do not take an unwarrantable time; nor, in such case, does the fact that repairs might have been made of a less permanent character occupying less time aid assurer.[2] So a statement that the facilities for extinguishing fire are a "force pump and abundance of water" is not a continuing warranty, but only that such were the facilities at the time of the insurance.[3] Nor is a condition precedent created by a stipulation that the force pump on the premises should be kept in working order and substantial compliance only is required and there is such compliance, although it was out of repair for about three months, where reasonable efforts to repair it were made, and when repaired it continued to operate until the night of the fire, when freezing prevented its operation.[4] Again, although the statement that there is plenty of water upon the premises and force pumps are warranties, yet if the application covenants only for the truth of such matters as are material to the risk so far as known to the insured, the materiality of the facts so represented is a question for the jury, and they are only warranties so far as material.[5] Nor does the mere fact that a building is insured as that shown upon the plan, and that a force pump is marked upon the plan, create a continuing warranty that any particular kind of pump will always be kept ready for use. In this case the application was oral, and the plan was merely referred to as on file in the office.[6] So a stipulation to keep a supply of water constantly on top of the mill ready for immediate use is satisfied although the tank is only about two feet deep and three feet square, is fed by a small flume, and said tank is below the apex of the roof.[7] In case the building is being constructed, the warranty that water tanks are to be well supplied with water must be construed with reference to the then state of completion of the building and the tanks, and whether the building of the tanks has been continued with reasonable diligence down to the time of the fire.[8]

[2] Townsend v. Northwestern Ins. Co. 18 N. Y. 168.

[3] Gilliat v. Pawtucket Ins. Co. 8 R. I. 282, 91 Am. Dec. 229.

[4] Cady v. Imperial Ins. Co. 4 Cliff. (U. S. C. C.) 203, Fed. Cas. No. 2,283. See Bulkley v. Protection Ins. Co. 2 Paine (U. S. C. C.) 82, Fed. Cas. No. 2,118.

[5] Garcelon v. Hampden Fire Ins. Co. 50 Me. 580. See Jones Manufacturing Co. v. Manufacturers' Mutual Fire Co. 8 Cush. (62 Mass.) 82, 54 Am. Dec. 742.

[6] Albion Lead Works v. Williamsburg City Fire Ins. Co. 2 Fed. Rep. 479. See opinion in this case.

[7] Sierra M. S. & M. Co. v. Hartford Fire Ins. Co. 76 Cal. 235, 18 Pac. 267.

[8] Gloucester Manufacturing Co. v. Howard Fire Ins. Co. 5 Gray (71 Mass.) 497, 66 Am. Dec. 376.

**§ 2079. Residence: birthplace: life risk.**[9]—Where the policy was conditioned to be avoided by "any untrue or fraudulent answer" to the questions in the application, and the answers were not strictly true so far as related to birthplace and residence, it was held that the answers were representations, and that the company must prove affirmatively that they were fraudulently made or were material to the risk.[10] If the word "residence" is used in the sense of a permanent domicil, instead of a temporary inhabitancy, the policy is not avoided by a two years' residence in another state.[11] But if the statement as to residence is materially false, the policy will be held void.[12] So a false statement that one's residence is at a certain place which is several miles distant from that where he actually resides avoids the contract.[13] If, however, answers as to residence and birthplace are not strictly accurate, yet if they are substantially true and correct they are sufficient as where assured resides and was born in a rural district and the form of the application is such as to mislead, and does not permit space for a detailed description.[14] And conditions respecting residence as well as other stipulations for assurer's benefit may be waived.[15]

**§ 2080. Relative situation and distance: other buildings: variance in description no warranty that location of other buildings shall remain unchanged.**[16]—If the policy requires that all buildings within a specified distance shall be mentioned, and stipulates that any misrepresentation or concealment shall avoid the contract, or makes such a statement a warranty, the assured must comply with such condition, and his omission to mention all the buildings so relatively situated vitiates the policy, as a rule, even though innocently done, but if the statement is merely a representation, it is a question for the jury whether the omission is material.[17] And the rule vitiating the policy will be especially enforced where the conditions annexed to the policy and the

[9] See § 1987 herein.

[10] Southern Life Ins. Co. v. Booker, 9 Heisk. (56 Tenn.) 606, 24 Am. Rep. 344.

[11] Mobile Life Ins. Co. v. Walker, 58 Ala. 290.

On character of residence or sojourn in prohibited place which will avoid policy, see note in L.R.A.1915F, 1056.

[12] Huguenin v. Rayley, 6 Taunt. 186, 16 R. R. 599.

[13] Hutchinson v. Hartford Life & Accident Ins. Co. — Tex. Civ. App. —, 39 S. W. 825.

[14] Blackstone v. Kansas City Life Ins. Co. — Tex. —, 174 S. W. 821, rev'g — Tex. Civ. App. —, 143 S. W. 702, 41 Ins. L. J. 683.

[15] Germania Life Ins. Co. v. Koehler, 168 Ill. 293, 61 Am. St. Rep. 108, 48 N. E. 297.

[16] See § 1987 herein.

As to clear space clause: warranty, see § 1998b herein.

As to location: representations and warranties, see § 2068 herein.

[17] Day v. Conway Ins. Co. 52 Me. 60; Burritt v. Saratoga Mutual Ins. Co. 5 Hill (N. Y.) 188, 40 Am.

printed form of application require the fact to be stated, and the omitted buildings are of a hazardous nature, so far as danger from fire is concerned.[18]

So if the assured stipulates in the application that all the exposures within the specified distance are mentioned, such stipulation, coupled with the question as to their relative situation to and distance from other buildings, the application being referred to and forming part of the policy, makes the statements warranties.[19] And if there is a warranty that the building in which a boat is stored is five hundred feet distant from "exposing buildings" the warranty does not require that distance in feet to all buildings, but only to buildings which would tend to increase the risk and might reasonably and naturally be considered in fixing the premium rate, as the word "exposing" or "exposure" in insurance matters means openness to danger, accessibility to anything which may detrimentally affect, and the words "exposing buildings" mean, not a building in itself, but one erected and occupied for the use of dangerous elements, such as fire, whereby the exposure is increased; the use is the test, accordingly if said warranty is breached there can be no recovery regardless of the fact whether or not such building actually influenced the loss, but if "exposing buildings" ceased to be such at the time of loss, recovery is not precluded under a statute requiring that insurer should be injured by the breach in order to avoid the policy.[20]

Again, the statement, made a warranty by the policy, that the house was one hundred feet from the granary, when it was only forty-six feet distant, is a fact the evidence of which may not be stricken out by the court.[1] And slight errors will not avoid the representation; as where it stated that the building was connected on one side, when it was connected on both sides with another building.[2] So it is an immaterial variance that a mill is described as situate in one corner of a section, when in fact it is across a

Dec. 345; Frost v. Saratoga Mutual Ins. Co. 5 Denio (N. Y.) 154, 49 Am. Dec. 234; Wilson v. Herkimer County Mutual Ins. Co. 2 Seld. (6 N. Y.) 53; Jennings v. Chenango County Mutual Ins. Co. 2 Denio (N. Y.) 75.

As to houses and buildings: connected structures or additions: description of property, see §§ 1738, 1739 herein.

[18] Burritt v. Saratoga Mutual Ins. Co. 5 Hill (N. Y.) 188, 40 Am. Dec. 345.

[19] Chaffee v. Cattaraugus County Mutual Ins. Co. 18 N. Y. 376.

[20] Macatawa Transportation Co. v. Fireman's Fund Ins. Co. 168 Mich. 365, 134 N. W. 193, 41 Ins. L. J. 531, Comp. L. 1897, sec. 5180.

[1] State Ins. Co. v. Jordan, 24 Neb. 358, 38 N. W. 839.

[2] Stetson v. Massachusetts Mutual Fire Ins. Co. 4 Mass. 330, 3 Am. Dec. 217.

stream in an adjacent corner of the next section.[3] Nor is an omission to mention buildings on another street, and from which there is no reasonable apprehension of danger, such a suppression of the truth as invalidates the policy, though the fire is communicated through them.[4] And where assured gives the distance to the nearest buildings in each direction and describes them, it is sufficient, even though there are other buildings beyond them within the specified limits, when the question is, "How bounded and the distance from other buildings, if less than ten rods, and for what purposes occupied, and by whom?" and it appears that the assured answered the question as he understood it, and that it was accepted as sufficient at the time.[5]

The knowledge of an insurance agent that a warranty by the assured that "a continuous clear space of one hundred and fifty feet shall hereafter be maintained" between the property insured and any woodworking or manufacturing establishment does not represent the existing state of facts, and that there is no intent to change the situation, and that the insured cannot control a clear space for that distance, prevents a forfeiture of the policy for breach of the warranty, where the agent accepts the premium and issues the policy without taking any steps subsequently to rescind it though knowing of the breach of the warranty, and it appears that on account of the situation of the property, the manner of its use, and its proximity to water, he considered that the existing space was equivalent to that required.[6]

If the application is made a warranty, yet if the statements therein are qualified by the words "so far as known to the applicant and material," an incorrect statement as to the distance of the nearest building, assured not knowing the exact distance, does not avoid the policy.[7] Although where assured truthfully answers the questions in regard to the locality of neighboring buildings, it adds nothing in aid of assurer that the assured also states that said buildings "would not endanger" the insured property "if they should burn," for this is merely matter of opinion.[8] An insur-

[3] Prieger v. Exchange Mutual Ins. Co. 6 Wis. 89.

[4] Dennison v. Thomaston Mutual Ins. Co. 20 Me. 125, 37 Am. Dec. 42.

[5] Gates v. Madison County Ins. Co. 5 N. Y. (1 Seld.) 469, 55 Am. Dec. 360, s. c. 2 N. Y. (2 Comst.) 43.

[6] Michigan Shingle Co. v. State Investment Ins. Co. 94 Mich. 389, 22 L.R.A. 319, 53 N. W. 945. See § 2068 herein.

[7] Noone v. Transatlantic Ins. Co. 88 Cal. 152, 26 Pac. 103.

On effect of qualifying statements or warranties by words to "best of my knowledge and belief," or words of like import, see notes in 43 L.R.A. (N.S.) 431, and 48 L.R.A.(N.S.) 714.

[8] Dennison v. Thomaston Mutual Ins. Co. 20 Me. 125, 37 Am. Dec. 42.

ance company authorized to insure "livestock, wagons, harness," etc., "being upon farms and farm property," but not village property within one hundred feet of other buildings, is not liable for livestock and harnesses insured as farm property, but destroyed while in a village barn within one hundred feet of other buildings.[9]

§ 2081. **Relationship: life risk.**—(a) The decisions are not in harmony as to the effect of a misrepresentation or false statement of relationship of the designated beneficiary to assured, or of the relations existing between them, it being held in certain jurisdictions that such designation is merely a direction for payment, the falsity of which does not avoid the contract or preclude recovery on that ground, while in other courts, the statement when false avoids the policy on the ground of warranty, or materiality, or both, or because expressly so provided. An important point of weight in this connection, and one which goes rather to the ground of recovery by the beneficiary as such, than to the avoidance of the policy because of the falsity of the statement itself, is this, that consideration must be given to the charter, etc., limitations of classes of beneficiaries to whom benefits may be paid. The above points and such others as are relevant under the decisions will, however, appear from the following presentation of authorities.[10]

(b) *When recovery is not precluded.* If it does not appear that a statement as to relationship of a beneficiary is regarded as in anyway material to the risk, or that it was clearly intended to be made a warranty or a material representation, or a condition precedent to liability, it will not be so held, and especially is this so where such statement appears only in the application with no mention thereof in the policy and the contract provisions as to changing the beneficiary show that it was not deemed material or important, and in addition, the rule of construction in favor of assured also applies; accordingly the falsity of said statement does not avoid the contract.[11] And in Illinois a statement of relationship in a nomination of a beneficiary of a mutual benefit certificate is not a warranty or false representation which will avoid the certificate in case the relationship proves to be untrue, but it is

[9] Wildey v. Farmers' Mutual Fire Ins. Co. 52 Mich. 446, 18 N. W. 212, Sherwood, J., dissenting.

As to locality: location: description of property, see §§ 1741 et seq. herein.

[10] For discussion of the numerous questions involved as to designation of beneficiaries, specified classes, etc., charter, etc., limitations, see chaps. XXXI.–XXXIII. (§§ 727–882) herein.

[11] Baltimore Life Ins. Co. v. Floyd, 5 Boyce (28 Del.) 401, 94 Atl. 515, aff'g 5 Boyce (28 Del.) 201, 91 Atl. 653.

only a direction for the payment of the policy proceeds.[12] So a misrepresentation as to relationship of the beneficiary, made in an application for a certificate in a fraternal benefit society limited, by the statute under which it was organized, to the payment of death benefits to specified classes, will not because of the falsity of the statement avoid the contract, but will only preclude recovery where the beneficiary is not one of the class, so that if said beneficiary is eligible in his or her true relationship or dependency, etc., the certificate is not invalidated.[13] And if an applicant for membership in a corporation formed to accumulate a fund for the benefit of the widows and children of deceased members makes a false representation as to his relationship to the named beneficiary, this does not constitute a warranty so as to preclude his real beneficiary from recovering on the contract.[14] Again, where any person having an insurable interest in assured's life may be designated as a beneficiary, and such person is also a dependent and is generally known to sustain to the applicant the relation stated in the application, the policy is not avoided by a statement of relationship which does not exist in fact, there being no blood relation between them.[15] A policy is not avoided by a misrepresentation as to the relationship of the beneficiary if made in good faith, and without actual intent to deceive, and under such circumstances in connection with the relations sustained between the applicant and the named beneficiary as are calculated to create the impression that the statement was correct, as such a case is within a statute which requires that representations in order to avoid the policy be made with an actual intent to deceive, or that the matter misrepresented increase the risk of loss.[16]

(c) *When recovery is precluded.* The policy is held avoided and the right of recovery defeated where it is stipulated in a contract of membership in a benefit society that the applicants statements shall be warranties and payment of any benefit be conditioned by their truth, and a statement was made by the applicant that the beneficiary was his wife, when at the time he was divorced

[12] Cunat v. Supreme Tribe of Ben Hur, 249 Ill. 448, 34 L.R.A.(N.S.) 1192, Ann. Cas. 1912A, 213, 94 N. E. 925, 40 Ins. L. J. 1319, *citing* Minnesota Mutual Life Ins. Co. v. Link, 230 Ill. 273, 82 N. E. 637. See also Lumpkin v. Travelers' Ins. Co. 11 Colo. App. 249, 52 Pac. 1040; Standard Life & Accident Ins. Co. v. Martin, 133 Ind. 376, 381, 33 N. E. 105.

[13] Goff v. Supreme Lodge Royal Achates, 90 Neb. 578, 37 L.R.A. (N.S.) 1191, 134 N. W. 239, 41 Ins. L. J. 375.

[14] Britton v. Supreme Council, 46 N. J. Eq. 102, 19 Am. St. Rep. 376.

[15] Berdan v. Milwaukee Mutual Life Ins. Co. 136 Mich. 396, 4 Ann. Cas. 332, 99 N. W. 411 (designated as nephew which was in fact untrue).

[16] Afro-American Life Ins. Co. v. Adams, 195 Ala. 147, 70 So. 119; Code 1907, sec. 4572.

from her.[17] So under a New York decision a warranty upon a material matter, as where the applicant stated that the beneficiary was his wife, must be true as a condition precedent to recovery,[18] and where the answer was that the beneficiary was the applicant's wife, but it was false in that she was not his wife but a woman with whom he was living in illicit cohabitation, the statement was held related to material matters affecting the risk and a warranty and therefore the policy was avoided.[19] Under an Oklahoma decision under the law in force in the Indian Territory prior to statehood, and under which the rights of the parties concerning their relations to each other attached, if an inquiry is made as to the relationship of the beneficiary to an applicant for accident insurance, and the answer is a warranty by the terms of the policy, its falsity vitiates the contract even though the statement was made in good faith without knowledge that it was untrue.[20] As above stated, however, this case was based upon the law of Indian Territory, and the determination of the point rested upon the authority of a Federal Supreme Court decision.[1] It was held in this last case that, where assured was asked whether he was married or single and falsely stated that he was single, and there were also false statements as to other matters, a demurrer to a plea setting up said facts was bad even though it did not aver that the alleged false answers were material to the risk, it being held that, regardless of the question of materiality to the risk, any answer untrue in fact, known by an applicant to be so, avoids the policy. It will be seen, therefore, that the Oklahoma case interprets the law more strictly in favor of insurer than does the Federal case, in so far as the factor of good faith of the applicant and his knowledge or want of knowledge of the falsity of his statements are concerned.[2] Again, where both by statute and the constitution and laws of a fraternal beneficiary association the benefits are limited to a certain class and the certificate is issued subject thereto, a false warranty as to relationship of a beneficiary not within the limited class, voids the certificate.[3] And, if one

[17] Smith v. Baltimore & Ohio R. R. Co. 81 Md. 412, 32 Atl. 181.

[18] Gaines v. Fidelity & Casualty Co. 188 N. Y. 411, 11 Com. Cas. 71, 81 N. E. 169.

[19] Continental Casualty Co. v. Lindsay, 111 Va. 389, 69 S. E. 344, 40 Ins. L. J. 124.

[20] Pacific Mutual Life Ins. Co. v. O'Neil, 36 Okla. 792, 130 Pac. 270, 42 Ins. L. J. 655.

[1] Jeffries Admr. v. Economical Life Ins. Co. 22 Wall. (89 U. S.) 47, 22 L. ed. 833.

[2] In the Oklahoma case the applicant did not know that the named beneficiary was not his wife and that they had been divorced.

[3] Gray v. Sovereign Camp Woodmen of the World, 47 Tex. Civ. App. 609, 106 S. W. 176, acts 26 Leg. Sess. acts 1899, p. 195, c. 115 (applicant misrepresented that beneficiary was cousin).

of the objects of a beneficial corporation, chartered under a statute authorizing it to pay to the widows, orphans, relatives, or dependents of a deceased beneficial member a sum of money, is to establish a benefit fund out of which is to be paid to the family, orphans, or dependents of a deceased beneficial member a certain sum of money, a statement in an application for membership and insurance in such society which describes the beneficiary as the niece of the applicant is material; and if it be shown that there was no kinship between them, such false statement in the application will defeat an action to recover the payment of the insurance money, it being provided in a subsequent clause of the application that any false statement therein should forfeit all rights of the applicant or of his beneficiaries.[4] It is also held that it constitutes a fraud upon an association to falsely state that the beneficiary is the applicant's sister in order to enable her to come within the class entitled to the "mortuary money" in case of a member's death, and therefore said beneficiary's claim to the fund will not be sustained.[5] If a false statement as to relationship is so clearly material to the risk as to avoid the policy, plaintiff in an action to recover the proceeds is not aided by a statute which provides that answers to interrogatories shall not bar the right to recover by reason of any warranty, unless it be clearly proved that such answer was material. etc.[6]

§ 2082. **Sailing: warranty to sail: marine risk.**—If a vessel is warranted to sail, the warranty must be strictly complied with, as must also the warranty that the ship has sailed or that she will sail after a specified day, and nothing excuses performance. The time of sailing may vary the risk according to the seasons of the year, or in policies "at and from" it may be important to fix the duration of the risk at the place, and limit thereby the assured's

[4] Supreme Council American Legion of Honor v. Green, 71 Md. 263, 17 Am. St. Rep. 527, 17 Atl. 1048. See also Gray v. Sovereign Camp Woodmen of the World, 47 Tex. Civ. App. 609, 106 S. W. 176.

[5] Koerts v. Grand Lodge of Wisconsin Order of Hermann's Sons, 119 Wis. 520, 97 N. W. 163.

[6] Continental Casualty Co. v. Lindsay, 111 Va. 389, 69 S. E. 344, 40 Ins. L. J. 124, under Va. acts 1906, p. 139, c. 112, par. 28 (which provides that: "All statements or descriptions in any application for a policy of insurance shall be deemed representations and not warranties, and no answer to any interrogatories made by an applicant for policy of insurance shall bar the right to recover upon any policy issued upon such application by reason of any warranty in said application or policy contained, unless it be clearly proved that such answer was wilfully false or fraudulently made, or that it was 'material'"). See also Ashford v. Metropolitan Life Ins. Co. 80 Mo. App. 638, 2 Mo. App. Repr. 766; Rev. Stat. 1889, sec. 5849. See § 1916 herein.

liability.[7] So a stipulation in a charter that the ship will sail on a specified day is a condition precedent to be strictly performed, regardless of the risks and causes which may prevent compliance. If not performed, the charterer may reject the vessel;[8] and if the ship sails before the day, intending to return, but finding a cargo proceeds on her voyage, there is a breach of warranty.[9]

**§ 2083. Sailing: representation as to time of.**—A statement as to time of sailing may be a representation, and not a warranty, and if made at the time the insurance is effected and is material and false, it will avoid the policy; or if it be of a character to have caused the vessel to have appeared less out of time than she was in reality, it is material.[10] So where a specific inquiry is made as to the time of sailing it makes the answer material and a misrepresentation avoids the policy; and if it is represented that a ship has "not sailed" such representation continues up to the time of the consummation of the contract and if she has actually sailed and is lost before that date there can be no recovery.[11]

**§ 2084. Sailing: representation as to time of may be merely of expectation or belief.**[12]—A statement as to the time of sailing may not be a warranty or misrepresentation of the fact, but a mere declaration of opinion, expectation, or belief; as where it is represented that the ship is "expected to sail" about or on a certain day.[13] So a statement that the vessel "will sail" from a certain port "in the course of this month," when not shown to be material

[7] Hore v. Whitmore, Cowp. 784; Vizeau v. Grant, reported in 1 Marshall on Ins. (ed. 1810) *353; Beckwith v. Sydebotham, 1 Camp. 117, 10 R. R. 652; Bond v. Nutt, Cowp. 601, per Lord Mansfield.

When breach of warranty may be excused, see marine ins. act of England, sec. 34, given in Appendix C. herein.

[8] Pedersen v. Pagenstecher, 32 Fed. 841.

[9] Vezean v. Grant, reported in 1 Marshall on Ins. (ed. 1810) *353.

[10] Baxter v. New England Ins. Co. 3 Mason (U. S. C. C.) 96, Fed. Cas. No. 1,127; Curell v. Mississippi Ins. Co. 3 La. (O. S.) 353, s. c. 9 La. 163, 29 Am. Dec. 439; Bowden v. Vaughn, 10 East, *415. See §§ 2084–2087 herein.

The accidental concealment of the time of sailing will not prejudice the insurance. M'Lanahan v. Universal Ins. Co. 1 Pet. (26 U. S.) 170, 7 L. ed. 98.

[11] Kerr v. Union Marine Ins. Co. 130 Fed. 415, 64 C. C. A. 617, rev'g 124 Fed. 835, certiorari denied, 194 U. S. 635, 48 L. ed. 1160, 24 Sup. Ct. 854.

[12] See §§ 1987, also §§ 1904, 1924 herein.

[13] Augusta Ins. & Banking Co. v. Abbott, 12 Md. 348; Allegre v. Maryland Ins. Co. 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; Rice v. New England Ins. Co. 4 Pick. (21 Mass.) 439; Brine v. Featherstone, 4 Taunt. 869; Hubbard v. Glover, 3 Camp. 313; Jendrvine v. Slade, 2 Esp. 572; Bowden v. Vaughn, 10 East, 415, 13 Eng. Rul. Cas. 533.

to the risk, is held to be merely a statement of belief or mere expression of opinion that she will sail at the specified date.[14]

**§ 2085. Sailing: warranty to sail may not be engrafted on policy by parol evidence.**[15]—An agreement by parol that the ship will sail before a certain day may not be ingrafted on the policy by evidence thereof to establish a warranty.[16]

**§ 2086. Sailing: what constitutes.**—A ship has sailed when she has actually quitted her mooring and broken ground, intending bona fide to at once proceed to sea on the voyage insured, she being then in a state of complete readiness and equipment therefor, with nothing remaining to be done after such commencement of the voyage.[17] And the rule obtains even though after the ship has so commenced her voyage she is forced by stress of weather to stop and come to anchor, provided she intends to proceed at once on her voyage so soon as wind and weather permit, or where the vessel has moved forward for the bona fide purpose, placing herself in a more favorable situation to prosecute the voyage.[18] So if the voyage has commenced, the vessel may be justified by usage in going out of her course to join convoy, that being her only purpose in deviating,[19] or comes to anchor within her direct course for that same purpose, or having so sailed is detained by orders of government, at the port where she expects to join convoy.[20] So where a vessel is to sail "on or after" a certain date and before that date she is ready for sea but is detained by port regulations and for the purpose of keeping her crew on board the master moves her a short distance out from her wharf and anchors in the river where she is more advantageously located for starting, although not intentionally so, from which place she proceeds the next day on her voyage on the date specified, she has "sailed" on

[14] Allegre v. Maryland Ins. Co. 2 Gill & J. (Md.) 136, 20 Am. Dec. 424.

[15] See § 1987 herein.

[16] Whitney v. Haven, 13 Mass. 172.

[17] Lang v. Anderdon, 3 Barn. & C. 495, 499, 5 D. & R. 393, 1 Car. & P. 171, 3 L. J. (O. S.) K. B. 62, 27 R. R. 412, per Lord Tenterden; Thelluson v. Ferguson, 1 Doug. 361; Bond v. Nutt, Cowp. 601, 1 Dougl. 367n, per Lord Mansfield; Ridsdale v. Sheddon, 4 Camp. 107; Pettigrew v. Pringle, 3 Barn. & Adol. 514, per Lord Tenterden, C. J.

[18] Bowen v. Hope Ins. Co. 20 Pick. (37 Mass.) 275, 32 Am. Dec. 213; Fisher v. Cockrane (Cockrane v. Fisher) 5 Tyrw. 496, 4 Tyrw. 424, 2 Cromp. & M. 581, 1 Cromp. M. & R. 819, 4 L. J. Ex. 328, 3 L. J. Ex. 185, 40 R. R. 730, 39 R. R. 854. See opinion of Lord Lyndhurst in this case.

[19] Bond v. Nutt, Cowp. 601, 1 Dougl. 367n, reported in 1 Marshall on Ins. (ed. 1810) *354.

[20] Thelluson v. Ferguson, 1 Dougl. 361. And see further on these last two points, Wright v. Shiffner, 11 East, 515, 2 Camp. 247, 11 R. R. 263; Earle v. Harris, 1 Dougl. 357, 352n; Ridsdale v. Sheddon, 4 Camp. 107.

that date and not on the date of moving from the wharf, and there is no breach of warranty.[1] A ship insured at and from an island may sail from port to port of the island.[2] And on much the same grounds the extent of or limits of a port, place, or harbor is not infrequently a matter entitled to weight in determining whether a vessel has sailed, especially in cases where usage enters as a factor.[3] So again, in certain cases the river navigation may be of such a character that the ship may not be enabled to fully equip herself for proceeding to sea until certain limits of navigation have been reached. In such cases it is sufficient if she is at the time of sailing as fully equipped as is consistent with the river navigation, and sails intending to perfect her fitting at the first place possible or usual; as in case of a voyage to and from Lyons to Galatz, and the ship could not pass down the Rhone to Marseilles with standing masts and rigging, and she sailed from Lyons on the day named with intention to put in the mast and bend the sails at Marseilles.[4] Under a time policy, where the warranty is not to sail after a specified day for a named port, it is sufficient that the vessel is prosecuting a voyage not begun after the day designated.[5]

§ 2087. **Sailing: what does not constitute.**—The rule given under the last section comprises the factors necessary to constitute a ship's sailing, and must be fully complied with. Thus, a ship has not sailed although she has partly weighed anchor and has her sails partly set, and in heaving anchors has moved a few fathoms, but does not actually start on her voyage until after the time, by reason of the master's fears occasioned by heavy seas and severe weather;[6] nor where she is detained by port regulations and moves out a short distance from her wharf for an early start the next morning and for the purpose of keeping her crew on board, and anchors but does not proceed on her voyage until the next day, and this is so even though she is more advantageously placed for starting, although not intentionally so, by so moving and

[1] Sea Insurance Co. v. Blogg [1898] 1 Q. B. D. L. R. 27, [1898] 2 Q. B. D. 398, 67 L. J. Q. B. 757, 78 L. T. 785, 47 W. R. 71, 3 Can. Cas. 1218.

[2] Thelluson v. Ferguson, 1 Doug. 361; Thelluson v. Staples, 1 Doug. 366n.

[3] See Dennis v. Ludlow, 2 Caines (N. Y.) 111; Lang v. Anderdon, 3 Barn. & C. 495, 1 Car. & P. 171, 480, 495, 5 D. & R. 393 (case also of warranty "to sail from"); Williams v. Marshall, 7 Taunt. 468, 6 Taunt. 390, 1 Moore, 168, 2 Marsh. 92.

[4] Bouillon v. Lupton, 15 Com. B. N. S. 113, 3 Fost. & F. 726, 33 L. J. Com. P. 37, 10 Jur. (N. S.) 422, 11 W. R. 966, 14 Eng. Rul. Cas. 72.

[5] Cochrane v. Fisher, 5 Tyrw. 496, 1 Cromp. M. & R. 809.

[6] Nelson v. Salvador, Moody & M. 309, 31 R. R. R. 733. See Meyer v. Gregson, 3 Doug. 402.

anchoring;[7] nor where she has not actually broken ground, although fully ready for sea and intending to sail, but is detained by embargo,[8] provided in such case that the commencement of the risk depends upon the time of sailing;[9] nor where she has not a sufficient crew competent to carry her to her port of destination, and is obliged to stop and take on seamen; nor where she has not obtained her clearance;[10] nor where she starts without her full ballast.[11] So where in a charter of a vessel she was stated to be at B, "guaranteed to sail on or before December 10th," it was held that a constructive sailing did not arise from the fact that, having her general cargo in, she was moored before that date, by order of the harbor master, where she filled out her crew and took on provisions, and after the 10th went out to the roadstead and sailed in a few days.[12]

§ 2088. **Sheathing vessel.**—Neither a representation nor warranty that the vessel has sheathing can be raised by construction from a stipulation in the policy of nonliability for any damage to the vessel "to or from her sheathing," but if it could, the representation is immaterial if it appears that sheathing would be regarded as of no benefit to the vessel.[13] A representation to an insurer at Boston by the assured in New York that a ship is "coppered" must conform to the meaning of that term as used in New York, the vessel being in that port.[14]

§ 2089. **Ship's safety: warranty: marine risk.**[15]—If ship or goods insured, lost or not lost, are warranted safe or well on a specified day, and a loss happens on that day before the subscription, the warranty is not broken if at any time on the specified day the ship was in safety.[16]

§ 2090. **Smoking on premises: continuing warranty: fire risk.**[17]—Although the assured warrants that there is no smoking on the premises, this refers to the time of making the application. It is

[7] Sea Ins. Co. v. Blogg [1898] 1 Q. B. D. L. R. 27, [1898] 2 Q. B. D. 398, 67 L. J. Q. B. 757, 78 L. T. 785, 47 W. R. 71, 3 Com. Cas. 1218.

[8] Hore v. Whitmore, Cowp. 784.

[9] See 1 Phillips on Ins. (3d ed.) 428, sec. 773; 1 Parsons on Marine Ins. (ed. 1868) 360, 361.

[10] Ridsdale v. Newnham, 4 Camp. 111, 3 Maule & S. 456, 15 R. R. 327; Graham v. Barras, 5 Barn. & Adol. 1011, 3 Nev. & M. 125.

[11] Pettigrew v. Pringle, 3 Barn. & Adol. 514.

[12] Pedersen v. Pagenstecher, 32 Fed. 841.

[13] Martin v. Fishing Ins. Co. 20 Pick. (37 Mass.) 389, 32 Am. Dec. 220.

[14] Hazard v. New England Marine Ins. Co. 8 Pet. (33 U. S.) 557, 8 L. ed. 1043; 1 Sum. (U. S. C. C.) 218, Fed. Cas. No. 6,282.

[15] See § 1987 herein.

[16] Blackhurst v. Cockell, 3 Term Rep. 360.

[17] See § 1987 herein.

not a continuing warranty, and is not broken though the assured or other persons smoke there afterwards.[18]

**§ 2091. Spirits on board ship: carying prohibited articles: reasonable construction: marine risk.**[19]—A statement that no "spirits are allowed on board" in an application for a marine policy must be given a reasonable construction, and the fact that spirits are carried on board which are not for use and are not broached does not avoid the contract.[20]

**§ 2092. Stay of vessel at certain place limited by warranty: marine risk.**[1]—If a vessel is warranted not to stay on a certain coast over a specified time, the policy is forfeited if she remains over that time, commencing after her arrival there, and being moored twenty-four hours in safety, and the loss of an anchor in a gale will not extend the time.[2] So in case of a warranty that a vessel remain at her moorings during the winter months, and she is moved therefrom for repairs, takes on coal, and proceeds under a charter for a cargo for the purpose of taking on the same, but before reaching the place where she is to receive the cargo she becomes disabled and ties up at a pier where she is destroyed by fire, there is a breach of warranty, even though it is stipulated that in case of loss or misfortune assured should make all reasonable exertions to safeguard the vessel without prejudice to the insurance; so also, where, although the vessel, while moored, became leaky, still the water could have been kept down by pumping; and in such case the claim that she was moved solely for repairs to be made will not be sustained.[3]

**§ 2093. Stock kept up to specified amount.**—If it is stipulated that the stock insured shall be kept up to a specified amount, it is no defense that said stock is not kept up to said agreed sum, nor does such failure warrant the defense of fraud, for it cannot operate to injure the insurer, since the risk is reduced by said breach.[4]

**§ 2094. Stowage of cargo: warranty: marine risk.**[5]—It is an implied stipulation in marine policies on cargo that the goods will

[18] Hosford v. Germania Fire Ins. Co. 127 U. S. 399, 403, 32 L. ed. 196, 8 Sup. Ct. 1199. See § 2215, post, as to condition concerning smoking.

[19] See § 1987 herein.

[20] Irvin v. Sea Ins. Co. 22 Wend. (N. Y.) 380.

See for principle of reasonable construction, Alsop v. Commercial Ins. Co. 1 Sum. (U. S. C. C.) 451, 459, Fed. Cas. No. 262, and § 211 herein.

[1] See § 1987 herein.

[2] Murden v. South Carolina Ins. Co. 1 Mill. Const. (S. C.) 200.

[3] Ryan v. Providence-Washington Ins. Co. 79 N. Y. Supp. 460, 79 App. Div. 316.

[4] So held in Travis v. Peabody Ins. Co. 28 W. Va. 583.

[5] See § 1987 herein.

be properly stowed in the vessel and customary place for the carriage of goods of that character, and if the risk is varied or increased by any breach of this implied condition, the policy will be avoided, although usage may justify a stowage which would not otherwise be permitted.[6]

**§ 2095. Suicide: effect of warranty against.**[7]—If the assured warrants in his application that he will not commit suicide within a specified time from the date of the policy, he is bound thereby, and in effect he warrants that his mental condition will be such for the time stipulated as will prevent suicide, sane or insane.[8]

**§ 2096. Temperate habits: drunkenness: use of intoxicating liquors.**[9]—(a) Whether a man is of temperate habits, and what constitutes drunkenness, habitual intemperance, or the habitual use of intoxicating liquors, has been a question frequently before the courts. We will include under this section conditions relating to temperate habits, drunkenness, and use of intoxicating liquors, as necessary to the proper consideration of the question indicated. The policies have evidently been so framed in numerous cases as to endeavor to cover the ground, and bind the assured to some positive stipulation. Where the case has been presented to the jury under the usual clauses, the necessity of a definition of words of the character here under consideration used in the particular policy becomes of the utmost importance, yet it is difficult, if not impossible, to give a legal definition of any of said words which can be separated and considered apart from the contract stipulation and facts before the court. While from the particular facts of the individual case courts have attempted such definitions, they can hardly be taken as applicable to all cases wherein like words are used, except in a most general way, and for these reasons the first inquiry necessarily is, What are the facts of the particular case? Questions concerning what constitutes habitual intemperance, etc., have also

[6] Leitch v. Atlantic Mutual Ins. Co. 66 N. Y. 100. See also Taunton Copper Co. v. Merchants' Ins. Co. 22 Pick. (39 Mass.) 108; Wolcott v. Eagle Ins. Co. 4 Pick. (21 Mass.) 429; Wadsworth v. Pacific Ins. Co. 4 Wend. (N. Y.) 33, 34; Lenox v. United Ins. Co. 3 Johns. Cas. (N. Y.) 178; Merchants & Manufacturers Ins. Co. v. Shillito, 15 Ohio St. 559; Apolinaris Co. v. Nord Deutsche Ins. Co. [1904] 1 K. B. L. R. 252, 73 L. J. K. B. 62, 89 L. T. 670, 52 W. R. 174, 20 T. L. R. 79, 9 Asp. M. C. 526; Gould v. Oliver, 4 Bing. N. C. 134, 14 Eng. Rul. Cas. 400; Da Costa v. Edmund, 4 Camp. 142, 2 Chit. 227, 16 R. R. 763; Milward v. Hibbert, 3 Q. B. 120, 2 G. & D. 142, 11 L. J. Q. B. 137, 24 Eng. Rul. Cas. 473.

[7] See § 1987 herein.

[8] Ballantyne v. Mutual Life Ins. Co. (1891) 25 Ir. L. T. & S. J. 538. See Ellinger & Co. v. Mutual Life Ins. Co. of N. Y. [1904] 1 K. B. L. R. 832. See c. LXXI. (§§ 2635 et seq.) herein (on suicide).

[9] See § 1987 herein.

As to representations, etc., under statutes, see § 1916 herein.

been frequently before the courts in various cases other than insurance, with varying conclusions as to the meaning of these terms.[10] But, as above stated, in contracts of life insurance, intemperance and like questions cannot be considered in the abstract, and independently they are involved with the point whether they impair the health. They are dependent upon other and qualifying phrases set forth in the contract, and with the intent of the parties as evidenced by their agreement, as well as with other matters existing

[10] The following authorities, in addition to those hereinafter considered, show the different views taken by the courts as to intemperance, etc., in both insurance and other cases, and they are pertinent here in so far as the interpretation of the words themselves is concerned.

*Alabama.*—State v. Pratt, 192 Ala. 118, 68 So. 255 ("Intemperance:" case of impeachment of judge of probate); State v. Latham, 174 Ala. 281, 61 So. 351 ("Intemperate habits," "intemperance" defined: proceedings for removal of sheriff for intemperance).

*Arkansas.*—St. Louis, Iron Mountain & Southern Ry. Co. v. Waters, 105 Ark. 619, 152 S. W. 137 ("Intoxicated condition;" "drunk;" action against carrier).

*California.*—Mahone v. Mahone, 19 Cal. 627 (habitual intemperance: divorce).

*Indiana.*—Hughes v. State, 50 Ind. App. 617, 98 N. E. 839 ("Intoxicated" defined: action on bond of saloon keeper under statute).

*Iowa.*—State v. Baughn, 162 Iowa, 308, 50 L.R.A.(N.S.) 912, 143 N. W. 1100 ("Drunk" and "intoxicated" synonymous: removal of mayor of city); Lewis v. Lewis, 75 Iowa, 200, 39 N. W. 271 (habitual drunkenness: divorce); Wheeler v. Wheeler, 53 Iowa, 511, 36 Am. Rep. 240, 5 N. W. 585 (habitual drunkenness: divorce).

*Kansas.*—Walton v. Walton, 34 Kan. 195, 8 Pac. 110.

*Massachusetts.*—Blaney v. Blaney, 126 Mass. 205 (habitual drunkenness: divorce); Commonwealth v. Whitney, 11 Cush. (65 Mass.) 477.

*Michigan.*—Magahay v. Magahay, 35 Mich. 210.

*Mississippi.*—Yazoo & Mississippi Valley R. Co. v. Davidson, 106 Miss. 108, 63 So. 340 ("Intoxication:" ejection of passenger).

*Nebraska.*—Freeburg v. State, 92 Neb. 346, 138 N. W. 143 (what are synonyms of "intoxicated," "intoxication").

*New Hampshire.* — Bachelder v. Bachelder, 14 N. H. 380.

*Ohio.*—New York Life Ins. Co. v. La Boiteaux (Cin. Super. Ct.) 5 Big. L. & A. Cas. 437.

*Oregon.*—Parker v. C. A. Smith Lumber & Manufacturing Co. 70 Oreg. 41, 138 Pac. 1061 ("Intoxication;" "Intoxicated:" action for damages: contributory negligence).

*Pennsylvania.*—Commonwealth v. Tryman, 62 Pa. Super. Ct. 241 ("Intoxication" under statute, allows conviction of "drunkenness;" Ludwick v. Commonwealth, 18 Pa. St. 172; Fox v. Pennsylvania Mutual Life Ins. Co. (Dist. Ct. of Phila.) 4 Big. L. & A. I. Cas. 458.

*Texas.*—Paris v. Great Northern R. Co. 104 Tex. 482, 140 S. W. 434 ("Drunk;" "Intoxicated;" synonymous: action against carrier: contributory negligence) rev'g — Tex. Civ. App. —, 127 S. W. 294.

*Vermont.*—State v. Pratt, 34 Vt. 323 (habitual drunkard: prosecution for selling liquors to ).

*England.* — Chattock v. Shaw, 1 Moody & R. 498.

See Taylor's Medical Jurisprudence, 741 et seq. See note, "Warranty of temperate habits," etc., 38 Am. Rep. 615–617.

and in proof in the case. Again, whether the statement is a representation or warranty must be considered. Not infrequently the question is raised whether such statement is a matter of opinion or belief on the part of the assured, or has the force of a fact, and if there be a condition in the policy avoiding it for intemperance and the like, its exact terms must be construed.[11]

[11] The words of the court in an English case are pertinent. Lord Watson says: "I believe it to be useless to attempt a precise definition of what constitutes 'temperate habits' or 'temperance' in the sense in which these expressions are ordinarily employed. Men differ so much in their capacity for imbibing strong drink that quantity affords no test; what one man might take without exceeding the bounds of moderation another could not take without committing excess. In judging of a man's sobriety, his position in life and the habits of the class to which he belongs must, in my opinion, be always taken into account, because it is the custom of men engaged in certain lines of business to take what is called 'refreshment' without any imputation of excess at times, when a similar indulgence on the part of men not so engaged would be, to say the least, suspicious. But I do not think that the habits of a particular locality ought to be taken into account, or that a man who would be generally regarded as of intemperate habits ought to escape from that imputation because he is no worse than his neighbors. In the present case, the evidence clearly establishes that the assured was a most able and estimable man, but that circumstance is not of much weight, because able and estimable men are not necessarily exempt from social failings. . . . It seems to me to be the fair result of the evidence that the assured was in the habit of taking more drink than was good for him; that he was frequently affected with drunkenness on occasions when all excepting himself were sober; that his indulgence to excess had become so apparent that several of his friends remonstrated with him on the subject, and that instead of repudiating the charge he admitted it and promised amendment. These facts . . . are, in my opinion, altogether inconsistent with the truth of the assertion that he was, on the 9th of November, 1881 (the date of the proposal), of temperate habits and had always been so. I cannot, of course, leave out of view the cause of assured's death," which was certified by the attending physician to have been chronic hepatitis, which fact was not rebutted. The court further distinguishes the case from those where some latent disease exists only discoverable by post mortem, and says the purpose of a question of this character is "to elicit the fact and not the opinion of the assured, and if he chooses to give a satisfactory answer, he must take the risk of its being true. If his answer is hesitating or unsatisfactory, the insurers are put upon their guard and have the option of declining the assurance, or seeking information from other sources, or of charging a higher premium." Thomson v. Weems, L. R. 9 App. Cas. 671, reviewing Scottish Life Assur. Co. v. Buist, 4 Ct. Sess. Cas. 4th series, 1076; Hutchinson v. National Loan Fund Life Assur. Co. 7 Ct. Sess. Cas. (2d series) 467; Life Assoc. of Scotland v. Foster, 11 Ct. Sess. Cas. (3d series) 351, *quoting* from Lord Chancellor Cranworth in Andersen v. Fitzgerald, 4 H. L. Cas. 484, 503, 17 Jur. 595, and Knickerbocker Life Assur. Co. v. Foley, 15 Otto (105 U. S.) 350, 26 L. ed. 1055, so far as it decides that "in the case of an intemperate man delirium tremens is occasioned by abstinence from drink, and in the case

(b) In a Federal Supreme Court case the question concerning what constituted habitual intemperance was considered. We believe the opinion is of sufficient importance to warrant its insertion in part as given below.[12] Another decision in the same court holds

of a temperate man by indulgence in liquor," and also on the ground that a finding of fact by the jury can form no ground for a precedent for the guidance of a court of law, even though the court may have refused to set it aside.

On scope and effect of provisions in policies of insurance forbidding use of intoxicating liquor, see notes in 15 L.R.A.(N.S.) 206, and 25 L.R.A.(N.S.) 1241.

[12] Northwestern Life Ins. Co. v. Muskegon National Bank, 122 U. S. 501, 30 L. ed. 1100, 25 Cent. L. J. 300, 7 Sup. Ct. 1221, opinion by Mr. Justice Miller. "The Muskegon National Bank recovered a judgment in the circuit court of the United States for the southern district of New York, against the Northwestern Mutual Life Insurance Company, upon a policy of insurance on the life of Erwin G. Comstock for twenty-three thousand seven hundred and seventeen dollars and four cents, and to this judgment the present writ of error is directed. The bank had an insurance upon the life of Comstock, its debtor, for the sum of twenty thousand dollars. On the trial before the jury, although some other issues were made in the pleadings, the contest turned, so far as the assignments of error are presented here, on the condition of Comstock in regard to the habit of drinking alcoholic liquors. The policy, and the application for it, the answers to which were signed both by Comstock and the bank through its president, present the foundation of the controversy. The sixteenth interrogatory is as follows: 'Are you, or have you ever been, in the habit of using alcoholic beverages or other stimulants.' The answer to this was, 'Yes; occasionally.' The twenty-second interrogatory, 'Have you read and assented to the following agreement?' was answered, 'Yes.' This agreement, so far as it touches the present issue, reads as follows: 'It is hereby declared that the above are the applicant's own fair and true answers to the foregoing questions, and that the applicant is not, and will not become, habitually intemperate or addicted to the use of opium.' The body of the policy declared that if Comstock shall become intemperate, so as to impair his health or induce delirium tremens, or if any statement in the application, on the faith of which the policy is made, shall be found to be in any material respect untrue, the policy is void. . . . We do not know of any established legal definition of those words. As they relate to the customs and habits of men generally in regard to the use of intoxicating drinks, and as the observation and experience of one man on that subject is as good as another of equal capacity and opportunities, their true meaning and significations would seem to be a question addressed rather to the jury than to the court. While there may be, on the one hand, such a clear case of intemperate habits as to justify the court in saying that such and such facts constitute a condition of habitual intemperance, or, on the other, such an entire absence of any proof, beyond an occasional indulgence in the use of ardent spirits, as to warrant the opposite conclusion, yet the main field of inquiry, and the determination of the question within it, must be submitted to the jury, and the question on this submission must be decided by them. The testimony in this case is all embodied in the record, and is contra-

that the answer that assured had never been addicted to the intemperate use of liquors must be referred to a time prior to the issue of the policy; that if the policy is conditioned to be void if assured shall become so far intemperate as to impair his health, an excessive

dictory. It must be divided into its relations to the two periods—before and after the execution of the policy. It is seen from the testimony that Comstock left Muskegon, where many of these witnesses resided who testify as to his excessive use of intoxicating drinks prior to 1875, and that they knew nothing of his habits after that. The policy was taken out in 1879. It is also quite clear that, under a pledge made to one of his partners in business, he had refrained from the use of intoxicating drinks from the 1st of June, 1878, up to the time of taking out this policy, and continued so to refrain up to March, 1880. There are several witnesses who testify that, after his removal to New York in 1875, he was drunk, had sprees once in a while, and perhaps several of them, up to the time when he made this pledge to his partner. There are others who testify that, after March, 1880, he was again seen intoxicated, and had spells of confinement on account of those sprees. On the other hand, there were four or five witnesses examined, some of whom were in the same building in which Comstock was employed in New York, who saw him daily, and transacted business with him for the two or three years prior to his death, which was in 1881, who testify that they never saw him drunk, or under the influence of liquor, and did not suppose that he was addicted to drinking; but that he was a prompt, efficient business man, and that they had no suspicion that he was intemperate, or indulged in the excessive use of stimulants. Among these, Mr. Samuel Borrow, vice-president of the Equitable Life Assurance Society, in whose building Comstock was a tenant, says that he saw him almost daily for two or three years prior to his death; that he struck him as a very energetic, active man; and that he never saw him under such circumstances as to suggest that he had been drinking. Under these circumstances, and in view of this conflicting testimony, the following language of the judge in his charge to the jury in this case seems to contain all that was necessary for him to say by way of assisting them to arrive at a just verdict: 'I think that there is no rule of law which says that, in order to make a man a drunkard, he must drink every day or every week to excess. Neither, on the other hand, does a single or an occasional excess make a man an habitual drunkard; but if you find that the habit and rule of a man's life is to indulge periodically and with frequency, and with increasing frequency and violence, in excessive fits of intemperance, such a use of liquor may properly cause the finding of habitual drunkenness. It is the fact of the certainty of these periodical sprees, accompanied with their frequency, which marks the habit. If a man should indulge in such a debauch once in a year only, it could not, in my opinion, properly be said that he was an habitual drunkard; he would be an occasional drunkard. But if such debauches increased in frequency, and the certainty of their increasing frequency becomes established, then the time finally arrives when the line between an occasional excess and habit is crossed. It is for you to say whether Comstock was, at the time of the application, or became afterward, the victim of such a habit. If you find that, after the making of the policy, Comstock became so far intemperate as to impair his health, the policy is avoided, and the verdict will be for the defendant.' At the request of the defendant, he also gave to the jury the following instructions: 'If the jury find from the evidence that Erwin G. Comstock was habitually intemperate when the

use of liquor even though it does not induce delirium tremens, vitiates the policy, and that it is a question of fact whether such intemperance caused the death of assured. This case also holds that such intemperance need not necessarily continue down to the

application for the policy of insurance was made, then they must find for the defendant. If the jury find from the evidence that Erwin G. Comstock became habitually intemperate after the issuing of that policy, then they must find for the defendant. If the jury find from the evidence that, after the making of the policy, Erwin G. Comstock became so far intemperate as to impair his health, then they must find for the defendant.' . . . What effect should be given to an entire abstinence from the use of liquors, for a whole year, in connection with occasional drunken sprees before or after, is not for the court to determine. . . . It would be rather harsh for a court to instruct a jury, as a matter of law, that a man who was sober nearly two years was at a period near the middle of that time 'habitually intemperate.' It was certainly a question to be left to the jury, on all the testimony, to draw their own conclusions in regard to the subject. . . . The court had no right in this summing up to ignore the testimony of four or five respectable and intelligent gentlemen who knew Comstock well during the most important part of this period, during several years of it, who saw him almost daily, and who testify that they never had any reason to suppose that he used ardent spirits at all, much less to excess. It was for the jury to weigh all these circumstances, and to determine in view of them all whether he was habitually intemperate. There are very few decisions by courts of high character relating to this question. The principal one which has been brought to our attention is Knickerbocker Life Ins. Co. v. Foley, 105 U. S. 350, 26 L. ed. 1055. In that case the insured, in answer to the question, 'Is the party of temperate habits; has he always been so?' answered 'Yes;' whereas the defendant company alleged that in fact he was a man of intemperate habits. The court, through Mr. Justice Field, said: 'The question was as to the habits of the insured. His occasional use of intoxicating liquors did not render him a man of intemperate habits, nor would an occasional case of excess justify the application of this character to him. An attack of delirium tremens may sometimes follow a single excessive indulgence. . . . When we speak of the habits of a person we refer to his customary conduct, to pursue which he has acquired a tendency from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. . . . The court did not, therefore, err in instructing the jury that, if the habits of the insured, "in the usual, ordinary, and everyday routine of his life, were temperate," the representations made are not untrue, within the meaning of the policy, although he may have an attack of delirium tremens from an exceptional overindulgence. It could not have been contemplated, from the language used in the policy, that it should become void for an occasional excess by the insured, but only when such excess had, by frequent repetitions, become a habit. And the testimony of witnesses, who had been intimate with him for years, and knew his general habits, may well have satisfied the jury that, whatever excesses he may at times have committed, he was not habitually intemperate.' We think this language eminently applicable to the case before us. . . . The judgment of the circuit court is therefore affirmed."

time of the last illness.[13] But it is also determined that a statement that assured has been and is of temperate habits is not necessarily falsified by the fact that he has had delirium tremens, and that the declaration is true if his usual and everyday life was temperate; also that an occasional use of intoxicating liquors does not make one a man of intemperate habits, nor an exceptional case of excess justify such an appelation.[14] So it is likewise decided that a representation by assured that he had never used spirituous liquors to excess is not falsified by proof of a single case of excess, or even by evidence of overindulgence in one, two, or three instances, as "excess" is used in the sense of increasing the insurance risk, and if directed against a habit or condition it must likewise be of sufficient substance to increase the risk, that is, the conditions shown by the evidence must, in the sense of the contract, be substantially and materially at variance with the representations upon which said contract was made, and then, if found material, they must have been relied on as a substantial inducement, not the sole or entire inducement, to issue the policy. In addition, a reasonable time limit which should comprehend the substantial and material conditions of the contract should be made within which such inquiries should be confined, and this involves the court's discretion, which is ordinarily not subject to review, so that even though the inquiry whether assured had ever indulged excessively would literally carry the time limit to such a remote period as to be unreasonable, still a reasonable limitation should be deemed intended and not an unreasonable one, notwithstanding the literal scope of the inquiry.[15] And in line with the above decision a

[13] Ætna Life Ins. Co. v. Davey, 123 U. S. 739, 31 L. ed. 315, 8 Sup. Ct. 331, rev'g 20 Fed. 482. See Davey v. Ætna Life Ins. Co. 38 Fed. 650, 18 Ins. L. J. 665, 811, s. c. 140 U. S. 76, 35 L. ed. 371, 11 Sup. Ct. 720.

[14] Knickerbocker Life Ins. Co. v. Foley, 105 U. S. 350, 26 L. ed. 1055, *approved* in Northwestern Life Ins. Co. v. Muskegon National Bank, 122 U. S. 501, 30 L. ed. 1100 (*considered* in note 12 ante under this section).

*Cited* in Holtum v. Germania Life Ins. Co. 139 Cal. 645, 647, 73 Pac. 591; Supreme Lodge Knights of Pythias v. Foster, 26 Ind. App. 333, 342, 59 N. E. 877; Henn v. Metropolitan Life Ins. Co. 67 N. J. L. 310, 316, 51 Atl. 689.

*Distinguished* in Malicki v. Chicago Guaranty Fund Life Soc. 119 Mich. 151, 156, 77 N. W. 690.

*Doubted* in Thompson v. Weems, L. R. 9 App. Cas. 671 (*quoted* from in note 11 ante under this section). See Swick v. Home Life Ins. Co. 2 Dill. (U. S. C. C.) 160, Fed. Cas. No. 13,692, 2 Ins. L. J. 415; Brockway v. Mutual Benefit Life Ins. Co. 9 Fed. 249; Ranney v. Mutual Benefit Life Ins. Co. (1873) U. S. C. C. 1st Dist. Mass.

As to intemperance, use of intoxicating liquors, etc., as excepted risks and losses, see §§ 2612 et seq. herein.

[15] Provident Savings Life Assur. Soc. v. Hadley, 102 Fed. 856, 43 C. C. A. 25, 29 Ins. L. J. 998, aff'g Hadley v. Provident Savings Life Assur. Soc. 90 Fed. 390, certiorari

negative answer to the question "Do you use alcoholic stimulants?" is held to refer to the then present time, and also where the reply was "no" to an inquiry, "were you ever intoxicated?" that a finding was justified, even though there was evidence of excesses in the past, of treatment for inebriety and acute alcoholism.[16] Again, where the question was "What is your daily practice in regard to the use of wines, spirits, or malt liquors?" and "What has been your practice in the past?" to both of which the answer was "none," the two questions must be read together so that the words "practice in the past" are limited to wines, spirits, or malt liquors, and the word "daily" should also be adopted, and the latter question being susceptible of two constructions, one which would relate not to daily but to general practice, it should be construed against insurer and in favor of insured, so that the answer being "no" or "none" it was either irresponsive or responsive, if the former, the want of an answer or an imperfect answer without further inquiry is waived, if the latter, then the interrogatory was fully met in the absence of fraud, and where it is alleged that assured then was and theretofore had been strongly addicted to the use of wines, spirits, or malt liquors, and indulged therein at frequent and regular intervals, it does not falsify the above answer "no" to the inquiry as to daily practice, therefore a demurrer to such a plea will be sustained, especially so when said plea does not allege that assured fraudulently or wrongfully omitted to state or concealed that he was or had been strongly addicted to the use of wines, spirits, or malt liquors, and indulged therein at frequent and regular intervals, or even that he drank to excess, or how often he drank, or that his indulgence therein had injuriously affected his health, or in any manner was material to the risk.[17] And where assured's alleged misrepresentations or concealments as to his drinking habits, and as to the kind and amount of daily consumption of malt, etc., liquors, and alcoholic beverages, and of concealment as to matters relating thereto are not shown to be wilfully false or to be of such a nature as to increase or enhance the risk or

denied 179 U. S. 686, 46 L. ed. 386, 21 Sup. Ct. 919.

[16] Bacon v. New England Order of Protection (U. S. C. C.) 123 Fed. 152.

[17] Keatley v. Grand Fraternity (U. S. D. C.) 198 Fed. 264, 41 Ins. L. J. 1776, s. c. 25 Del. (2 Boyce) 267, 78 Atl. 874, 25 Del. (2 Boyce) 511, 82 Atl. 294, s. c. (U. S. D. C.) 198 Fed. 272, 41 Ins. L. J. 1784; Grand Fraternity v. Keatley, 27 Del. (4 Boyce) 308, 88 Atl. 553, 42 Ins. L. J. 1715 (the last three of these cases related, however, to representations as to health, family history, consultations with physicians, etc., and the effect of the Pa. act June 23, 1885, P. L. 134, as to material representations, etc., although these points were also involved in the first two cases above cited).

to be material to the risk assumed within the intent of a statute relating thereto and assured is found not to be an excessive drinker, nor his death caused by the drinking habit, assurer's defense fails and the policy is not avoided.[18]

Under an *Alabama* decision where the claim is that a negative answer to an inquiry whether assured used alcoholic or other stimulants was false, the court may properly instruct the jury that it must believe that it was assured's habit to use alcoholic or other stimulants at the time he made his application in order to find for defendant.[19] In *Arkansas* it is also held that an exceptional or occasional excess is not contemplated, but only an habitual or customary use, that is, a habit or customary course of conduct with a tendency to frequent repetitions, where the inquiry is as to the extent or excessive use of alcoholic stimulants, wine or malt liquors, etc.[20] So the word "addicted" in a requested instruction whether assured was "addicted to the use of intoxicating liquor" has the same meaning of habitual, etc., use as above stated.[1] And in that state a warranty of use of intoxicants only moderately, has reference, unless otherwise expressly so provided, to the time when made and not to a future use, so that if true when first made at the time of an original application for fraternal insurance the fact that assured surrenders his first certificate and obtains another and again applies for a third certificate, the application blank for which reaffirms the warranties in the first, but at the time the last application was made he drank to excess, said blank confirmation in said last application is not a warranty that he does not at that time use intoxicants to excess.[2] So under another decision if answers given in an application for life insurance are made warranties, inquiry as to assured's use of liquors and tobacco calls for the habit of the insured in these respects at the time of the application, and does not direct his mind to a single or incidental use.[3] But excessive use both before and after the policy is issued avoids the contract and precludes recovery where assured falsely stated that he did not

[18] Royal Union Mutual Life Ins. Co. v. Wynn (Wynn v. Royal Union Mutual Life Ins. Co.) (U. S. C. C.) 177 Fed. 289, Ga. Civ. Code 1895, secs. 2097–2098, 2101, aff'd (mem.) 185 Fed. 1007, 107 C. C. A. 664.

[19] Supreme Lodge Knights & Ladies of Honor v. Baker, 163 Ala. 518, 50 So. 958.

[20] Metropolitan Life Ins. Co. v. Shane, 98 Ark. 132, 135 S. W. 836. See also Mutual Reserve Fund Life Assoc. v. Cotter, 81 Ark. 205, 99 S. W. 67.

[1] Des Moines Life Ins. Co. v. Clay, 89 Ark. 230, 116 S. W. 232.

[2] Supreme Lodge Knights of Pythias v. Davis, 90 Ark. 264, 119 S. W. 257.

[3] Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 100 Am. St. Rep. 73. See Brotherhood of Locomotive

use liquor at all.[4] But a statement in an accident policy application by assured that his habits are correct and temperate is held not a warranty; and the words "except as follows: no exceptions" qualify the disabilities to which the applicant has stated that he is not subject, and do not refer to separate statements as to habits.[5] Under a *California* decision a representation by an applicant that his habits of life are correct and temperate, does not refer necessarily to his temperance as a user of liquor or narcotics, so that, even though he was not addicted to these faults and although his representations may be true in said particular, it does not protect him in living in adultery.[6] In a *Canada* case the policy was so worded as to make the question not so much one of what constituted intemperance, as whether insured's habits as to temperance had been so far altered as to increase the risk.[7] In a *Delaware* case the point of daily "practice" as to the use of malt and spirituous liquors, and the construction of questions and answers relating thereto, was fully discussed, but as the same point arose in the same case in a Federal court it has been considered under that subdivision of this section.[8] In *England,* in addition to the decision already noted, it is held that if the jury find that assured was not of temperate habits at the time the proposal was made, the policy is avoided, even though the statement was made in good faith,[9] and that the question is whether assured was of temperate habits at the time of the insurance, also that it is not a question whether he was intemperate to such a degree as to impair his health.[10] Under a *Georgia* decision it appeared among other statements in an application that in answer to an inquiry "are you and have you always been of sober and temperate habits?" assured stated that he then was, and had been for some time, a total abstainer, but had formerly drank occasionally. Said statements were made the basis of the contract and a warranty. Assured surrendered this policy and took out another for a larger amount in place thereof containing a very similar stipulation, but it also excepted

Firemen & Enginemen v. Cole, 108 Ark. 527, 158 S. W. 153 (*considered* under subd. (d) of this section).

[4] Franklin Life Ins. Co. v. American National Bank, 74 Ark. 1, 84 S. W. 789.

[5] Maloney v. Maryland Casualty Co. 113 Ark. 174, 167 S. W. 845.

[6] Elliott v. Frankfort Marine, Accident & Plate Glass Ins. Co. 172 Cal. 261, L.R.A.1916F, 1026, 156 Pac. 481. As to intemperate habits, etc., see Hogins v. Supreme Council of the Champions of the Red Cross, 76 Cal. 109, 9 Am. St. Rep. 173, 18 Pac. 125.

[7] Boyle v. Phœnix Mutual Life Ins. Co. Ram's App. Cas. (L. C.) 379; 14 Can. S. C. Rep. 723 (three judges dissenting).

[8] *Considered* near end of subd. (a) this section.

[9] Hutton v. Waterloo Life Assur. Co. 1 Fost. & F. 735.

[10] Southcombe v. Merriman, Car. & M. 286.

the risk of death from the use of intoxicating liquors or narcotics, and also voided the policy and authorized its cancelation, etc., if assured should fall into the habit of becoming intoxicated, or into the habitual use of narcotics, or should have delirium tremens within three years from the date. There were also various warranties among which were affirmative answers as to the present and past use of malt or spirituous beverages made to the medical examiner. Assured had, between the dates of these two policies, made another application which was exactly the same as the last with a reference to "the old application" upon which was indorsed a requirement that agents and examiners answer questions explicitly stating that the terms "temperate, moderate," etc., would not do. In a suit upon the second policy taken out in place of the one surrendered, it was alleged in defense that assured had falsified his above statement in that he was an habitual drinker of intoxicating liquors, and had suffered from delirium tremens within the three years, that the policy had lapsed and upon reinstatement he had falsely reiterated his statements in his original application. There was considerable evidence sustaining said allegations of intoxication, drunkenness, etc., and he died in the "city stockade" where he had been sent for public drunkenness. It was held as to the above points that all matters which would destroy or defeat the contract, such as habits, etc., of assured, were controlled by the incontestable clause; that if an application for reinstatement was unnecessary, misrepresentations therein constituted no defense. Accordingly a judgment for the full policy amount was affirmed.[11] In *Illinois,* a case was decided wherein the assured was held to have forfeited his rights under a benefit certificate for violation of an agreement of total abstinence.[12] So it is held that the beneficiary is precluded from recovering where assured died as a result of the use of intoxicating liquors where he had falsely stated that he was not addicted to the excessive use of intoxicants, even though proof of habitual excessive use would have been required in order to expel him from the society under its rules.[13] In another case in the same state statements of the member of a mutual benefit society as to his habits were held representations, and not warranties, not avoiding the policy when made in good faith, even though

[11] Massachusetts Benefit Life Assoc. v. Robinson, 104 Ga. 256, 42 L.R.A. 261, 30 S. W. 918, 28 Ins. L. J. 1003. See subd. (a) at end of this section (Ga. Stat.).

As to incontestability: fraud: false and fraudulent misrepresentations or warranties, etc., see §§ 3733a–3733h herein.

[12] Supreme Council of Royal Templars of Temperance v. Curd, 111 Ill. 284.

[13] Marren v. North American Union, 145 Ill. App. 375.

partly untrue.[14] In *Indiana* where the issue was upon the question what constituted temperate habits in respect to the use of intoxicating liquors, it was held that this referred to the applicant's habits at the date of the application, and excluded findings of the jury as to previous habits.[15] And if assured signs a statement in the medical examination that he is, to the best of his knowledge and belief, temperate, etc., and a proper subject for insurance, it will be construed as a warranty only of his bona fide belief and opinion.[16] Under another decision where assured represented that he was a total abstainer from the use of intoxicants a finding of the jury that at the time of the application he was not addicted to the use of such liquors and was a total abstainer will be sustained, notwithstanding evidence to the contrary, where a large number of witnesses who were often in his company, and also the hotel keeper where he boarded, testify that they had never seen him intoxicated or when he had showed signs of intoxication, and had never detected the smell of liquor on his breath, and that they had known him to refuse offers of drink, and there was also other evidence of like tenor and effect.[17] Under an *Iowa* decision the use of whisky to some extent does not breach a warranty by assured that he used a glass of beer occasionally, so stated in answer to an inquiry: "Do you use either malt or spirituous liquors daily or nearly every day?" nor by the statement "beer" in answer to a question "If so, what is used and the approximate amounts?" answer explicitly.[18] So in case assured states that he does not use intoxicants to "excess" and also that he does take "a glass of beer occasionally" it suggests the advisability of further inquiry, and it is very pertinently declared, per Weaver, J., that "What consti-

[14] Northwestern Benefit & Mutual Aid Soc. v. Cain, 21 Ill. App. 471. See further, Richards v. Richards, 19 Bradw. (Ill. App.) 435; Murphy v. People, 90 Ill. 59. It is also held in the appellate court in that state that if the statements in an application for membership in a mutual benefit society are made warranties, and the applicant states in his application that he uses liquors to no extent, the fact that he does use alcoholic stimulants occasionally will not, it is held, avoid the insurance, unless there appears to be to some extent a habit or custom in using them: Grand Lodge Ancient Order United Workmen v. Belcham, 48 Ill. App. 346. But see Mutual Life Ins. v. Simpson, 88 Tex. 333, 28 L.R.A. 765, 53 Am. St. Rep. 757, 31 S. W. 501, rev'g (Tex. Civ. App.) 28 S. W. 837.

[15] John Hancock Mutual Life Ins. Co. v. Daly, 65 Ind. 6. See also 8 Ins. L. J. 319.

As to excessive use of intoxicating liquor, see Union Life Ins. Co. v. Jamison, 31 Ind. 28, 67 N. E. 199.

[16] Iowa Life Ins. Co. v. Haughton, 46 Ind. App. 467, 87 N. E. 702.

[17] Union Central Life Ins. Co. v. Hollowell, 20 Ind. App. 150, 50 N. E. 399.

[18] Lakka v. Modern Brotherhood of America, 163 Iowa, 159, 49 L.R.A. (N.S.) 902, 143 N. W. 513. See Miller v. Mutual Benefit Life Ins. Co. 34 Iowa, 222.

tutes 'excess' in this respect is largely a matter of opinion, and varies all the way between a 'drink' and a 'drunk;' while an occasional glass of beer may mean anything from a glass once a month to one every fifteen minutes according to the capacity of the individual, or, perhaps according to the 'liberality' of his views." [19] In *Kentucky,* and this is undoubtedly true in all jurisdictions, an insurer has a right to require for his own protection information as to the habits of an applicant for insurance concerning the use of intoxicants so that it may understandingly act in assuming or rejecting the risk, for knowledge of this character is of vital importance,[20] as such inquiries relate to matters material to the risk and a full, true and correct answer should be given, and the policy will be avoided if the applicant's statements concerning the same are false,[1] although it is held that they need only be substantially true,[2] and under the statute of said state, whereby statements are to be deemed representations and not warranties, no misrepresentations unless material or fraudulent prevent recovery.[3] It is also decided that in order to be material such former habits must have existed to such an extent as to affect assured's health or physical condition at the time of the application, and thereby render him an unsatisfactory subject for insurance.[4] A distinction, however, is made in this respect that although the case holding as last stated is approved, still it is decided that there should be a reversal of judgment where an instruction in effect required insurer to show that assured was, at the time of the application, addicted to the intemperate or excessive use of intoxicating liquor, etc., in order to defeat a recovery on that issue, it being held that if the applicant was at the time in the habit of using such intoxicants, no recovery should be allowed on the policy although he was not using them excessively or intemperately.[5] Under another decision a statement by assured that he

[19] Biermann v. Guaranty Mutual Life Ins. Co. 142 Iowa, 341, 120 N. W. 963, 965.

[20] Metropolitan Life Ins. Co. v. Ford, 31 Ky. L. Rep. 514, 102 S. W. 876; Union Central Life Ins. Co. v. Lee, 20 Ky. L. Rep. 839, 47 S. W. 614, 28 Ins. L. J. 171; Mutual Life Ins. Co. of N. Y. v. Thomson, 94 Ky. 253, 259, 22 S. W. 87.

[1] Provident Savings Life Assur. Soc. v. Dees, 27 Ky. L. Rep. 670, 86 S. W. 522; Union Central Life Ins. Co. v. Lee, 20 Ky. L. Rep. 839, 47 S. W. 614, 28 Ins. L. J. 171.

[2] Metropolitan Life Ins. Co. v. Ford, 31 Ky. L. Rep. 514, 102 S. W. 876.

[3] Ky. Stat. 639; Russell's Ky. Stat. 1909, p. 1031, sec. 4286, in force since 1874. See § 1916 herein.

[4] Mutual Life Ins. Co. of N. Y. v. Thomson, 94 Ky. 253, 259, 22 S. W. 87.

[5] Union Central Life Ins. Co. v. Lee, 20 Ky. L. Rep. 839, 47 S. W. 614, 28 Ins. L. J. 171 (negative answers were given to the questions: "Do you use spirituous, malt, or other intoxicating liquors? If so, to what

had never been drunk to intoxication during the five years last past, made in answer to a question, is not falsified by testimony that he had been seen intoxicated by two witnesses on one occasion and by one witness on perhaps one occasion; nor is it falsified where the applicant was at no time shown to be unable to take care of himself or to go about his business especially so, as what would be considered intoxication by one witness would be regarded as duly sober by another.[6] Again, a representation that the applicant's habits are correct without exception, continued on yearly renewal contracts, refer only to the time when made and if true then, there is no continuing warranty that they were true as to the renewal policy sued on, so that their then falsity is no defense.[7] The question as to the use of alcoholic beverages may be such as to render a direct answer practically impossible by one who has ever indulged in such use in the slightest degree, and the answer may therefore be not responsive. As where the question was: "What is your practice as regards the use of spirits, wines, malt liquors, or other alcoholic beverages?" and the answer was "Kind, nothing. Amount, none. How often, never;" but it is held that the word "practice" means, in said connection, "custom," "habit," and that if the applicant's use of intoxicants has not been so frequent as that he can be said to have acquired the habit of using intoxicants, a jury would be warranted in finding that his negative answer as to his practice in said use of intoxicants was true; and a judgment for plaintiff was affirmed even though assured had taken the Keeley treatment, but the evidence failed to show that he had taken it for inebriety.[8] In a *Louisiana* case it is held, affirming the judgment of the court of appeal, that a negative answer to the question, "Do you use spirituous, malt, or vinous liquors?"—is not false when the answerer partakes of intoxicating liquors only occasionally and temperately. Upon rehearing, however, the judgment of the court of appeal was held erroneous and it was decided that a life policy is forfeited where, in answer to questions in the application whether the applicant used spirituous liquors, and as to the average quantity used per day, he wrote "No," when in fact he did use liquor to some extent, even though such use was not habitual or excessive. It was also determined that specific inquiries make material the matter inquired about and that any misrepresentation avoids the policy without regard

extent? Kind? Average quantity each day? Have you at any time used them to excess? When? Give full particulars).

[6] Columbian Life Ins. Co. v. Tousey, 152 Ky. 447, 153 S. W. 767.

[7] Ætna Life Ins. Co. v. Rustin, 152 Ky. 42, 153 S. W. 14.

[8] Columbia Life Ins. Co. v. Tousey, 152 Ky. 447, 153 S. W. 767.

to actual materiality; and if the answers were such as might have influenced insurer in accepting the risk, or fixing the premium, they must be truthful, and, therefore, in answering questions as to habits of the above character the statements should not be misleading.[9] It is also decided in that state that if the policy stipulates that it shall be void if any untrue answer has been made, and the assured declares that his habits then were, and always had been, temperate, the contract is avoided if the answer is untrue, although made in good faith and without intent to deceive.[10] In a *Maryland* case insured stated that his habit as to the use of intoxicants was one glass of beer a day on an average, and that such had been his habit in the past, also that he had never taken any special treatment for alcoholism, which under the evidence was manifestly untrue in that it appeared that he drank very much more on the average per day than he had stated, and he had been specially treated for acute alcoholism, he had also been treated for cirrhosis of the liver of which alcohol, or the abuse of spirituous liquors was shown to be the most common or chief cause. It was held that the applicant's drinking was palpably material to the risk and his false answers avoided the policy; also, that being so material and in view of the fact that he must have known his statements to be untrue, they were not made in good faith; and in addition, in view of the materiality of the statements and their falsity the cause of death was unimportant.[11] But it is also held that the use of alcoholic liquors within six months prior to the application date does not falsify a statement that the applicant is a total abstainer made in reply to a question: "Do you use alcoholic or other stimulants, and if so to what extent?" [12] In *Massachusetts* it is determined that under its statute a contract is voidable if fraudulently obtained either by misrepresentations made with actual intent to deceive, or if the matter misrepresented increased the risk; also that if insured used ardent spirits to excess his habits of inebriety were material upon whether he was an insurable risk; and where the falsity of negative answers to questions concerning this habit is shown by competent evidence, that for a long time prior to the application, not too remote, assured

[9] Brignac v. Pacific Mutual Life Ins. Co. 112 La. 576, 66 L.R.A. 322, 36 So. 595.

[10] Hartwell v. Alabama Gold Life Ins. Co. 33 La. Ann. 1353, 39 Am. Rep. 294.

[11] Mutual Life Ins. Co. v. Mullen, 107 Md. 457, 69 Atl. 385, 37 Ins. L. J. 507; act 1894, p. 1059, c. 662; Code Pub. Gen. L. 1904, art. 23, sec. 196. See also Forwood v. Prudential Ins. Co. of America, 117 Md. 254, 83 Atl. 169, 41 Ins. L. J. 1135. See § 1916 herein.

[12] Supreme Council of Royal Arcanum v. Brashears, 89 Md. 633, 43 Atl. 866.

was addicted to habits of intoxication, of which he must have had knowledge, the policy would be avoided.[13] In a *Michigan* case, by the terms of the application and certificate the answers were warranties. It was also stipulated that if the member became so far intemperate from the use of intoxicating liquors as to produce delirium tremens, or should die as a direct result of the drinking of intoxicating liquors, or if any of the statements or declarations in the application should be found untrue in any respect the policy should be void and all benefits thereunder forfeited without notice. The trial court charged the jury that "intoxication" was defined as a condition of a man whose physical and mental powers are affected by the use of intoxicating liquors; also that the term "intoxicated" is defined "as 'inebriated,' 'made drunk,' 'excited by frenzy.' You see it is a pretty strong definition when you get down to intoxication." In the Supreme Court, Ostrander, C.J., said: "The undisputed testimony was that after the certificate was issued deceased used intoxicating liquors. It is not very clear whether he used liquor for three years immediately before the certificate was issued; before the three year period he used liquors. We think the testimony does not conclusively prove either that he used liquor at the time the application was made, that he had before that time been intoxicated, that he had delirium tremens, or that he died as the direct result of drinking intoxicating liquors. . . . We are not satisfied with either definition of 'intoxication' given in the charge—one most favorable, and the other most unfavorable, to the defendant. For the favorable definition given, defendant is responsible, because the instruction was requested. The question, 'Were you ever intoxicated?' in an application for insurance, ought not to be treated as asking whether at any time the applicant had taken liquor with any perceptible effect upon either his mental or physical powers. Nor should it be held to be the equivalent of the question, 'Were you ever excited to frenzy by drink?' The testimony tended strongly to sustain each of defendant's contentions, and especially the one that the insured had been many times, if not commonly, intoxicated before he made the application. We are therefore constrained to hold that in giving the definition of the word intoxicated unfavorable to defendant reversible error was committed."[14] It was also held in that

[13] Langdeau v. John Hancock Mutual Life Ins. Co. 194 Mass. 56, 18 L.R.A.(N.S.) 1190, 80 N. E. 452, 36 Ins. L. J. 432; Rev. L. c. 173, sec. 27.

[14] Gall v. Sovereign. Camp Woodmen of the World, 166 Mich. 690, 132 N. W. 468, 40 Ins. L. J. 1964 (questions and answers were as follows: "Do you now use wine, spirits, or malt liquors? No. If so what kind and average amount per day [no answer]. Were you ever intoxicated? No. If so, when [no answer]. Have

state that if there was a false representation as to the habit of using spirituous liquors before the issue of the policy it was avoided and that an instruction was erroneous, that if assured at the time of effecting the insurance "was in the habit of drinking intoxicating liquors to excess, that would end the case and your verdict should be for defendant. If you find he was not an intemperate user of alcoholic liquors, it would not avoid the policy. It is a simple question whether he was an excessive drinker. If he was an habitual, excessive drinker, it would avoid the policy." In the case so holding assured was asked whether he drank beer, ale, wine, or spirits and if so to state what, how often, and how much, to which he answered, "Yes, two or three glasses of beer daily." And he also gave a negative answer to the question "Have you ever drank beer, wine, or spirits, or ale, to excess?" and there was evidence tending to falsify this statement. Grant, C. J., said: "The representation was clear and explicit that he did not drink spirituous liquors. Defendant asked this and was entitled to know it. If he was in the habit of using spirituous liquors as a beverage, he should have so stated." [15] In the same case it is held error to instruct the jury that if it believed that insured "indulged in ale, wine, beer, or intoxicating liquors to excess" then the policy was obtained by false representations and was void, but that if "he did not indulge in spirituous liquors to excess" then the defense was not sustained.[16] It is decided in *Minnesota* that the expression "intemperate use of intoxicating liquors," in a contract of insurance, means such an indulgence in intoxicants as tends to impair the health of the insured, or render the insurance risk more hazardous.[17] It is also held that the question, "Do you use malt or spirituous beverages?" refers to a customary and habitual use and not to a single occasional act or use; so that inquiry, "Have you always been temperate?" means moderation and an abstinence from excessive or injurious use, and not total abstinence from the use of malt or spirituous liquors.[18] And a benefit certificate is not vitiated, in the absence of fraud or intentional concealment, by the answer "When I come to town,—beer" to the question, "If you use intoxicants at all, state kind and quantity consumed," where question and

you ever taken a liquor cure? No. If so, when and where? [no answer]."

[15] Malicki v. Chicago Guaranty Fund Life Soc. 119 Mich. 151, 5 Det. L. N. 743, 77 N. W. 690, 28 Ins. L. J. 216.

[16] Malicki v. Chicago Guaranty Fund Life Soc. 123 Mich. 148, 81 N. W. 1073.

[17] O'Connor v. Modern Woodmen of America, 110 Minn. 18, 25 L.R.A. (N.S.) 1244, 124 N. W. 454.

[18] Chambers v. Northwestern Mutual Ins. Co. 64 Minn. 495, 58 Am. St. Rep. 549, 67 N. W. 367.

answer were by the certificate made a part thereof and it was provided that, if such information was not literally true in every respect, the benefit certificate would be void, although the applicant was in the habit of drinking both beer and whisky, as the answer was truthful so far as responsive and was sufficient to inform the society that the applicant to some extent was in the habit of drinking intoxicants.[19] In a *Mississippi* case assured stated among other matters that he did not and never had used narcotics, and never used daily exceeding two ounces of spirits or two drinks of wine, or malt liquors and "have always been temperate and sober, except as stated below, never drank habitually, nor to any excess." He also stated that several years prior thereto he had suffered from insomnia and nervousness due to overwork, but had fully recovered. It was agreed that these statements were material to the risk, the sole basis of the contract and they were also warranties to be full, complete and true. It appeared that about the time stated as to suffering from insomnia, etc., assured had been treated for acute dementia partly due to alcoholism and to overtaxation and worry, and that he remained at a sanatarium for about three weeks. The rule was asserted that any contract induced by misrepresentation or concealment of material facts may be avoided by the party injured thereby; that if a party makes a positive statement of a fact material to the risk, such fact must be true; that it is not sufficient that he believes it to be true, but it must be so in fact, or the policy will be avoided, provided always that the misstatement be about a material matter, and a judgment for plaintiff was reversed.[20] In *Missouri*, if the statement as to sober and temperate habits is true when made, assured's subsequent intemperate habits do not avoid the contract.[1] So where the misrepresentation relates to assured's habits as to temperance, etc., it does not avoid the insurance unless, within the statute, the matter so misrepresented contributed to assured's death.[2] It is also decided in that state that a statement that insured abstained entirely from the use of intoxicating liquors and had always been a total abstainer, and which were warranted to be true in the application which formed

[19] O'Connor v. Modern Woodmen of America, 110 Minn. 18, 25 L.R.A. (N.S.) 1224, 124 N. W. 454.

[20] Fidelity Mutual Life Ins. Co. v. Miazza, 93 Miss. 18, 46 So. 817, 37 Ins. L. J. 810, s. c. 93 Miss. 422, 48 So. 1017.

[1] Reichard v. Manhattan Ins. Co. 31 Mo. 518. See further, Gartside v. Connecticut Mutual Life Ins. Co. 8 Mo. App. 593.

"Habitual drunkard," see Sitton v. Grand Lodge Ancient Ord. U. W. 84 Mo. App. 208.

"Intemperate," see Evans v. Modern Woodmen of America, 149 Mo. App. 166, 129 S. W. 485.

[2] Harris v. Fidelity Casualty Co. of N. Y. 172 Mo. App. 241, 157 S. W. 1046, 42 Ins. L. J. 1357; Rev. Stat. 1909, sec. 6937. See § 1916 herein.

part of the contract, were warranties, and if the jury had found the statements false it would have been their duty to have found for insurer. A judgment for plaintiff was reversed upon the point that the credibility of a witness, upon whose testimony rested the proof of the falsity of assured's statement, was improperly assailed.[3] In *Nebraska,* where one was insured in a mutual benefit society, it was held that the failure to declare a forfeiture for the excessive use of liquors during assured's lifetime prevented the company from raising such an objection for the first time after death to defeat a recovery.[4] In *New York,* if there is a warranty against habitual intemperance, it is not necessary to prove that the health has been impaired to sustain the defense of a breach of warranty;[5] and the word "temperate" as a warranty is held to mean, not that assured totally abstains, but that he is moderate in the use of intoxicants, and refrains as a habit from excessive indulgence,[6] and that assured, if not generally or specifically inquired of as to the habit of intemperance, is not obligated to disclose the same, although it may be prejudicial to his health.[7] In another case in that state assured warranted that he was temperate and did not use liquor to excess, but he also stated that he had "taken beer" and had been intoxicated twice, the last time being "six months ago," but it appeared that he was given to yearly periodical sprees and had within three or four years been several times convicted of public intoxication and sentenced to jail, and that he died during such a confinement, but otherwise he was not an habitual drinker and that his health was apparently not thereby impaired or affected. It was held that by his acceptance as a member a practical construction was placed upon his statements by the parties, that the jury was justified in finding assured's statements true, and a judgment for plaintiff was affirmed.[8] In *Ohio,* a

[3] Hoagland v. Modern Woodmen of America, 157 Mo. App. 15, 137 S. W. 900, 40 Ins. L. J. 1580.

[4] Grand Lodge Ancient Order United Workmen v. Brand, 29 Neb. 644, 46 N. W. 95.

[5] McGinley v. United States Life Ins. Co. 77 N. Y. 495. See Shader v. Railway Passengers Ins. Co. 66 N. Y. 441, 23 Am. Rep. 65, 5 Thomp. & C. (N. Y.) 643; Van Valkenburg v. American Popular Life Ins. Co. 70 N. Y. 605; Horton v. Equitable Life Assur. Soc. (N. Y. C. C. P. 1870), 2 Big. L. & A. I. Cas. 108; Furness v. Mutual Ins. Co. (Supr. Ct. N. Y.) 11 Rept. 98, 14 J. & S. (46 N. Y. Super. Ct.) 467.

[6] Meacham v. New York State Mutual Benefit Assoc. 30 N. Y. St. Rep. 874, 120 N. Y. 237, 24 N. E. 283.

"Excessive" held to mean excessively or intemperately, Moon v. Prudential Ins. Co. of America, 87 N. Y. Supp. 368, 92 App. Div. 135 (finding for plaintiff held not sustained by evidence), s. c. 95 N. Y. Supp. 1147.

[7] Rawls v. American Life Ins. Co. 36 Barb. (N. Y.) 357. But see Rawlins v. Desbrough, 2 Moody & R. 328.

[8] Hann v. Supreme Ruling of Fraternal Mystic Circle, 140 N. Y. Supp.

warranty that the applicant has never been intemperate and is of correct and temperate habits, is not broken by occasional excessive indulgences, although a continuous and daily use of intoxicating drinks is not necessary to constitute intemperate habits,[9] but that if assured has been addicted to periodical and habitual spreeing, the contract will be void.[10] In a *Pennsylvania* case the stipulation was that if assured should become so intemperate as to seriously and permanently impair his health, or induce delirium tremens, the policy should be void, and it was held that habitual intemperance was not meant unless it had the exact effect stipulated, and that any less effect was insufficient;[11] but a witness may be asked, under the issue of falsity of a declaration of temperate habits, whether he had ever seen the insured under the influence of liquor, and also whether he had ever seen the assured drunk more than once.[12] In *Rhode Island,* it is held that assured need not have been strictly temperate, and although he occasionally used liquor, yet if he did not indulge to an excess, he was not intemperate or addicted to the excessive use of alcoholic liquors.[13] Under a *South Carolina* decision an occasional excessive use of intoxicating liquors does not constitute intemperate habits.[14] In *Texas* representations concerning habits as to the use of intoxicants are held limited to the time of making the application and are not retroactive and do not relate to the future;[15] and evidence of the knowledge of insured's agent as to assured's habits of drunkenness must be properly set up in the replication to render it admissible.[16]

666, 155 App. Div. 665, 42 Ins. L. J. 649 (Kruse, J. dissenting; one of the grounds being that "He was intoxicated too much and too often to be classed as temperate"). *Compare* Shea v. Great Camp of Knights of Maccabees, 52 N. Y. Supp. 333, 31 App. Div. 633.

[9] Union Mutual Life Ins. Co. v. Reif, 36 Ohio St. 596, 38 Am. Rep. 613. See Protected Home Circle v. Winter, 14 Ohio C. C. 194.

[10] Mutual Benefit Ins. Co. v. Holterhoft, 2 Cinc. (Ohio) 379. See Northwestern Mutual Life Ins. Co. v. Risley, 22 Ohio C. C. 160, 12 Ohio C. D. 186.

[11] Odd Fellows Mutual Life Ins. Co. v. Rohkopp, 94 Pa. St. 59, 9 Ins. L. J. 787. See Knecht v. Mutual Life Ins. Co. 90 Pa. St. 118, 35 Am. Rep. 641.

[12] United Brethren Mutual Aid Soc. v. O'Hara, 120 Pa. 256, 13 Atl. 932. See Keatley v. Travelers Ins. Co. 187 Pa. 197, 42 W. N. C. 371, 40 Atl. 808.

[13] Mowry v. Home Ins. Co. 9 R. I. 346.

[14] Fludd v. Equitable Life Assur. Soc. of the U. S. 75 S. C. 315, 55 S. E. 762.

[15] Order of United Commercial Travelers v. Sampson, — Tex. Civ. App. —, 177 S. W. 169.

[16] Texas Mutual Life Ins. Co. v. Davidge, 51 Tex. 244.

For other cases as to intemperance, etc., see Darrill v. Modern Woodmen of America, — Tex. Civ. App. —, 118 S. W. 211 (statements as to never having been intoxicated, etc., merely statements of opinion); Equitable Life Assurance Soc. v. Liddell, — Tex. Civ. App. —, 74 S. W. 87 (occasional excesses no breach of

Under a *Virginia* decision assured's statements that he had never drank intoxicants to excess evidently has reference to the time when he made his application and not to excessive drinking or being drunk at periods of time subsequent thereto.[17] In *Washington* an admission of occasional drinking, as where assured had stated that he drank beer once in a great while, must be considered in connection with his statement that he was almost, and always had been, a total abstainer, and in view of both statements the certificate will not be avoided: so, unless assured is so addicted to excessive or periodical indulgence in the use of intoxicating liquors that it becomes habitual, he is not "intemperate" even though he may have drank to excess upon exceptional occasions; and it does not constitute error to charge the jury that "the best definition I can give you of the word 'intemperate' so far as the intemperate use of intoxicating liquor is concerned is the immoderate use of intoxicating liquor. I don't know whether you know any more about it now than you did before. I don't."[18] Under a *Wisconsin* decision, "Intemperate habit" as applied to the use of intoxicants is defined as commonly meaning the use thereof to excess; that no idea of regularity of interval between indulgence or degree of excessiveness is meant, but merely that one has an appetite and has indulged it so as to become accustomed to indulge it with considerable frequency and to an apparent degree. The idea is conveyed that a man has so often excessively indulged in intoxicating liquor that it has become his customary rather than exceptional course of conduct, that is, it is a usual, customary characteristic of him.[19]

(c) *As to waiver or estoppel: insurer's or agent's knowledge or acts.* Where a policy of life insurance provides that it shall be void if the insured shall use alcoholic drinks so as to injure his health, and that the insurer may cancel the policy, when it comes

warranty); Brown v. Sovereign Camp Woodmen of the World, 20 Tex. Civ. App. 373, 49 So. 893 (defense of misrepresentations as to use of intoxicating liquors: judgment for assurer).

[17] Metropolitan Life Ins. Co. v. De Vault's Admx. 109 Va. 392, 63 S. E. 982.

[18] Schon v. Modern Woodmen of America, 51 Wash. 482, 99 Pac. 25. See Aris v. Mutual Life Ins. Co. of N. Y. 54 Wash. 269, 103 Pac. 50, 54 Wash. 695, 103 Pac. 53 ("occasional" defined).

[19] Andrews v. United States Casualty Co. 151 Wis. 82, 142 N. W. 487, 42 Ins. L. J. 1370—Marshall, J. (accident insurance), s. c. but decided on one of the other points involved, 159 Wis. 604, 150 N. W. 947, 45 Ins. L. J. 539. See Bakalors v. Continental Casualty Co. 141 Wis. 43, 25 L.R.A.(N.S.) 1241 (annotated on scope and effect of provisions in policies of insurance forbidding use of intoxicating liquor), 122 N. W. 721.

to his knowledge that the insured has made false statements in this respect, or does so use alcoholic liquor, and that the policy shall be void if he dies from the effects of intoxication, or while intoxicated, and the insurer's agent makes out a policy well knowing the insured to be an habitual drunkard, and afterward receives the premium without canceling the policy, the insurer thereby waives all the conditions in the policy, except that making it void if the insured dies while intoxicated, or from the effects of intoxication.[20] And the acceptance of a premium upon a life policy, with knowledge that since the issue of the policy the assured has become addicted to the use of intoxicating liquors, is a waiver of a right of forfeiture on that ground.[1] So in a Colorado case the policy was revived by a creditor, with the knowledge of insurer's president that insured had become so far intemperate as to impair his health, and the plaintiff was permitted to recover.[2] Again, although it is claimed that assured's answers as made were by mistake or fraud of insurer's agent, so inserted in the application as to falsify or qualify those made by assured, it is held that a policy provision prohibiting an agent from changing or modifying the terms of said policy does not apply to conditions relating to the inception of the contract.[3]

(d) *As to evidence.* The burden of proof is upon assurer to sustain its relied upon claim of misrepresentations, their material-

[20] Newman v. Covenant Mutual Benefit Assoc. 76 Iowa, 56, 1 L.R.A. 659, 14 Am. St. Rep. 196, 40 N. W. 87.

[1] Phoenix Mutual Life Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. 500.

[2] Pomeroy v. Rock Mountain Insurance & Saving Inst. 9 Colo. 295, 12 Pac. 153.

[3] Forwood v. Prudential Ins. Co. of America, 117 Md. 254, 83 Atl. 169, 41 Ins. L. J. 1135.

See further as to waiver and estoppel the following cases:

*Illinois.*—Busing v. Modern Woodmen of America, 151 Ill. App. 49 (waiver of defense as to excessive use of liquor held not to waive defense of death from such use).

*Iowa.*—Bierman v. Guaranty Mutual Life Ins. Co. 142 Iowa, 341, 120 N. W. 963 (agent had knowledge of insured's intemperate habits: insurer estopped).

*Maryland.*—Forwood v. Prudential Ins. Co. of America, 117 Md. 254, 83 Atl. 169, 41 Ins. L. J. 1135 (mistake or fraud of agent in writing in answers as to use of liquor does not aid recovery).

*Ohio.*—Protected Home Circle v. Winter, 14 Ohio C. C. 194 (if member stated facts truly as to use of intoxicants and agent inserted false answers certificate cannot be forfeited).

*Oregon.* — Whigham v. Supreme Court Independent Order of Foresters, 51 Oreg. 489, 94 Pac. 968 (knowledge of officers and agents of lodge as to use of liquor does not estop) s. e. 44 Oreg. 543, 75 Pac. 1067.

*Virginia.* — Modern Woodmen of America v. Lawson, 110 Va. 81, 3 Va. Appeals, 527, 65 S. W. 509 (assurer held,—estopped by agent's personal knowledge of applicant's habits as to use of intoxicating liquors and that his statements as to same are false).

ity and fraudulent intent.[4] So the burden of proving death from delirium tremens is on insurer when it relies upon this defense.[5] And where the statute so requires and the contract is within the terms thereof, it must, in order to preclude recovery, be clearly shown that assured's statements that he never used intoxicating liquor and was a total abstainer were wilfully false, fraudulently made, material, and induced insurer to issue the policy.[6] In case an applicant states that he used a glass of beer occasionally, in answer to the question whether he used either malt or spirituous liquors daily or nearly every day; and to the further inquiry, "If so, what is used and the approximate amount? Answer explicitly," he answers "beer," it is held that evidence that he used whisky to some extent does not show that the warranty was breached.[7] And death from the intemperate use of intoxicating liquor is not shown by evidence of accidental poisoning and consequent death from drinking wood alcohol since the latter is not an intoxicating liquor but a narcotic poison.[8]

If, however, assurer has clearly and fully met the burden of proof resting upon it and has shown beyond controversy the falsity of assured's negative answers to questions as to his daily use of malt, and spirituous liquors, and also whether he had ever used them to excess, and assured has admittedly signed the application which declared "that all the statements and answers to above questions are complete and true, and I agree that they shall form a part of the insurance applied for," the original burden of proof is shifted and it then rests upon plaintiff to show that said answers and statements were not those of assured, or that he qualified the same, but that assurer's agent or medical examiner wrote them in the application as they appeared therein, as the latter's conclusions, and that they were so written without assured's knowledge, and without his qualifications; that is, that said answers, as written in the application, were not in fact those made by assured. In addition the burden thus shifted must rest upon evidence sufficiently positive and certain to remove the barrier to recovery raised by

[4] Metropolitan Life Ins. Co. v. De Vault's Admx. 109 Va. 392, 63 S. E. 982.

That excessive use of intoxicants not provable under general denial, see Marren v. North American Union, 145 Ill. App. 375.

[5] Malicki v. Chicago Guaranty Fund Life Soc. 119 Mich. 151, 77 N. W. 690, 28 Ins. L. J. 216, s. c. 123 Mich. 148, 81 N. W. 1073.

[6] Northwestern Mutual Life Ins. Co. v. Risley, 22 Ohio C. C. R. 160, 12 Ohio C. D. 186.

[7] Lakka v. Modern Brotherhood, 163 Iowa, 159, 49 L.R.A.(N.S.) 902, 143 N. W. 513.

[8] Modern Woodmen of America v. Lawson, 110 Va. 81, 3 Va. Appeals, 527, 65 S. E. 509.

the proven falsity of assured's answers in view of the fact that the matters falsely stated were peculiarly within the knowledge of the applicant and not necessarily, or even presumably within assurer's knowledge and where it also appears that the application was annexed to and made a part of the policy assured could have discovered the fact that the answers as written, either through mistake or fraud of the agent, were not his, and that he failed to disclose the same, or to notify assurer, thereby participating in said agent's mistake or fraud.[9] And where physicians testify that they had treated assured for alcoholism the latter's statement that he had never been treated for the alcohol habit is not aided by evidence that he was a temperate man.[10]

In Kentucky, it has been held if assured warrants that he is of temperate habits, and has not taken a drink for over a year, that evidence may be given of acts of intemperance done within a sufficiently reasonable time prior to the making of the proposal to have allowed the habit to be formed.[11] So evidence of a plea of guilty, by an applicant for insurance, to a charge of drunkenness, is admissible in an action by an assignee of the beneficiary upon the policy in support of a defense of misrepresentation by the applicant as to his habits in that regard, where the plea was not so remote from the time of the application as to have no evidentiary value.[12] And if, under a life policy providing that the application for insurance shall be a part thereof, and that any false or fraudulent representation made therein shall render the policy null and void, the insurer alleges that a representation made by the insurer that he has "always been temperate" was false, evidence as to his business habits, pursuits and associations, at and before the time of issuing the policy is admissible as bearing upon the question whether he was temperate or intemperate.[13] But it is also held that even though evidence of assured's nonuse of intoxicants subsequent to the time of his application might be admissible if it related to a date not too remote but immediately after making said application, still a retroactive effect cannot be given a pre-

[9] Forwood v. Prudential Ins. Co. of America, 117 Md. 254, 83 Atl. 169, 41 Ins. L. J. 1135.

[10] Home Life Ins. Co. v. Sibert, 96 Va. 403, 31 S. E. 519.

[11] Mutual Life Ins. Co. v. Gividen, 13 Ky. L. Rep. 970.

[12] Langdeau v. John Hancock Mutual Life Ins. Co. 194 Mass. 56, 18 L.R.A.(N.S.) 1190, 80 N. E. 452, 36 Ins. L. J. 432.

That insured had at no time been tried for intemperance by the local lodge is inadmissible evidence, see Evans v. Modern Woodmen of America, 149 Mo. App. 166, 129 S. W. 485.

[13] Chambers v. Northwestern Mut. L. Ins. Co. 64 Minn. 495, 58 Am. St. Rep. 549, 67 N. W. 367.

sumption of continuance of a habit by evidence of insured's nonuse of intoxicants at a remote time of about nine months after the date of his application and such evidence is inadmissible and its admission justifies a reversal of a judgment for plaintiff where without such evidence his testimony is uncorroborated.[14]

In case assured has stated that he had suffered from insomnia and nervousness from overwork but had been treated therefor and fully recovered, and he has negatived, by his answers to questions concerning the same, any habitual or excessive drinking excepting a specified small amount daily, evidence is relevant, material and admissible of physicians which shows that at the time referred to he was suffering from acute mania or total dementia, and that his condition was partly due to alcoholism and partly to overtaxation, insomnia and mental worry, the effect or result of which might be fatal or otherwise.[15] And it is a proper inquiry, on cross examination of the physician who had examined assured at the time of his application, if at the time of making his said examination there were any indications of an habitual use of alcoholic stimulants by assured.[16] But a medical expert will not be permitted to state whether he regarded excessive use of intoxicating liquors as a pernicious habit, where such excessive use was relied on in defense and also that it had contributed to assured's death and that he had agreed not to use such liquors to excess nor indulge in any pernicious habits that would obviously tend to shorten life.[17] And where error was claimed in refusing to admit in evidence certain letters of the medical examiner to insurer containing declarations as to the habits of an applicant for life insurance, made by said medical examiner, it was held that they were not binding on the applicant, although the application stated that the examiner was his agent in filling it up, and he knew that the examiner was to write a letter in relation to the matter, and therefore the evidence was irrelevant and properly excluded, especially so where the policy contained an incontestible clause.[18]

A nonexpert may give his opinion as to another's intoxication.[19] And as an aid to the determination of the point whether or not

[14] Brotherhood of Locomotive Firemen & Enginemen v. Cole, 108 Ark. 527, 158 S. W. 153.

[15] Fidelity Mutual Life v. Miazza, 93 Miss. 18, 46 So. 817, 37 Ins. L. J. 810, s. c. 93 Miss. 422, 48 So. 1017.

[16] Supreme Lodge Knights & Ladies of Honor v. Baker, 163 Ala. 518, 50 So. 958.

[17] Union Life Ins. Co. v. Jamison, 31 Ind. App. 28, 67 N. E. 199.

[18] Massachusetts Benefit Life Assoc. v. Robinson, 104 Ga. 256, 42 L.R.A. 261, 30 S. E. 918, 27 Ins. L. J. 1003.

[19] Commonwealth v. Eyler, 217 Pa. 512, 11 L.R.A.(N.S.) 639 (annotated on opinion evidence by nonexperts as to intoxication), 66 Atl. 746.

As to evidence of fellow workman, see Union Life Ins. Co. v. Jamison, 31 Ind. App. 28, 67 N. E. 199.

assured falsely represented that he was temperate in the use of intoxicating liquors, witnesses may, after stating the basis of their information, state whether assured was temperate or intemperate.[20] So the opinion of a witness as to insured's being under the influence of liquor on a certain occasion, or his "judgment" if he did not know, may properly be given where he has had ample opportunity to observe the facts on which to base said opinion or judgment. If, however, his opinion is not based upon observation, it is not error, or if so, harmless error, to exclude the same.[1] Again, permitting a large number of persons having knowledge of the facts to testify as to the temperate character of one who, in applying for life insurance, represented himself as temperate with respect to the use of intoxicating liquors, is not error.[2] The applicant's reputation, however, "for being an intemperate user of alcoholic beverages" is not admissible to contradict a statement in his application for life insurance that, while he used intoxicating liquors, he did so temperately; for it is not offered to affect credibility, but in denial of a fact, pertinent to the issue raised, and not difficult to prove, if true, by the acts of the insured.[3] And it is held that a clause that assured "does not now and will not practice any pernicious habits that obviously tend to shorten life" cannot be extended or enlarged by parol evidence to include the habit of using intoxicating liquors, by showing that assurer's agent explained it to assured as having that meaning.[4]

(e) *Court or jury.* The jury ought to decide upon the weight of evidence whether assured was of temperate habits at the time of the insurance,[5] and this applies also to intoxication, excessive use of intoxicating liquors and the like.[6] Under a comparatively

[20] Taylor v. Security Life & Annuity Co. 145 N. Car. 383, 15 L.R.A. (N.S.) 583 (annotated on opinion evidence as to intemperance of particular person), 59 S. E. 139.

[1] Campbell v. Fidelity & Casualty Co. 22 Ky. L. Rep. 1295, 60 S. W. 492.

[2] Taylor v. Security Life & Annuity Co. 145 N. C. 383, 15 L.R.A. (N.S.) 583, 59 S. E. 139.

[3] Smith v. Prudential Ins. Co. 83 N. J. L. 719, 43 L.R.A.(N.S.) 431, 85 Atl. 190.

As to evidence generally of reputation as to drunkenness or sobriety, see Norfolk & Western R. Co. v. Hoover, 79 Md. 253, 25 L.R.A. 710, 29 Atl. 994 (evidence of general reputation for intemperance of railroad brakeman); Guy v. Lanark Fuel Co. 72 W. Va. 728, 79 S. E. 941, 48 L.R.A. (N.S.) 536 (general reputation for drunkenness of physician).

[4] Masons' Union Life Ins. Assoc. v. Brockman, 20 Ind. App. 206, 50 N. E. 493.

[5] Southcombe v. Merriman, Car. & M. 286.

[6] *Alabama.* — Supreme Lodge Knights & Ladies of Honor v. Baker, 163 Ala. 518, 50 So. 958 (refusal to direct verdict not error).

*Arkansas.*—Des Moines Life Ins. Co. v. Clay, 89 Ark. 254, 20 L.R.A. (N.S.) 205, 116 S. W. 232 (jury

recent decision the answer was, "my habits of life are correct and temperate," but the evidence tended to show that the applicant had gone on periodical sprees; that he had taken the so-called "gold cure" with only temporary good results; that at a time not long before the application, he had taken another kind of medical treatment for the cure of the liquor habit, and that he died from a relapse of the habit. Upon these facts it was declared that an issue was raised for the jury.[7] But it is also decided that the fact that assured drank intoxicating liquors very much in excess of what he has represented in answer to inquiries as to his daily average, is material to the risk as matter of law.[8]

**§ 2097. Tobacco: moderate use of.**—The "moderate" use of tobacco implies a habit more or less fixed.[9]

**§ 2098. Trade and employment of ship: marine risk.**[10]—The trade and employment of every ship must be strictly in accordance with law, and this includes municipal law, the law of nations, and commercial treaties with the country to which the vessel belongs; for such treaties bind the subjects of the countries which are parties thereto, as well as their own municipal laws. The trade and employment must also be not only lawful, but must be lawfully prosecuted. This rule also extends to the navigation and conduct of the ship, and to the master's legal qualifications. The

question although only one witness testified on contradiction as to intoxication).

*Michigan.*—Gall v. Sovereign Camp Woodmen of the World, 166 Mich. 690, 132 N. W. 468, 40 Ins. L. J. 1964 (defense of use of liquor at time of application, or before then had been intoxicated, or had had delirium tremens, or that he died as result of such use not conclusively proven: question for jury); Malachi v. Chicago Guaranty Fund Life Soc. 123 Mich. 148, 81 N. W. 1073 (excessive use of spirituous liquors: for jury), s. c. 119 Mich. 151, 5 Det. L. N. 743, 77 N. W. 690, 28 Ins. L. J. 216.

*Mississippi.*—Fidelity Mutual Life Ins. Co. v. Miazza, 92 Miss. 422, 48 So. 1017 (whether insurer influenced in issuing policy by assured's statements, is for jury), s. c. 93 Miss. 18, 46 So. 817.

*New York.*—Moore v. Prudential Ins. Co. of America, 87 N. Y. Supp. 368, 92 App. Div. 135 (excessive use of liquor: for jury), s. c. 95 N. Y. Supp. 1147; Keefe v. Supreme Council Catholic Mutual Ben. Assoc. 64 N. Y. Supp. 1012, 52 App. Div. 616 (whether such use excessive or such as to impair health, for jury).

*Wisconsin.*—Bakalars v. Continental Casualty Co. 141 Wis. 43, 25 L.R.A.(N.S.) 1241, 122 N. W. 721. (when court cannot direct that insured under accident policy was under influence of intoxicating liquor).

[7] Maryland Casualty Co. v. Eddy, 239 Fed. 477, 152 C. C. A. 355.

[8] Mutual Life Ins. Co. v. Mullan, 107 Md. 453, 457, 69 Atl. 385,—Worthington, J., *approved* and *applied* in Forwood v. Prudential Ins. Co. of America, 117 Md. 254, 83 Atl. 169, 41 Ins. L. J. 1135.

[9] Grand Lodge Ancient Order United Workmen v. Belcham, 48 Ill. App. 346, per Wall, J.

[10] See § 1987 herein.

As to liberty of ports where employment of ship is limited by the policy, see § 2401 herein.

ship is also obligated to carry all such documents and papers as are required by the existing treaties above mentioned and the law of nations.[11] But this rule does not refer to such enactments as are collateral to, but which may affect trade and navigation.[12]

The term "lawful trade" refers to an employment by the owners, and not to the ship's being barratrously employed by the master.[13] But a warranty not to use certain specified ports under an insurance to navigate the Atlantic ocean between Europe and America may be construed to describe the trade in which the vessel is engaged, rather than a stipulation confining the insurance to those portions of her voyage specified;[14] even though a warranty under a time policy not to carry grain across the Atlantic is broken if the vessel is then carrying grain, although she is just entering harbor after a voyage across the Atlantic.[15] Again, "Lawful goods" does not amount to a warranty that goods are not contraband.[16] But a stipulation not to be employed in the cotton trade is broken if the vessel insured is on each of several trips chiefly loaded with cotton, although at the time of loss she is loaded with corn and has no cotton on board, and is engaged for several trips thereafter to carry corn.[17] So a time policy on a vessel, warranted employed in general passenger and freighting business on a designated sound during the term of the policy does not cover it while it is laid up for the winter in a river flowing into the sound; and evidence is inadmissible to show that by custom and usage, the form of the policy covered a vessel when laid up.[18]

As to limited or prohibited trade: prohibited waters: excepted risks, see § 2681 herein.

[11] Christie v. Secretan, 8 Term Rep. 192, per Lord Kenyon and Lawrence, J.; Eenrom, The, 2 C. Rob. Adm. 1, 6, per Lord Stowell; Farmer v. Legg, 7 Term Rep. 186; The Sisters, 5 C. Rob. Adm. 155, per Lord Stowell; Wilson v. Marryat, 8 Term Rep. 31; The Vigilantia, 1 C. Rob. Adm. 1; Barker v. Phœnix Ins. Co. 8 Johns. (N. Y.) 237, 5 Am. Dec. 339; 1 Marshall on Ins. (ed. 1810) *178.

[12] Redmond v. Smith, 7 Man. & G. 457, 8 Scott (N. S.) 250, 13 L. J. C. P. 159, 8 Jur. 711, 66 R. R. 734.

[13] Havelock v. Hancill, 3 Term Rep. 277, 1 R. R. 703.

[14] Merchants' Mutual Ins. Co. v. Allen, 121 U. S. 67, 30 L. ed. 858, 7 Sup. Ct. 821. The clause was "warranted by the assured not to use port or ports in Eastern Mexico, Texas, nor Yucatan during the continuance of this insurance, nor ports in the West India Islands between July 15th and October 15th, nor ports on the northeast coast of Great Britain beyond the Thames, nor ports on the continent of Europe north of Antwerp between November 1st and March 1st."

[15] Sawyers v. Coasters' Mutual Ins. Co. 6 Gray (72 Mass.) 221.

[16] Seton v. Low, 1 Johns. Cas. (N. Y.) 1.

On effect of warranty against contraband or illicit trade in marine insurance policy, see note in 5 B. R. C. 64.

[17] Gaty v. Phœnix Ins. Co. 30 Mo. 56.

[18] Canton Ins. Office, Ltd. v. Independent Transportation Co. 217 Fed. 213, 55 L.R.A.(N.S.) 408n, 45 Ins.

**§ 2099. "Uninsured:" policy on another subject matter: "honor policy."**—Where the insurance was on the hull and machinery of a steamship for "five thousand pounds, warranted uninsured," but it appeared that insurances had been effected on "disbursements" for two thousand six hundred pounds by means of "honor" policies, it was held that although the "honor" policies were void under 19 George II. chapter 37, they were effective to operate as a breach of warranty, but not being on any part of the subject matter insured under the policy in question, but on "disbursements" alone, there was no breach of warranty.[19]

**§ 2100. Unmarried: married: widower: wife.**[20]—If a married man represents himself as single, there is a breach of the warranty.[1] So where assured was married and stated that he was a widower, it was held such a material representation as avoided the contract.[2] But if a married woman has an insurable interest in goods purchased by her on credit, her concealment of her coverture at the time of taking the policy is not a fact material to the risk, nor are her rights affected by private instructions to agents, uncommunicated to her, that they are not to issue insurance on stocks of merchandise in the hands of married women.[3] A false warranty that assured is married avoids the policy.[4] So where assured expressly warrants that the designated beneficiary is his wife and this is untrue by reason of the fact that a prior

L. J. 206. (The court, per Gilbert, C. J., said: "these warranties cannot be reasonably construed to be other than what their terms plainly import. . . . All such warranties are inserted for the purpose of limiting and defining the risk"), rev'g Independent Transportation Co. v. Canton Ins. Office, Ltd., 173 Fed. 564. The court *cites* or *considers* upon the first point Hastorf v. Greenwich Ins. Co. (U. S. D. C.) 132 Fed. 122; London Assurance Co. v. Thompson, 179 N. Y. 94, 62 N. E. 1066; Kirk v. Home Ins. Co. 86 N. Y. Supp. 980, 92 App. Div. 26; St. Nicholas Ins. Co. v. Merchants Ins. Co. 11 Hun (N. Y.) 108; Mannheim Ins. Co. v. Charles Clarke Co. — Tex. Civ. App. —, 157 S. W. 291, 42 Ins. L. J. 1177, and *quotes* from Birrel v. Dwyer, 9 App. Cas. 345, per Lord Watson.

[19] Roddick v. Indemnity Mutual Marine Ins. Co. 1 L. R. Q. B. D. (1895) 836, aff'd as to the last point. 2 L. R. Q. B. D. (1895) 380, 14 R. 516, 72 L. T. 860, 44 W. R. 27. As to the first point, quære, whether the court below held rightly.

"Hull and machinery" does not cover "disbursements," see § 2784a herein.

[20] See § 1987 herein.

As to relationship, see § 2081 herein.

[1] Jeffries v. Union Mutual Life Ins. Co. 1 McCrary (U. S.) 114, 1 Fed. 450.

[2] United Brethren Mutual Aid Soc. v. White, 100 Pa. St. 12, 12 Wkly. Not. Cas. 147.

[3] Queen Ins. Co. v. Young, 86 Ala. 424, 11 Am. St. Rep. 51, 5 So. 116.

[4] Ashford v. Metropolitan Life Ins. Co. 98 Mo. App. 505, 2 Mo. App. Repr. 766, 72 S. W. 712; Makel v. John Hancock Mutual Life Ins. Co. 88 N. Y. Supp. 757, 95 App. Div. 241.

marriage entered into by her had not been dissolved by divorce or death and it does not appear that she had ever taken any steps to ascertain whether her husband was living or dead and there is no proof that he had ever absented himself and he was present at the trial and testified, a judgment for assurer will be affirmed.[5] But where one representing himself to be a married man effects an insurance on his own life for the benefit of his alleged wife, and as her agent, when in fact the marriage is void by reason of the reputed wife having a former lawful husband living at the time, and the policy contains a provision that any false statement by assured shall invalidate it, it is held that the policy is not void by reason of the illegality of the last marriage, unless it appears that the said reputed husband and wife knew at the time the insurance was effected that at the time of their supposed marriage the lawful husband was living and the marriage illegal, and failed to inform the company of the fact.[6]

**§ 2101. Use and occupation: whether continuing warranty: fire risk.**[7]—A description in the application of the uses to which the premises are to be applied, or as to occupancy, does not constitute a continuing warranty that they shall be used for no other purposes, or not otherwise occupied than as stated; such statement is a representation, the falsity of which must be proven by the assurer, and if proven, it avoids the contract.[8] And a statement that a house is occupied by a certain named person is not a promissory warranty of such person's continued occupation, and, if the house becomes vacant, there is no breach of the warranty, as it relates in time to the date of the policy and its then occupation.[9] Nor is there a continuing warranty created by the words "while occupied as the Park Terrace Sanitarium," especially so where there

[5] Gaines v. Fidelity & Casualty Co. of N. Y. 188 N. Y. 411, 81 N. E. 169, 36 Ins. L. J. 757, aff'g 97 N. Y. Supp. 836, 111 App. Div. 386, aff'g 87 N. Y. Supp. 821, 93 App. Div. 524. *Compare* Richards v. King, 107 N. Y. Supp. 720, 57 Misc. 177.

[6] Equitable Life Ins. Co. v. Patterson, 41 Ga. 338, 5 Am. Rep. 535. See also Holabird v. Atlantic Mutual Life Ins. Co. 2 Dill. (U. S. C. C.) 166, Fed. Cas. No. 6,587.

[7] See § 1987 herein.

[8] Burlington Ins. Co. v. Brockway, 138 Ill. 644, 28 N. E. 799, aff'g 39 Ill. App. 43; New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221; Howard Fire & Marine Ins. Co. v. Cornick, 24 Ill. 455; German Ins. Co. v. Russell, 65 Kan. 373, 58 L.R.A. 234, 69 Pac. 345; Smith v. Mechanics & Traders Ins. Co. 32 N. Y. 399, 29 How. Pr. (N. Y.) 384; Mullin v. Vermont Mutual Ins. Co. 54 Vt. 223. See authorities cited under § 2103 herein.

[9] O'Neil v. Buffalo Fire Ins. Co. 3 N. Y. (3 Comst.) 122. See Frisbie v. Fayette Mutual Ins. Co. 27 Pa. St. 325; East Texas Fire Ins. Co. v. Kempner, 12 Tex. Civ. App. 533, 34 S. W. 393, 35 S. W. 1069.

are other policy clauses evidencing a contrary intent.[10] So although special rates are charged, the policy is not avoided by a change of the represented use, which does not increase the risk, and which as changed is still of the same character of risk, calling for the same rates.[11] And if a policy upon goods does not require a statement of the occupancy of the building in which they are located, a failure to disclose the same does not avoid the contract. If the occupancy in such case is stated, it is not a warranty, but a representation, the mere falsity of which is not material where it does not occasion the loss.[12] But in case the terms of the contract make such statements as to use and occupation warranties, they are not, as a rule, promissory or continuing warranties, but only that the property was so used or occupied at the time stated; that is, merely a warranty in praesenti.[13] The policy may, however, be so worded as to make such warranty continuing.[14]

**§ 2102. Use and occupation: constantly worked: unlawful act not implied.**[15]—Although it is stated that the premises are constantly worked, the building being described as a mill used for drying paper, and even though it is stipulated that the statements are a just, true, and full exposition of all the facts and circumstances material to the risk, such statement does not amount to a warranty that the mill shall be worked on Sunday, for an unlawful act will not be implied. It will be construed to mean constantly worked during the usual working days and hours; nor does the fact that the only work carried on at night is the process of drying, constitute a substantial error.[16] But whether working Sundays would be an illegal act ought, it would seem, to depend upon some statutory enactment, prohibitive in character.[17]

[10] Southern National Ins. Co. v. Cobb, — Tex. Civ. App. —, 180 S. W. 155.

[11] Smith v. Mechanics & Traders Ins. Co. 32 N. Y. 399.

[12] Howard Fire & Marine Ins. Co. v. Cornick, 24 Ill. 455; Browning v. Home Ins. Co. 71 N. Y. 508, 27 Am. Rep. 86.

[13] Woodruff v. Imperial Fire Ins. Co. 83 N. Y. 133; Alexander v. Germania Fire Ins. Co. 66 N. Y. 464, 23 Am. Rep. 76, and note 79; United States Fire & Marine Ins. Co. v. Kimberly, 34 Md. 224, 6 Am. Rep. 325, and cases under following sections.

[14] Poor v. Humboldt Ins. Co. 125 Mass. 274, 28 Am. Rep. 228. See sections following.

[15] See § 1987 herein.

[16] Prieger v. Exchange Mutual Ins. Co. 6 Wis. 88, 89.

[17] Under the Sunday laws one who engages in business is presumptively engaged in an illegal transaction, subject to rebuttal by justifying circumstances: Cooley on Torts (2d ed.) 175, *152 et seq. Contracts made on Sunday were as valid at the common law as if made on any other day, but prohibited by the Sunday statutes, are void: 7 Wait's Actions and Defenses, 114–23. See 8 Wait's Actions and Defenses, 557. See 3 Parsons on Contracts (7th ed.) 898–907. But

**§ 2103. Use and occupation: dwelling-house: boarding-house: hotel, etc.**[18]—If a building is insured and described as a dwelling-house, or declared to be occupied or used as a dwelling, or unoccupied, it is as a rule a mere representation or matter of description only, which must be materially false to avoid the policy, or a change in the use and occupation must materially increase the risk. But in those cases where from the stipulations of the contract such statement amounts to a warranty, the warranty must be referred to the time of making the proposal. It is not a continuing warranty that it shall be continued to be used and occupied as stated during the entire risk, or that the use and occupation shall not be changed.[19]

In a New York case a statement that the building was used for a dwelling was held not a warranty that the building was used at the time as stated, but simply that such was the character of the building; that it was fitted and designed for that use, and the

see pp. 3629, 3631 herein, as to warranty that watchman will be kept every night: Sunday watchman.

[18] See § 1987 herein.

As to conditions voiding policy: change of occupancy: effect of non-occupation: increase of risk: vacant and unoccupied, etc., see §§ 2223 et seq. herein.

[19] *Illinois.*—Burlington Ins. Co. v. Brockway, 138 Ill. 644, 28 N. E. 799, aff'g 39 Ill. App. 43 (occupancy held matter of mere description and not continuing warranty).

*Kansas.*—German Ins. Co. v. Russell, 65 Kan. 373, 58 L.R.A. 234, 69 Pac. 345 (not continuing warranty but only warranty of situation at time insurance affected); Niagara Fire Ins. Co. v. Johnson, 4 Kan. App. 16, 45 Pac. 789 (is descriptive of property and not warranty that building then occupied as dwelling house).

*Maine.* — Thayer v. Providence-Washington Ins. Co. 70 Me. 531 (building unoccupied at time of fire held immaterial unless risk increased); Joyce v. Marine Ins. Co. 45 Me. 168, 71 Am. Dec. 536 (held matter of description merely and not a continuing warranty).

*Missouri.*—Waddle v. Commonwealth Ins. Co. 184 Mo. App. 571, 170 S. W. 682, 45 Ins. L. J. 183 ("occupied as a residence:" "occupied:" do not mean uninterrupted, continuous, occupation).

*New Jersey.* — Rafferty v. New Brunswick Fire Ins. Co. 3 Har. (18 N. J. Law) 480, 38 Am. Dec. 525 (held not a warranty that it will not be used for any other purpose).

*New York.*—Alexander v. Germania Fire Ins. Co. 66 N. Y. 464, 23 Am. Rep. 76, and note 79 (case holds the clause a warranty and policy void if house not occupied at the time as stated); O'Neil v. Buffalo Fire Ins. Co. 3 N. Y. (3 Comst.) 122 (not a continuing warranty of occupation).

*Pennsylvania.* — Heffron v. Kittaning Ins. Co. 132 Pa. St. 580, 20 Atl. 698 (held not a warranty but mere description); Cumberland Valley Mutual Protection Co. v. Douglass, 58 Pa. St. 419, 98 Am. Dec. 298 (held not a continuing warranty).

*Tennessee.*—Planters' Ins. Co. v. Sorrels, 1 Baxt. 352, 25 Am. Rep. 780 (not avoided by subsequent change in use).

*West Virginia.*—Bryan v. Peabody Ins. Co. 8 W. Va. 605 (held not a warranty, but mere matter of description).

policy was not avoided, even though it was unoccupied at the time.[20] It is also held that the description of a building as a "dwelling-house" is not, in the absence of misrepresentation or concealment as to the fact of occupation, a warranty that the building is occupied as a dwelling, and the omission of the applicant to disclose the fact that the building is vacant, in the absence of any inquiry on that point is not a breach of a condition that any omission to make known every material fact shall avoid the policy.[1] So where an insurance was upon the building and furniture therein, it was held not necessarily a continuing warranty of occupation as stated, and that the vacancy of the house was not per se an increase of risk,[2] and keeping private boarders in a house insured and actually occupied as a dwelling by assured does not avoid the policy in the absence of some express prohibition or other contract provision to the contrary.[3] Nor is a warranty, that the insured premises are "occupied as a boarding-house," broken by their occupancy in part as a bar-room and billiard-room, where such occupancy is not forbidden and does not increase the risk.[4] So a representation that a building is occupied is not made by describing it as a dwelling house.[5] And if the building is described as a "hotel," it is sufficient that it is then so used.[6] So one applying for insurance on a "dwelling house" which he states is in process of erection, complies with his undertaking if, when occupied, the building is used for that purpose.[7] It is also held that where a policy was upon goods described as contained in a dwelling-house "occupied all the year round," there is a sufficient compliance with the warranty that the building was so occupied at the time of insurance and of loss, where it also appeared that it was permanently occupied during the entire period with the exception of about a month, and that the occupation was resumed about six months before the loss.[8] Again, a clause that barns are "used for hay, straw, grain unthreshed, stabling, and shelter," is not a continuing warranty of exclusive use for such purposes. The words are a description, or, at most, a warranty that the build-

[20] Woodruff v. Imperial Fire Ins. Co. 83 N. Y. 133.

[1] Browning v. Home Ins. Co. 71 N. Y. 508, 27 Am. Rep. 86.

[2] Cumberland Valley Mutual Protection Co. v. Schell, 29 Pa. St. 31.

[3] Milwaukee Mechanics' Ins. Co. v. Fuquay, 120 Ark. 330, 179 S. W. 497.

[4] Martin v. State Ins. Co. 44 N. J. L. 485, 43 Am. Rep. 397.

[5] Slabodisky v. Phenix Ins. Co. 53 Neb. 816, 74 N. W. 270.

[6] Hall v. People's Mutual Fire Ins. Co. 6 Gray (72 Mass.) 185.

[7] Harris v. North American Ins. Co. 190 Mass. 361, 4 L.R.A.(N.S.) 1137 (annotated on building in process of erection as vacant), 77 N. E. 493.

[8] Ring v. Phœnix Assur. Co. 145 Mass. 426, 14 N. E. 525.

ings at the time they were insured were as described.[9] Nor can a claim that a building was warranted to be occupied by the insured and his family be sustained when his answer to the question contained in the application, "Each story how occupied?" is this, "Second story by tenant as a lodging-house." [10]

In case there is stamped on the face of the policy a warranty that "the within-described building is occupied exclusively for dwelling purposes by not more than two families" it will be construed as meaning primarily that said building is used exclusively for dwelling purposes, so that, in the absence of waiver, if it is used for business purposes there is a breach of warranty.[11] In another case the description of the building as a dwelling-house was also held a warranty of exclusive use for that purpose, and that there was a breach where the building was used for a purpose coming within the class designated as extra-hazardous, such as its occupation in the past for a billiard saloon and bar.[12] So a statement that the insured building is a dwelling is held not a representation but a warranty which is breached where it is used as a feed store, thereby avoiding the policy.[13] And use as a dwelling house does not include a grocery store.[14] A statement that the building is occupied as a "dwelling and boarding-house" is also held a warranty of its then occupation.[15] So the declaration of occupation as "hotel with bar and billiard-room attached" constitutes a warranty of exclusive use at that time as stated, the policy stipulating that false representations or concealment as to the use shall avoid the contract.[16] Again, if the policy warrants that a family shall live in the house throughout the year, such warranty is not complied with where at the time of the fire, and for some time previous, the premises were occupied only by two workmen, who ate and worked elsewhere during the day, but kept their trunks and clothing in the house and slept there at night.[17]

There is a waiver of a breach of warranty as to exclusive occu-

[9] Billings v. Tolland County Mutual Fire Ins. Co. 20 Conn. 139, 50 Am. Dec. 277.

[10] Menk v. Home Ins. Co. 76 Cal. 51, 9 Am. St. Rep. 158.

[11] De Noyelles v. Delaware Ins. Co. of Phila. 138 N. Y. Supp. 855, 42 Ins. L. J. 403.

[12] Sarsfield v. Metropolitan Ins. Co. 61 Barb. (N. Y.) 479, 42 How. Pr. (N. Y.) 97.

[13] Lennox v. Greenwich Ins. Co. 9 Pa. Super. Ct. 171, 29 Pitts. L. J. N. S. 279, 43 Wkly. N. C. 398, s. c. 2 Pa. Super. Ct. 451, 39 Wkly. N. C. 188.

[14] Greenwich Ins. Co. v. Dougherty, 64 N. J. L. 716, 42 Atl. 485.

[15] Franklin Fire Ins. Co. v. Martin, 40 N. J. L. 568, 29 Am. Rep. 271.

[16] Baker v. German Fire Ins. Co. 124 Ind. 490, 24 N. E. 1041.

[17] Poor v. Humboldt Ins. Co. 125 Mass. 274, 28 Am. Rep. 228.

On effect of sleeping on premises to prevent their becoming vacant or unoccupied within insurance policy, see note in 40 L.R.A.(N.S.) 58.

pation for dwelling purposes, where insurer has knowledge at the time of accepting the premium and delivering the policy that the building was used for business purposes.[18] And the agent's knowledge that the insured building which was owned by a city was intended for occupation for small pox patients, or as a pest house, and was not occupied by the city sexton as stated precludes assurer from avoiding the policy.[19] And if the agent was informed that one room of the insured dwelling was used as a millinery store but he described it in the application as a dwelling house, telling assured it should be so described, assurer is estopped to assert that the policy is void even though both it and assurer's charter prohibit waiver by agents with certain exceptions.[20] Again, where the building insured was described in the policy as a "Pri. frm. dwg., by me or tenant" but at the time of destruction it was used as a storehouse for machinery and it appeared that the agent to whom the application was made was informed that the building could not be kept occupied as a dwelling by tenants during the policy term and he was requested to prepare the application so that the building would be covered by the policy whether used as a dwelling, storehouse, or granary and said agent agreed for an extra premium, which was paid, to do so, but instead the policy was made out as above stated, a direction of a verdict in favor of insurer was held error.[1] In case dwelling houses in process of erection are insured under a warranty that they shall be occupied by a family during the life of the policy and they are not completed at the time of the fire but permission to complete them had been given by agreement added to the policy, signed by an agent authorized to execute and issue it, the warranty of occupation is waived.[2] So where insurance is upon property while occupied as a dwelling and greenhouse recovery is not precluded, even though the greenhouse was never used for that purpose, where the agent knew that insured intended that the dwelling, then attached to a greenhouse, was to be moved to another lot and connected with a greenhouse then being constructed, and also that each building was to be occupied for its own particular use, and permission was given to complete the building which was moved and enlarged but not connected with

[18] De Noyelles v. Delaware Ins. Co. of Phila. 138 N. Y. Supp. 855, 42 Ins. L. J. 403.

[19] City of De Soto v. American Guaranty Fund Mutual Fire Ins. Co. 102 Mo. App. 1, 74 S. W. 1.

[20] Ross-Langford v. Mercantile Town Mutual Ins. Co. 97 Mo. App. 79, 71 S. W. 720.

[1] Cornelius v. Farmers' Ins. Co. — Iowa, —, 81 N. W. 236, 29 Ins. L. J. 509, s. c. 113 Iowa, 183, 84 N. W. 1037.

[2] Bakkaus v. Caledonia Ins. Co. 112 Md. 676, 77 Atl. 310, 39 Ins. L. J. 1431.

the greenhouse.[3] Nor is a building in process of construction within the meaning of an instruction by an insurance company to its agent not to insure unoccupied buildings.[4] A building is a dwelling house where the upper part thereof is fitted up and occupied as such although the lower part is not occupied by anyone it having once been used as a creamery, of which fact insurer's agent had knowledge.[5]

If personal property is insured while located and contained in a building occupied as a private dwelling the fact that it was so occupied at the time of the fire should be shown by the complaint in an action to recover for the loss, if, however, after a general denial said fact as well as that the property was contained therein are admitted a demurrer may properly be overruled,[6] and the burden of proof of increase of hazard in such cases is on the insurer.[7] In another case the defense was that the house was insured as a dwelling but in fact it was used as a place for the manufacture of candy and the question was one of falsely concealing the fact that the building was a factory and not a dwelling house. It was held that the burden of proving that the plaintiff who obtained the policy knew that the house when the policy was issued was used as a factory, and where the evidence does not show any fraudulent concealment of said fact the question should at least be submitted to the jury and it is error to instruct the jury to find for the defendant.[8] And, for the purpose of showing insurer's knowledge, evidence is material, competent, and relevant that there were maps and cards in the office and possession of insurer's agent which showed the occupancy of the insured premises and which were kept for the purpose of obtaining information as to such matters; and said evidence is admissible even though it contradicts another witness called by the same party, since a distinction is made between contradicting and impeaching a witness.[9] If in addition to the description as a dwelling-house the policy is conditioned to be void for any increase of hazard by change of use or occupancy, there is then a continuing warranty of

[3] Holter Lumber Co. v. Fireman's Fund Ins. Co. 18 Mont. 282, 45 Pac. 207, 26 Ins. L. J. 10.

[4] Harris v. North American Ins. Co. 190 Mass. 361, 4 L.R.A.(N.S.) 1137n, 77 N. E. 493.

[5] Walrod v. Des Moines Fire Ins. Co. 159 Iowa, 121, 140 N. W. 218, 42 Ins. L. J. 732.

[6] Germania Fire Ins. Co. v. Barringer, 43 Okla. 79, 142 Pac. 1026.

As to description of property: locality: contained in, see §§ 1742 et seq. herein.

As to representations and warranties: location, see § 2068 herein.

[7] Planters' Ins. Co. v. Sorrels, 1 Baxt. 352, 25 Am. Rep. 780.

[8] Bailey v. Liverpool & London & Globe Ins. Co. 166 Mo. App. 593, 149 S. W. 1169, 41 Ins. L. J. 1819.

[9] De Noyelles v. Delaware Ins. Co. of Phila. 138 N. Y. Supp. 855, 42 Ins. L. J. 403.

use, but the question whether a change in use increases the hazard is for the jury.[10]

**§ 2104. Use and occupation: hazardous trade or business.**[11]—If the fact is known to the company's agent that a hazardous trade is carried on in an adjoining building, and an extra premium is charged by reason thereof, the policy is not avoided because such fact is not recited therein.[12] But a prohibition against exercising a hazardous or extrahazardous business is in effect a prospective or promissory warranty, the violation of which avoids the policy, although it has been discontinued.[13]

**§ 2105. Use and occupation: house of ill-fame: disorderly or bawdy house.**[14]—Although the warranty is that the insured building is occupied as a hotel, it being leased for that purpose and apparently so used, no breach arises from the fact that it is then occupied and used as a house of ill-fame, the assured not having knowledge thereof and not consenting thereto.[15] In determining the materiality of the fact not disclosed that the insured property was used as a house of ill fame, the point should be considered that increased premiums are not charged on risks of such a character, should be considered and the natural consequences of such use are only to be regarded; acts of lawless violence are not such.[16] And if a contract of insurance is made in good faith, without any purpose to effect, advance, or encourage acts in violation of law, the policy is not void.[17]

**§ 2106. Use and occupation: manufactory: mill.**[18]—Where the property was described as a four-story warehouse, "first floor occupied by machinery used for making barrels, with privilege of storing barrels on the premises and other merchandise not more "hazardous," and a true and accurate description of the use and occupation was stipulated, otherwise the policy to be forfeited, it was held

[10] Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868.

[11] See § 1987 herein.

As to prohibited uses: hazardous and extra hazardous, see §§ 2211 herein.

[12] Southern Ins. & Trust Co. v. Lewis, 42 Ga. 587.

[13] Mead v. Northwestern Ins. Co. 7 N. Y. 530.

Compare as to temporary increase of risk, § 2239 herein.

[14] See § 1987 herein.

Use of premises for unlawful purposes, see § 2218 herein.

Where traffic insured, unlawful, or unlawful business carried on upon insured property, see § 2536 herein.

[15] Hall v. People's Mutual Fire Ins. Co. 6 Gray (72 Mass.) 185.

[16] Loehner v. Home Mutual Ins. Co. 17 Mo. 247. See § 2218, post, "Use of premises for unlawful purpose."

[17] Corinthian v. Royal Ins. Co. 91 Miss. 386, 18 L.R.A.(N.S.) 214 (annotated on insurance on bawdy house or furniture therein), 124 Am. St. Rep. 701, 45 So. 361.

[18] See § 1987 herein.

As to conditions voiding policy: ceasing to operate factory: operating factory, etc., at night, see §§ 2216, 2216a herein.

that this was not a continuing warranty, but a warranty in praesenti.[19] So a warranty that the property is a paper-mill is not broken merely by discontinuing the use of the paper-mill and putting in a pair of mill stones for grinding in place of the rag cutter and duster, all the other machinery continuing the same as before.[20] And the drawing of a lottery with the consent and participation of the assured in a building insured against loss by fire as a "shoe manufactory" does not avoid the policy on the building, nor on the stock therein.[1] So although the contract states that no steam engine is used, this does not preclude the erection of one thereafter, provided it does not increase the risk. In this case there was, however, a condition against an increase of risk.[2] But if the description is made a warranty, and the property is described as a grist-mill, it is held that it must not be used for other purposes.[3] In another case the business carried on was described as the manufacture of bath tubs. On adjoining premises the insured also conducted the business of sawing and planing lumber, and the shavings therefrom were carried by a tube to feed the boiler furnace on the insured premises; it was held that this did not amount to a carrying on of the business of sawing and planing lumber on the insured premises.[4] In a Federal case the policy was upon a builder's risks to cover a structure in process of construction which was to be equipped with requisite ore-crushing machinery. The premium rate being greater for occupied premises than for those being constructed there was a warranty that they should not be occupied for a longer period than thirty days without special permission in writing and readjustment of rate. The question whether there was an actual occupancy within the terms of the policy or whether it was an occupancy merely for experimental tests and adjustment of machinery was held to be a question of fact upon the evidence. A judgment below for insured was reversed and a new trial granted.[5]

**§ 2107. Use and occupation: manufactory: incidental uses.**[6]—If a manufactory is insured as used for a certain kind of business, this will, as a rule, include therein such things as are incidental

[19] United States Fire & Marine Ins. Co. v. Kimberly, 34 Md. 224, 6 Am. Rep. 325.

[20] Wood v. Hartford Ins. Co. 13 Conn. 533, 35 Am. Dec. 92.

[1] Boardman v. Merrimack Ins. Co. 8 Cush. (62 Mass.) 583.

[2] Stokes v. Cox, 1 Hurl. & N. 533, 26 L. J. Ex. 113, 3 Jur. (N. S.) 45, 5 W. R. 89.

[3] Jennings v. Chenango County Mutual Ins. Co. 2 Denio (N. Y.) 75.

[4] Keeney v. Home Ins. Co. 71 N. Y. 396, 27 Am. Rep. 60.

[5] Scottish Union & National Ins. Co. v. Encampment Smelting Co. 166 Fed. 231, 92 C. C. A. 319, 38 Ins. L. J. 495.

[6] See § 1987 herein.

to and reasonably necessary for carrying on the business; as where a building was described as used for the manufacture of lead pipe, the manufacture of reels for coiling the same is within the use.[7] The question, however, whether the use is such an incident of the business as to be included therein, may be one for the jury. This was so held where the application contained the inquiry "for what purpose the building was used," and the answer was, "Tobacco pressing; no manufacturing;" but the evidence showed that in a shed attached to the main building tobacco hogsheads were manufactured.[8]

**§ 2108. Use and occupation: running factory nights.**[9]—In a Maine case the question was asked, "during what hours is the factory worked?" and it was stated in answer thereto that it was worked during certain specified hours up to 7 P. M., summer and winter, "short time now." The factory was thereafter run all night for a certain time, when the insurer's agent, with knowledge of the facts, consented for an additional premium that the same might be continued, and the case was decided upon this point, such act being held a waiver, but the court, although expressly saying that it was unnecessary to determine whether the running all night unattended with loss operated to forfeit the policy, nevertheless declared that it might be fairly inferred that it was expected that the factory would be run nights at times.[10]

**§ 2109. Use and occupation: stores: storehouse: storage.**[11]—If the building is described as used in a certain part for stores, it is not necessary that all of said part should be so occupied; a substantial compliance is sufficient.[12] The words "occupied as a storehouse" are a warranty, and must be complied with, and if occupied for any other purpose the contract will be void,[13] although the clause "used for the storage of ice" is merely descriptive of the business ordinarily carried on in the building, and not a warranty that ice is then stored therein at that time.[14] And the fact that a milliner who pays no rent occupies a small room in a build-

[7] Collins v. Charlestown Mutual Fire Ins. Co. 10 Gray (76 Mass.) 155.

[8] Sims v. State Ins. Co. 47 Mo. 54, 4 Am. Rep. 311.

[9] See § 1987 herein.

[10] North Berwick County v. New England Fire & Marine Ins. Co. 52 Me. 336. See § 2239 herein.

When statements as to night work in factory is not a warranty, see Phoenix Assur. Co. v. Munger Improved Cotton Machine Mfg. Co. 92 Tex. 297, 49 S. W. 222, 28 Ins. L. J. 248, aff'g — Tex. Civ. App. —, 49 S. W. 271.

[11] See § 1987 herein.

[12] Carter v. Humboldt Mutual Ins. Co. 17 Iowa, 456. See also Peoria Marine & Fire Ins. Co. v. Perkins, 16 Mich. 380.

[13] Wall v. East River Mutual Ins. Co. 3 Seld. (7 N. Y.) 370, 3 Duer (N. Y.) 264.

[14] Dolliver v. St. Joseph Fire & Marine Ins. Co. 131 Mass. 39.

ing in which insured has stated that goods were stored does not avoid the policy where assured has control of the room.[15]

**§ 2110. Use and occupation: stores: when continuing warranty.**[16]—A statement that the lower part of the building is occupied for stores is not a continuing warranty, but only that it is at the time so occupied, and, if then false, the policy is avoided, but a warranty that the upper portion of the building is "to remain unoccupied during the continuance of the policy" is a promissory or executory warranty, a non-compliance with which at any time during the existence of the policy will operate to avoid it, whether material to the risk or not.[17]

**§ 2111. Use and occupation: tenants: continuing warranty.**[18]—In the absence of an express stipulation to the contrary, a change of tenants has no effect on the contract of insurance on a dwelling-house if the use be not changed;[19] and even though the then tenant was careful and prudent, and the substituted tenant grossly negligent, the policy is not avoided by the change, as this is not in itself a technical increase of risk.[20] It is also held that the breach of a condition in a policy that it shall be "void if the building insured now is, or shall hereafter be, occupied by a tenant," does not render the policy void in case the premises are so occupied, but voidable merely at the election of the insurer, and when an election has once been exercised, the insurer will be confined to its choice.[1] If it be warranted that a vacant house will be occupied by a tenant, and the policy states no certain time within which the warranty is to be performed, it is sufficient if it is complied with in a reasonable time.[2] But it is decided the holder of a policy on a dwelling-house described therein as occupied by good tenants cannot recover for a loss, if such house was in fact vacant when the policy was

[15] Liverpool & London & Globe Ins. Co. v. Colgin, — Tex. Civ. App. —, 34 S. W. 291.

[16] See § 1987 herein.

[17] Stout v. City Fire Ins. Co. 12 Iowa, 371, 79 Am. Dec. 539.

[18] See § 1987 herein.

[19] Cumberland Valley Mutual Protection Co. v. Douglass, 58 Pa. St. 419, 98 Am. Dec. 298. In this case the court said: "And if a building be insured as an 'occupied dwelling-house,' it is a matter of description rather than a stipulation affecting its use. So it is greater or less in case of tenancy by different persons, but in the absence of express stipulation to the contrary, a change of tenants will not affect the contract if the use be not changed."

[20] Gates v. Madison County Mutual Ins. Co. 1 Seld. (5 N. Y.) 469; Lyon v. Commercial Ins. Co. 2 Rob. (La.) 266; Hobson v. Wellington Ins. Co. 6 U. C. 356. See § 2223, post, as to change of occupancy.

[1] Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 3 L.R.A.(N.S.) 966 (annotated on effect on vacancy clause of tenant's removal without owner's knowledge), 117 Am. St. Rep. 382, 76 N. E. 977.

[2] Hough v. City Fire Ins. Co. 29 Conn. 10, 76 Am. Dec. 581; Herrick v. Union Mutual Fire Ins. Co. 48 Me. 558, 77 Am. Dec. 244.

issued. Such statement is a warranty; and to entitle the insured to recover, it must have been true, even though it was made in ignorance, and without any desire to misrepresent any of the facts.[3] Although the statements are made warranties, and the answer to the question, "For what is the building used and how many tenants are there?" is merely "Dwelling," it is doubtful whether this constitutes a warranty that it is then occupied. The question as to tenants being unanswered, the most that could be implied from the answer is that it is used as a dwelling, and if the agent or insurer who filled out the application had knowledge that it was not so used, such agent's knowledge estops the insurer.[4]

Knowingly issuing a policy upon a building in possession of a tenant waives a provision of the policy that it shall be void if the building shall be in such possession.[5] If a fire policy is intended to cover property occupied by the owner, and provides that it shall become void if such property shall become unoccupied or occupied by a tenant, but is used to insure property exclusively occupied by tenants to the knowledge of the insurer at the time of issuing the policy, such conditions for forfeiture are inapplicable and cannot be enforced.[6] But a letter from an insurance agent to the adjuster of the insurer, stating that the insured premises had been let and sublet, and that the subtenant had left the premises about four hours before the loss, does not admit the occupancy of the building at the time of the fire.[7]

**§ 2112. Watchman on premises: watch-clock: sleeping in store: continuing warranty.**[8]—If the statement that a watchman is kept at certain times or during the night, or constantly, is made a warranty, it is a continuing warranty,[9] but such a construction is not favored where any other reasonable one can be given, especially where words are used in the present tense.[10] So although a clerk sleeps in the store at the time of effecting the policy, one need not necessarily continue to sleep there unless the policy so provides, or unless it be shown that the rate of premium was affected thereby,

[3] Boyd v. Insurance Co. 90 Tenn. 212, 25 Am. St. Rep. 676, 16 S. W. 470.

[4] Alexander v. Germania Ins. Co. 5 Thomp. & C. (N. Y.) 208, 2 Hun (N. Y.) 655.

[5] Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 3 L.R.A.(N.S.) 966, 76 N. E. 977.

[6] Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 3 L.R.A.(N.S.) 966, 117 Am. St. Rep. 382, 76 N. E. 977.

[7] Stotenberg v. Continental Ins. Co. 106 Iowa, 565, 68 Am. St. Rep. 323, 76 N. W. 835.

[8] See § 1987 herein.

[9] Blumer v. Phœnix Ins. Co. 48 Wis. 535, 33 Am. Rep. 830, 4 N. W. 674, s. c. 45 Wis. 622 (one judge dissenting); Ripley v. Ætna Ins. Co. 30 N. Y. 136, 86 Am. Dec. 362.

[10] Virginia Fire & Marine Ins. Co. v. Buck, 88 Va. 517, 13 S. E. 973; Albion Lead Works v. Williamsburg City Fire Ins. Co. 2 Fed. 479.

or that the insurer was prejudiced by the fact that a clerk did not sleep there at the time of the loss.[11] If an application for insurance addressed to a certain company contains a statement that a watchman is kept on the premises, but the agent splits up the insurance among the various companies which he represents, the application does not become a part of the contract between the insured and the companies to which it was not addressed.[12]

The form of the question and answer and the character of the risk must necessarily be important in connection with the stipulations of the policy. Usage also of what is done in similar establishments is held admissible.[13] So an important factor to be considered is, whether or not the policy defines the specific duties of a watchman other than by the use of that word alone, and the nature of the risk with relation to the degree of care necessitated should also be given consideration, as where such services can be and ordinarily are performed by any reasonably competent, reliable person or employee whose duty it is and who is sufficiently familiar therewith, to attend to such matters.[14] The cases throughout this section also further instance the application and force of the above statement. Nor is it material to the fact whether a watchman is kept that he is not called a watchman.[15] It is also a consideration of force that insured exercised good faith in employing and instructing competent watchmen.[16] And it is assured's duty to exercise ordinary care in fulfilling the terms of his warranty, where the requirement is, where a ferryboat is insured, that two competent watchmen shall be employed, one of whom shall be on board and on duty all the time, and the watchman should likewise exercise, in the performance of duty, such care and skill as is usually exercised by reasonable prudent and careful men in watching similar

[11] Grubbs v. Virginia Fire & Marine Ins. Co. 110 N. C. 108, 14 S. E. 516.

[12] Waukau Milling Co. v. Citizens' Mutual Fire Ins. Co. 130 Wis. 47, 118 Am. St. Rep. 998, 109 N. W. 937, 36 Ins. L. J. 119, 10 Am. & Eng. Ann. Cas. 795.

[13] This was so held where the policy was upon a machine shop. It was also held in the same case that a statement that a watchman is kept on the premises does not require one to be constantly kept there, but only that he be employed at such times as men of ordinary care and skill would deem necessary under the circumstances. Crocker v. People's Mutual Fire Ins. Co. 8 Cush. (62 Mass.) 79.

[14] Mannheim Ins. Co. v. Charles Clarke & Co. — Tex. Civ. App. —, 157 S. W. 291, 42 Ins. L. J. 1177, 1185.

[15] Au Sable Lumber Co. v. Detroit Manufacturers' Mutual Fire Ins. Co. 89 Mich. 407, 21 Ins. L. J. 311, 50 N. W. 870.

[16] Theriault v. California Ins. Co. of S. F. 27 Idaho, 476, 149 Pac. 719. See Phoenix Assur. Co. v. Coffman, 10 Tex. Civ. App. 631, 32 S. W. 810.

premises.[17] The question is whether a watchman was employed and acted as such. The amount paid him is immaterial.[18]

A provision on a slip of paper pasted on the face of an insurance policy and having no connection with the warranties expressed therein that a watchman shall be employed by the insured to be constantly on the premises while the mill is not in operation, does not release the company from liability for a loss which is not due to a failure to keep the watchman.[19] And if the watchman is still on duty when the business of the factory is suspended, there is no forfeiture, even though discontinuing the operation of the factory is conditioned to work a forfeiture.[20] Under another decision an agreement on the part of the assured to keep a watchman on the premises when the machinery is not in operation, is a condition subsequent, a breach of which releases the insurer, but the obligation must not be so strictly construed as to effect a result which the parties cannot be reasonably presumed under all the circumstances of the case to have intended, therefore the temporary absence of a watchman from the insured premises without the consent or knowledge of the insured, during which a fire occurs, will not release the insurer, though in the application he agreed to keep a watchman on the premises at all times when the machinery was not in operation. He complied with the condition thereby imposed on him when he employed and retained a watchman whose competency and fidelity he had no occasion to distrust.[1] Nor does the failure to have a watchman on duty while the insured plant is shut down temporarily over Sunday, avoid the policy, where the requirement is that a day and night watchman be constantly kept on duty while the property was idle or inoperative, and that if it was shut down for more than thirty days permission must be indorsed upon the policy therefor, for in such case a cessation from the ordinary operation of the plant is meant and in this respect the words "idle and inoperative" and "shut down" will be held synonymous,[2] but the employment of a watchman, as a rule, fulfills the requirement that one be employed on the premises, day and night, and the policy is not avoided by the fact that he was

[17] St. Paul Fire & Marine Ins. Co. v. Kendle, 163 Ky. 146, 173 S. W. 373.

[18] Virginia Fire & Marine Ins. Co. v. Buck, 88 Va. 517, 13 S. E. 973.

[19] Hart v. Niagara Fire Ins. Co. 9 Wash. 620, 27 L.R.A. 86, 58 Pac. 213.

[20] American Fire Ins. Co. v. Brighton Cotton Manufacturing Co. 125 Ill. 131, 17 N. E. 771.

[1] McGannon v. Millers' National Ins. Co. 171 Mo. 143, 94 Am. St. Rep. 778, 71 S. W. 160, 32 Ins. L. J. 347.

[2] Tillamook Lumber Co. v. Liverpool & London & Globe Ins. Co. (U. S. C. C.) 175 Fed. 508, 34 Ins. L. J. 693, aff'd in Liverpool & London & Globe Ins. Co. v. Tillamook Lumber Co. 178 Fed. 161, 101 C. C. A. 481, 39 Ins. L. J. 1122.

sixty-five feet away at the time of the fire, where he was engaged in watching the property from a point which afforded a better view of the premises than if he had been in the mill.[3] And where a watchman was near by on the premises for two hours before the fire broke out, the requirement that one be kept on the premises at all times when the insured mill was not in operation is satisfied.[4] The temporary absence of a watchman in a matter directly in the line of his duty, where he immediately returns, is not a breach of the requirement that a watchman be kept about the premises.[5] Again, if the policy on a tug does not require that the watchman should be one especially employed for that purpose a warranty that the tug shall at all times have a competent watchman on board is fully complied with where a competent person performed this duty, although he performed other duties in the operation of the tug and was negligent on the occasion in question and did not keep watch as he should have done, and this is also so held although said duty of watchman may have been imposed on different members of the crew at different times.[6]

It is held that an answer to the question whether a watchman is employed on the premises during the night is a representation material to the risk, which must be regarded as obligatory on the insured.[7] But a warranty is not broken that a watchman be kept on duty at night, where without his employer's knowledge he goes to sleep during the time he should be on duty,[8] especially so where said watchman was employed in good faith.[9] A man employed to watch in the daytime, and who is permitted to sleep at night, is not a watchman at night within the meaning of a fire insurance policy providing that a "watchman shall be employed by the insured, to be in and about the premises day and night."[10] So where the words were "watchman on premises at night," it was held merely an affirmative warranty relating to the time of the application, and the fact that the watchman was away on the night of the fire constituted no defense, the insured having no knowledge

[3] Sierra Milling, Smelting & Mining Co. v. Hartford Fire Ins. Co. 76 Cal. 235, 18 Pac. 267.

[4] Kansas Mill Owners' & Manufacturers' Mutual Fire Ins. Co. v. Metcalf, 59 Kan. 383, 53 Pac. 68.

[5] Au Sable Lumber Co. v. Detroit Manufacturers' Mutual Fire Ins. Co. 89 Mich. 407, 21 Ins. L. J. 311, 50 N. W. 870.

[6] Mannheim Ins. Co. v. Charles Clarke & Co. — Tex. Civ. App. —, 157 S. W. 291, 42 Ins. L. J. 1177.

[7] Sheldon v. Hartford Mutual Ins. Co. 22 Conn. 235, 58 Am. Dec. 420.

[8] Burlington Fire Ins. Co. v. Coffman, 13 Tex. Civ. App. 439, 35 S. W. 406.

[9] Phoenix Assur. Co. v. Coffman, 10 Tex. Civ. App. 631, 32 S. W. 810.

[10] Rankin v. Amazon Ins. Co. 89 Cal. 203, 23 Am. St. Rep. 460, 26 Pac. 872.

thereof.[11] "During the night" means throughout the night when used in connection with keeping a watchman.[12] So the answer that "there is a watchman nights," is held in New York to mean every night, and the warranty is broken and the policy annulled if no watch is kept from twelve o'clock Saturday night till twelve o'clock Sunday night.[13] And the same decision was given in Connecticut, where the statement was, "There is a watchman nights; no clock; bell is struck every hour." [14] Although in another Connecticut case the answer, "There is a watchman nights," given to the question, "Is there a watchman, etc., during the night?" was held a material representation requiring substantial performance.[15] If a policy contains a permission for the works to remain idle, accompanied by a warranty by the assured "that at all times when the above works are idle and inoperative, one or more watchmen shall be kept constantly on duty at night," the assured is not required to keep a watchman at night when the works are operated during the day.[16] And where the question as to a watch being kept during the night was answered, "None, except people working in the mill during the night," this was held not to be a warranty that there should be a watch or that men should always be at work at night.[17]

If the policy provides that whenever the plant is idle competent watchmen shall be employed and due diligence shall be used to keep a continuous watch both day and night in and immediately around said parts of the plant, something more than the employment of competent men is required, and a mere agreement by insured with the men that they were to watch intermittently or occasionally at quite a distance from the premises, does not fulfil insured's obligation under the contract.[18] So a nonobligatory arrangement made by insured's watchman, one of whom only was employed, the other acting merely with the owner's consent with

[11] Virginia Fire & Marine Ins. Co. v. Buck, 88 Va. 517, 13 S. E. 973.

On absence of watchman without knowledge of insured as a defense, see note in 34 L.R.A.(N.S.) 563.

[12] Glendale Woolen Co. v. Protection Ins. Co. 21 Conn. 19, 54 Am. Dec. 309.

[13] Ripley v. Ætna Ins. Co. 30 N. Y. 136, 86 Am. Dec. 362. But see Ripley v. Astor Ins. Co. 17 How. Pr. (N. Y.) 244.

[14] Glendale Woolen Co. v. Protection Ins. Co. 21 Conn. 19, 54 Am. Dec. 309.

[15] Sheldon v. Hartford Fire Ins. Co. 22 Conn. 235, 58 Am. Dec. 420.

[16] Mackintosh v. Agricultural Fire Ins. Co. 150 Cal. 440, 119 Am. St. Rep. 234, 89 Pac. 102.

[17] Prieger v. Exchange Mutual Ins. Co. 6 Wis. 89. But see Blumer v. Phœnix Ins. Co. 48 Wis. 535, 33 Am. Rep. 830, 4 N. W. 674, s. c. 45 Wis. 622 (one judge dissenting).

[18] Shoshone Concentrating Co. v. Hamburg-Bremen Fire Ins. Co. 64 Wash. 638, 117 Pac. 500.

the watchman of another yacht forty or fifty feet away, does not constitute a compliance with a requirement that at least two competent watchmen should be employed, and that one of them should be on duty at all times.[19] And if a watchman sleeps at night so far away that he cannot see the mill, he cannot be said to be a night watchman kept in the mill.[20] Again, where insured warranted that his boat should at all times have a competent watchman on board and it appears that the sole watchman aboard went ashore to secure a change of clothing, and while absent the boat caught fire and was consumed, said act of insured's agent, even though done without his knowledge, constitutes a material breach of warranty.[1] One who sleeps on the premises is not a watchman kept there at night.[2]

In Michigan all policies, whether standard or not, are covered by a statute declaring that no policy of fire insurance shall be declared void by the insurer for breach of any condition if the insurer has not been injured by it.[3] In a Federal case it is held that there is no merit in the claim that the failure of insured to maintain upon the insured premises forty combination night watch and fire alarm boxes of the A. D. T. system, that a watchman should be on duty nights, Sundays and holidays and at all times when the premises were not in operation, and that the watchman on duty should ring in to the main or central office each hour for the purpose of registration, for in such case even though it is admitted that said hourly requirement is never complied with, still if it is also conceded that such noncompliance or failure to so report hourly, in no way contributed to the loss, and as a matter of fact the watchman on duty sent in a fire alarm promptly, the statute of the state applies which provides that a policy shall not be avoided for the breach of a warranty or condition unless the breach existed at the time of loss and contributed to the loss.[4] If

[19] Mannheim Ins. Co. v. Tyner, 142 Ky. 22, 133 S. W. 1000.

[20] Wenzel v. Commercial Ins. Co. 67 Cal. 438, 7 Pac. 817. See McKenzie v. Scottish Union & National Ins. Co. 112 Cal. 548, 44 Pac. 922.

[1] Whealton Packing Co. v. Ætna Ins. Co. 185 Fed. 108, 107 C. C. A. 113, 34 L.R.A.(N.S.) 563, *citing* Norwaysz v. Thuringia Ins. Co. 204 Ill. 334, 68 N. E. 551; Snyder v. Home Ins. Co. (U. S. D. C.) 133 Fed. 848, aff'd 148 Fed. 1021, 79 C. C. A. 536; Ripley v. Aetna Ins. Co. 30 N. Y. 136, 86 Am. Dec. 362; First National Bank v. Insurance Co. of N. A. 50 N. Y. 45; Ryan v. Providence Washington Ins. Co. 79 N. Y. Supp. 460, 79 App. Div. 316.

[2] Brooks v. Standard Fire Ins. Co. 11 Mo. App. 349.

[3] McGannon v. Michigan Millers' Mutual Fire Ins. Co. 127 Mich. 636, 54 L.R.A. 739, 89 Am. St. Rep. 501, 87 N. W. 61, 30 Ins. L. J. 872.

[4] E. H. Stanton Co. v. Rochester German Underwriters Agency (U. S. D. C.) 206 Fed. 978, 42 Ins. L. J. 1621; Wash. Ins. Code, 1911, sec. 34; L. 1911, pp. 161, 197, which provides

insurer has no knowledge of the breach of a warranty as to vacancy and a "watchman with approved watch clock clause" but expressly waives compliance therewith by a vacancy permit in consideration of the basis rate on which the policy is written, and also upon condition of full compliance with said warranty, such waiver has no force.[5]

The burden of proof rests upon insurer to show alleged remissness of duty on the part of the watchman; but whether he was on duty even though not awake all the time is a question for the jury.[6] It is also a question for the jury whether a temporary absence from an insured boat lying in port, the watchman going on shore to get a meal, is in accordance with a custom so to do, no meals being cooked on board ship.[7] So where a vessel was stipulated to be in charge of a watchman, it was held a question for the jury whether there was a sufficient compliance where the watchman was employed to watch this and other vessels, and was in a yard near by where the vessel lay.[8] So the term "good watch kept" will be construed to mean a suitable or proper watch, and the question whether such a watch is kept is for the jury.[9]

that: "The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contributed to the loss; anything in the policy or contract of insurance to the contrary notwithstanding. In case a loss occurs while a breach of warranty exists, if it contributes to the loss, the insured shall only be entitled to recover the amount of insurance the premium paid would purchase at the rate that would be charged without the warranty. This section shall be liberally construed."

[5] Frick v. Millers' National Ins. Co. — Mo. —, 184 S. W. 1161.

[6] St. Paul Fire & Marine Ins. Co. v. Kendle, 163 Ky. 146, 173 S. W. 373.

[7] Gibson v. Farmers' & Mechanics' Ins. Co. 1 Cin. Sup. Ct. 410, 13 Ohio Dec. 629.

[8] Plyer v. German-American Ins. Co. 48 Hun (N. Y.) 618, 1 N. Y. Supp. 395.

[9] Parker v. Bridgeport Ins. Co. 10 Gray (76 Mass.) 302.

# CHAPTER LXI.

## NEUTRALITY AND NATIONAL CHARACTER.

§ 2122. Warranty of neutrality: generally.
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§ 2144. Breach of neutrality from resistance to lawful right of search.

**§ 2122. Warranty of neutrality: generally.**[10]—In time of maritime war it has been customary for the insurer to require a warranty

[10] In this chapter the English admiralty cases are frequently cited. The decisions of Sir William Scott, who was appointed judge of the high

of neutrality, or that the ship or goods insured are neutral property when a neutral desired to effect a policy thereon, or some representation was made that the property belonged to a subject of a neutral state, or was neutral, which is the same as a warranty of neutrality.[11] Although such a warranty is generally expressed in the policy by proper words, it is declared if the insurance is effected by a resident neutral on his own property, that the neutral character at least of the vessel, if not the cargo, may be necessarily inferred, and, although there is no express warranty or representation, the assured impliedly stipulates that he will preserve his property and conduct the voyage insured in a neutral condition and character.[12] This rule was applied where the shipowner effected a policy on freight, and did not disclose the fact known to him that the goods were neutral, no inquiry being made by the insurer. The freight was lost by reason of the fact that false papers were used to disguise the national character of the cargo;[13] otherwise, had no false papers been used, it is not clear what interest the insurer on freight has in knowing the national character of the cargo, as freight is usually paid by the captors.[14] So it is held that the insured is not bound to anticipate a capture and condemnation in violation of the law of nations, and is under no obligation to communicate facts and circumstances from which such capture and condemnation might be apprehended, unless they are such

court of admiralty in 1798, so far as they are an exposition of the general principles of national law, are adopted and relied on by the federal courts, and Chancellor Kent declares that the decisions of the supreme court of the United States evidence that "the authority of that eminent judge stood as high at Washington as it does at Westminster." Griswold v. Waddington, 16 Johns. (N. Y.) 438, 468.

[11] Goix v. Low, 1 Johns. Cas. (N. Y.) 341; Walton v. Bethune, 2 Brev. (S. C.) 453, 4 Am. Dec. 597; Baring v. Christie, 5 East, 398, 3 Bos. & P. 201, 4 R. R. 520, 6 R. R. 759; Baring v. Claggett, 3 Bos. & P. 201, 5 East, 398, 4 R. R. 520, 14 Eng. Rul. Cas. 155; Lothian v. Henderson, 3 Bos. & P. 499, 7 R. R. 829.

*The marine insurance act of England provides:* "Warranty of neutrality. 36.—(1) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk." Marine ins. act 1906 (6 Edw. VII. c. 41) sec. 36 (1); 2 Butterworth's Twentieth Cent. Stat. (1900–1909) p. 408; Chitty's Stat. Eng. p. 890.

As to origin and growth of law of neutrality, see Taylor's Internat. L. pp. 617 et seq., secs. 596 et seq.

On liability of insurer under policy of marine insurance for losses arising out of state of war as affected by warranties, see note in 5 B. R. C. 10.

[12] Stocker v. Merrimack Ins. Co. 6 Mass. 220, per Sewall, J.

[13] See The Rising Sun, 2 Rob. Admr. 104.

[14] See The Atlas, 3 Rob. Adm. 299, 304n.

as to create so general an impression of danger as must enhance the premium of insurance; but a knowledge of facts and circumstances of the latter description is not to be presumed against the insured; and although he may be aware that certain circumstances may become ground of condemnation in violation of the law of nations, there is no implied warranty that they do not exist in relation to the property insured.[15] An exception in a policy of insurance against any loss arising from the violation of existing laws or regulations of belligerent nations restricting neutral commerce, does not cover a loss occurring from the violation of any decree subsequently made.[16]

§ 2123. **Object and meaning of this warranty.**—The object of this warranty is to apprise the insurer of the character of the property and to exclude the risk of belligerent capture. The general warranty has only in view a breach of neutrality under the laws of nations and subsisting treaties, and the engagement of the assured is that the property is neutral for the purpose of being protected, and that no act of the owner or his agents will be committed during the voyage insured constituting a breach of neutrality, and that the ship will be furnished with all necessary documents and papers to establish such neutrality, if questioned, as required by the law of nations and subsisting international treaties;[17] for the assured is bound not only to maintain the property as neutral, but to so conduct himself toward the belligerent parties as not to forfeit his neutrality. A warranty of neutrality will be broken by unneutral conduct of the assured.[18] Notwithstanding the object of this warranty, there are cases in which, although it may be fulfilled, yet the property insured may nevertheless be subjected to loss from seizure by a belligerent; as where goods of an enemy are carried,[19] or there is a breach of an arbitrary ordinance of a belligerent.[20]

[15] Marsh v. Muir, 1 Brev. (S. C.) 134, 2 Am. Dec. 648.

[16] Wood v. New England Ins. Co. 14 Mass. 31, 7 Am. Dec. 182.

For Proclamation of Neutrality of Aug. & Sept. 1914, by President of United States and acts prohibited thereby, see 9 Amer. Jour. of Internat. L. (1915) Suppl. pp. 110 et seq., with list of identical proclamations of belligerents, 9 Id. Special No., pp. 88, 96, 97, 99, 106, 194–206.

[17] Smith v. Delaware Ins. Co. 3 Wash. (U. S. C. C.) 127, Fed. Cas. No. 13,035; Galbraith v. Gracie, 1 Wash. (U. S. C. C.) 219, Fed. Cas. No. 2296.

[18] Cleveland v. Union Ins. Co. 8 Mass. 308; Schwartz v. Insurance Co. of North America, 3 Wash. (U. S. C. C.) 117, Fed. Cas. No. 12,504.

As to "neutral rights and duties in maritime warfare" and articles of Hague Conference of 1907, see Hershey's Essentials of International Pub. L. (1912) pp. 465 et seq., with Bibliography at p. 476.

[19] See Barker v. Blakes, 9 East, 283, 9 R. R. 558.

[20] See Mayne v. Walter, 1 Park. Ins. (8th ed.) 730, 3 Doug. 79.

In warranting the property to be neutral, this will be construed to mean a warranty only that the interest of the insured is neutral; the fact that another who is interested in the cargo is a belligerent does not falsify the warranty where his interest is not insured.[1] But if a part of the interest insured is owned by a belligerent, or if the entire interest is so owned, in consequence of which the risk is increased, the warranty is falsified, and this rule applies where the interest of the belligerent is merely an equitable one, or an interest as cestui que trust.[2]

§ 2124. **Neutral property defined: who is a neutral: domicil.**—Neutral property, within the meaning of the warranty of neutrality or of neutral ownership, is that which belongs to the subject of a neutral state; that is, a state at amity with the belligerent powers, or the property of one who, for the purposes of trade or commerce, has his domicil in the neutral state and has obtained the commercial character, and is entitled to the privileges of a neutral.[3]

We have seen that the fact that one is a citizen of a neutral state does not, as a rule, make his property neutral if he is a resident

[1] Livingston v. Maryland Ins. Co. 6 Cranch (10 U. S.) 274, 3 L. ed. 222. The interest of the belligerent was in the profits of the cargo. See Barker v. Blakes, 9 East, 283, 9 R. R. 558; Bayard v. Massachusetts Fire & Marine Ins. Co. 4 Mason (U. S. C. C.) 256, Fed. Cas. No. 1133.

[2] Murray v. United Ins. Co. 2 Johns. Cas. (N. Y.) 168; Bayard v. Massachusetts Fire & Marine Ins. Co. 4 Mason (U. S. C. C.) 256, Fed. Cas. No. 1133. See Galbraith v. Gracie, 1 Wash. (U. S. C. C.) 219, Fed. Cas. No. 2296; Price v. Dupeau, 1 Brev. (S. C.) 452, 2 Am. Dec. 680.

[3] Tabbs v. Bendelack, 3 Bos. & P. 207n, 4 Esp. 108, reported in 1 Marshall on Ins. (ed. 1810) *386; Wilson v. Maryatt, 8 Term Rep. 31, 1 Bos. & P. 430, reported in 1 Marshall on Ins. (ed. 1810) *68.

"In international practice there are applied two widely divergent criterions or tests of enemy character. France and some of the other European States apply the test of political nationality. The Anglo-American system, which is also applied in a somewhat modified form by Japan, makes enemy or neutral character in maritime warfare depend upon commercial or trade domicil." Hershey's Essentials of International Pub. L. (1912) pp. 442-443. *Quoting* also from Declaration of Paris that "the neutral flag covers enemy's goods, with the exception of contraband of war" and "neutral goods with the exception of contraband of war are not liable to capture under enemy's flag."

The enemy character of vessels is determined for purposes of maritime capture by the domicil of the owner "the domicil here contemplated being that frequently designated commercial (as distinguished from personal) domicil. Therefore, if a vessel, though flying the neutral flag, is found to be the property of a person domiciled or carrying on trade in the enemy country, his interest in her is liable to confiscation." Phillipson's International Law and the Great War (1915) p. 339. See Id. 254. See also as to test of the flag and domicil, Wheaton's Elements of International Law (5th Eng. ed. 1916) pp. 572 et seq.

of a belligerent country, domiciled there for commercial purposes;[4] for if a neutral engages in commerce in an enemy's country on the same footing and advantages, and subject to the same protection and benefits, as native resident subjects, his property so employed becomes incorporated into the general commerce of the hostile country, and therefore liable to confiscation, without regard to his citizenship, for he cannot carry on a substantially hostile commerce and have the immunity and advantages of a strictly neutral character.[5]

If a neutral has partners residing in a belligerent country, a warranty of neutral ownership will be falsified as to trade with the hostile firm, and if a neutral has a commercial establishment in a belligerent state during war, the same rule applies to the hostile trade.[6] But such merchants may also have a neutral domicil for commercial purposes, which will impress goods owned by him with the neutral character, and the above rule will not apply to goods of an owner notwithstanding he may also have a commercial establishment in the belligerent state.[7]

An established domicil in the United States for the purpose of commerce makes the property American, for, in respect to the trade in which such resident is engaged, he is a citizen of this country, even though a foreign subject and not naturalized.[8] But a residence from 1811 to 1813 in this country, at which latter date the insurance was effected, was held not to support a warranty that the property was Swedish, the presumption of permanent residence and domicil here not being repelled by proof.[9]

A hostile national character may impress itself upon the trade and property of one by reason of his habitual employment in the

[4] See §§ 296–299 herein; The Antonia Joanna, 1 Wheat. (14 U. S.) 159, 4 L. ed. 60; The Citto, 3 Rob. 41; The President, 5 Rob. 277; McConnell v. Hector, 3 Bos. & P. 113, 6 R. R. 724; Tabbs v. Bendelack, 4 Esp. 108, per Lord Kenyon; 3 Bos. & P. 207. See O'Meally v. Wilson, 1 Camp. 484, 10 R. R. 732.

[5] See The San Jose Indiano, 2 Gall. (U. S. C. C.) 268, Fed. Cas. No. 12,322, per Story, J.; The Antonia Joanna, 1 Wheat. (14 U. S.) 159, 4 L. ed. 60. See The Venus, 8 Cranch (12 U. S.) 253, 3 L. ed. 553; The Danons, 4 Rob. 255n; The Nayade, 4 Rob. 251; The Vigilantia, 1 Rob. 1. See §§ 296–299 herein.

[6] The Antonia Joanna, 1 Wheat. (14 U. S.) 159, 4 L. ed. 60; The San Jose Indiano, 2 Gall. (U. S. C. C.) 268, Fed. Cas. No. 12,322; Elbers v. United Ins. Co. 16 Johns. (N. Y.) 128. See Arnold v. United Ins. Co. 1 Johns. Cas. (N. Y.) 363; The Franklin, 6 Rob. 127; The Dree Gebroeders, 4 C. Rob. 235; The Vigilantia, 1 Rob. 1.

[7] See The Herman, 4 Rob. Adm. 228; The Portland, 2 Rob. 41.

[8] Bill v. Reid, 1 Maule & S. 726, 14 R. R. 557; Johnson v. Ludlow, 2 Johns. Cas. (N. Y.) 481; Wilson v. Marryatt, 8 Term Rep. 31; The Neptunus, 6 Rob. 408; The Matchless, 1 Hagg. 103.

[9] Elbers v. United Ins. Co. 16 Johns. (N. Y.) 128.

navigation of the hostile state; as in the case of a master or mariner so employed, and this without regard to the question of domicil, but it may be proven, however, to have acquired another and distinct national character.[10] We have further considered the question of domicil under a prior chapter, to which we refer.[11]

If the owner is a neutral or even a subject, but possesses an estate within belligerent colonial territory, the produce therefrom is impressed by the hostile character of the territory, and is liable to capture in transitu if shipped therefrom. In such case the property is not of neutral origin;[12] but if the voyage is not entire and direct from the colonial port of loading to a belligerent port, there may be a bona fide importation to a neutral port and exportation thence. What constitutes a bona fide importation and transshipment, and not an entire voyage from the hostile port to the mother country, rests upon the particular facts in evidence, although landing the cargo is not, it seems, absolutely necessary.[13] And even if a neutral could not lawfully carry on a trade between the mother country of a belligerent and its colonies, which was not allowed to such neutral in time of peace, yet the penalty of for-

[10] The Embden, 1 Rob. 16, *cited* in 1 Duer on Marine Ins. (ed. 1845) 526, sec. 43.

[11] See c. XI. herein; The Herman, 4 Rob. Adm. 228; The Portland, 3 Rob. Adm. 41.

[12] Thirty Hogsheads of Sugar v. Boyle, 9 Cranch (13 U. S.) 191, 3 L. ed. 701. In this case Mr. Chief Justice Marshall said: "The acquisition of land in the Danish colony bound him (the plaintiff) to the fate of that colony. When the colony became British, the soil and its unsold produce became British, and the general commercial or political character of the plaintiff could not affect this transaction. Although as a Dane he was an enemy of Great Britain, yet, as proprietor of land in one of her colonies, he was no enemy and could ship his produce to her in safety from her cruisers" (and at the risk of ours who were then at war with her). See also The Vrow Catharina, 5 Rob. 161; The Phœnix, 5 Rob. 25. And this is true even though such produce be shipped in time of peace, unless it be delivered while peace exists. "By reason," says Sir William Scott in The Vrow Anna Catharina, 5 Rob. 161, "that the proprietor has incorporated himself with the permanent interests of the nation, and is to be taken as a part of it independent of his own personal residence or sympathies." The Phœnix, 5 Rob. 25; The Rensburg, 4 Rob. Adm. 121.

[13] The William, 5 Rob. 349; The Polly, 2 Rob. 361; The Essex, 5 Rob. 369; The Maria, 5 Rob. 365. See 1 Duer on Marine Ins. (ed. 1845) 217–725, where this rule is considered, it being in effect a modification of the "rule of 1756," which prohibited neutrals from carrying on the coasting or colonial trade of the enemy in time of war from which they were excluded in peace: 1 Duer on Marine Ins. 699–717, 763, 770. *Examine* also appendix, 1 Wheat. (U. S.) 507; 1 Kent's Commentaries (15th ed.) 85n; 17 & 18 Vict. c. 5. See also § 2134 herein.

feiture can attach only during the existence of such unlawful trade, which cannot affect or vitiate a subsequent lawful voyage.[14]

If the goods are warranted American, it is not a breach of warranty that the goods are not exported by the importers where the vessel has on board a certificate of origin of a belligerent colony, it being a document in the course of trade without which the cargo would not be admitted to entry.[15] In the British prize courts it is declared that the question of national character is made to depend upon the ownership at the date of the seizure and is to be determined by the evidence, also that enemy ownership is the true criterion for condemnation; and this is applied to enemy goods on British ships at the commencement of hostilities.[16]

§ 2125. **Warranty true when made not forfeited by subsequent hostilities.**—The warranty, if true when made, is not falsified by the fact that by reason of subsequent hostilities arising the property ceases to be neutral in character. Future war is at the insurer's risk, but if the warranty is false when made, the policy has no inception.[17]

§ 2126. **Warranty of neutrality as affected by barratry.**—If there be a warranty of neutrality and the policy binds the underwriter to answer for the barratry of the master, the warranty implies that the neutral character shall not be forfeited by any acts of the insured or his agents, except only those amounting to barratry.[18]

§ 2127. **Documents, papers, etc., required.**—A warranty of neutrality or neutral ownership implies that there shall be on board ready for use every document and paper which is necessary, in accordance with the laws of nations and subsisting international treaties, to prove its neutral or national character. The ship must be navigated not only according to the law of nations, but also according to the particular treaties subsisting between the country to which she belongs and other countries,[19] and the assured can

[14] Kemble v. Rhinelander, 3 Johns. Cas. (N. Y.) 130.

[15] Le Roy v. United Ins. Co. 7 Johns. (N. Y.) 343.

[16] The Odessa; The Woolston (1915) L. R. 13 Asp. Mar. L. Cas. 215 [1916] 1 A. C. 145, 1 P. C. 554, 85 L. J. P. C. 49, 114 L. T. 10, 60 S. J. 292, 32 T. L. R. 103.

[17] Saloucci v. Johnson, 4 Doug. 224, 232; Park on Ins. 364; Tyson v. Gurney, 3 Term Rep. 477. See The Carlos J. Roses, 177 U. S. 655, 44 L. ed. 929, 20 Sup. Ct. 803; St. Enoch Shipping Co. v. Phosphate Mining Co. 86 L. J. K. B. 74, [1916] 9 K. B. 624, 21 Com. Cas. 192; 1 Marshall on Ins. (ed. 1810) *387. This subject is also considered under the sections herein covering "capture," "contraband," etc.

As to embargo and subsequently enacted laws, see §§ 2523 et seq. herein.

[18] Wilcocks v. Union Ins. Co. 2 Binn. (Pa.) 574, 4 Am. Dec. 480.

[19] Coolridge v. New York Firemen's Ins. Co. 14 Johns. (N. Y.)

never be surprised by the want of the proper documents, except by his own neglect or fault.[20]

While certain documents may evidence neutrality, it is held not necessary that all of such documents should be on board. It is sufficient that the vessel is provided with such authenticated documents as are necessary to establish the neutrality or ownership, and that such documents be ready for use, but the want of any documents so necessary to establish the ship's neutrality will not be a compliance.[1] And in estimating the materiality of the papers on board a ship to the risk, their effect taken together should be considered, not the effect of any one of them taken by itself.[2]

If by treaty between a neutral and belligerent certain documents are agreed upon as necessary to be furnished to evidence the neutral character of the ship, the warranty of neutrality is falsified if they are not furnished as agreed, nor must the ship subject herself to detention for want of such documents; but where no such treaty

308; Murray v. Alsop, 3 Johns. Cas. (N. Y.) 97; Blagge v. New York Ins. Co. 1 Caines (N. Y.) 549; Schwartz v. Insurance Co. of North America, 6 Binn. (Pa.) 378; Ludlow v. Union Ins. Co. 2 Serg. & R. 119; Siffkin v. Lee, 2 Bos. & P. N. R. 484; Barzillai v. Lewis, 3 Doug. 126; Christie v. Secretan, 8 Term Rep. 192, per Lord Kenyon.

"Where the nationality or neutrality of a ship or cargo is expressly warranted, it is implied that the ship will carry the requisite documents to show such nationality or neutrality, and that it will not carry any documents which cast reasonable suspicion thereon: Deering's Annot. Civ. Code Cal. sec. 2668.

*The marine insurance act of England provides:* "Warranty of neutrality. . . . (2) Where a ship is expressly warranted 'neutral' there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract." Marine ins. act 1906 (6 Edw. VII. c. 41) sec. 36 (1); 2 Butterworth's Twentieth Cent. Stat. (1900–1909) p. 408; Chitty's Stat. Eng. p. 890.

[20] Smith v. Delaware Ins. Co. 3 Wash. (U. S. C. C.) 127, Fed. Cas. No. 13,035.

[1] The San Jose Indiano, 2 Gall. (U. S. C. C.) 268, Fed. Cas. No. 12,322; Barker v. Phœnix Ins. Co. 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; Blagge v. New York Ins. Co. 1 Caines (N. Y.) 549; Griffith v. Insurance Co. of North America, 5 Binn. (Pa.) 464; Le Cheminant v. Pearson; Le Cheminant v. Allnutt, 4 Taunt. 367, per Marshall, C. J.; Baring v. Claggett, 3 Bos. & P. 201, 5 East, 398, 14 Eng. Rul. Cas. 155. See Siffkin v. Lee, 2 Bos. & P. N. R. 484. "It is to be observed that though by the law of nations the want of some of these papers may be taken as strong presumptive evidence, yet the want of none of them amounts to conclusive evidence against the ship's neutrality." 1 Marshall on Ins. (ed. 1810) *408.

[2] Livingston v. Maryland Ins. Co. 7 Cranch (99 U. S.) 506, 3 L. ed. 421.

exists, the warranty is not falsified because the ship has been navigated contrary to particular arbitrary ordinances of which neutrals are not obligated to take notice, and which are contrary to the law of nations.[3]

In times of universal peace a warranty of national character is complied with where the register is the only document on board and a duly certified copy of the original register from the office of the register of the treasury, which is required by law in case of loss to be deposited in such office, is legal evidence of such register.[4] In case of a ship with British register the court will look beyond nominal ownership and if the real owners make it enemy property it will be so held.[5]

If the national character of the vessel is not made a part of the contract of insurance so as to have the force of a warranty, and there is no warranty or representation of the national character of the vessel, yet if it appears that the loss is occasioned from the want of the proper documents required to show such character, there can be no recovery under an insurance on the vessel or freight or on the goods of the owner or charterer of the vessel, for in such case the fact that the vessel is not furnished with such documents as are necessary under the law of nations and international treaties to evidence her neutral or national character and ownership operates to exonerate the insurer from the loss, and to this extent there is an implied warranty that such documents shall be on board. The rule does not apply to papers required by the arbitrary ordinances of belligerent states not binding on a neutral power, nor to the goods of a shipper having no absolute or special interest in the vessel, unless perhaps he has knowledge of the fact that by the want of such documents his property is exposed to unusual peril or increased hazard and has failed to disclose the fact. An exception would also exist, in case the risks were notwithstanding expressly covered by the policy, if there had been a full disclosure of facts and the risk had, with such knowledge by the underwriter, been assured by him.[6] It must be observed, however, that the loss must distinctly

[3] Rich v. Parker, 7 Term Rep. 705, 4 R. R. 552, 14 Eng. Rul. Cas. 149; 2 Esp. 615; Pollard v. Bell, 8 Term Rep. 434, 5 R. R. 404; Mayne v. Walter, reported with the above two cases in 1 Marshall on Ins. (ed. 1810) 397, 409, 413 a.

[4] Catlett v. Pacific Ins. Co. 1 Paine (U. S. C. C.) 594, Fed. Cas. No. 2,517.

[5] The St. Tuno, 86 L. J. P. 1 (1916) p. 291, 2 P. Cas. 272, 115 L. T. 684.

[6] Polleys v. Ocean Ins. Co. 14 Me. (2 Shep.) 141; Cleveland v. Union Mutual Ins. Co. 8 Mass. 308, Sewall, J., dissenting; Bell v. Carstairs, 14 East, 374, 2 Camp. 544, 12 R. R. 557, 14 Eng. Rul. Cas. 319, per Lord Ellenborough; Steel v. Lacy, 3 Taunt. 285, 12 R. R. 658; Pollard v. Bell, 8 Term Rep. 434, 5

appear to have been wholly or partially caused by the want of such necessary documents, but it is not, therefore, necessary that the ship should sail with such documents.[7] In this connection it is declared that where the national character of a vessel is not warranted or represented, the assured need not show that she has a sea letter or other papers required by the laws of the country or by treaties with foreign nations.[8] In so far as this statement expresses a different rule from that above given, it apparently conflicts with the decisions cited on which said rule is based.[9]

**§ 2128. Character of documents and insignia of national character required.**—The following documents and insignia of national character are specified by Mr. Arnould as necessary: 1. The flag: 2. The passport, sea brief, sea letter, or pass; 3. The register or certificate of registry: 4. The bill of sale; 5. The muster-roll; 6. The charter-party; 7. The log-book; 8. The bill of health; 9. Proofs of the national character of the cargo, as invoices, bills of lading, certificates of origin, etc.[10] By the law of nations the flag

R. R. 404; Christie v. Secretan, 8 Term Rep. 1921; Hobbs v. Henning, 34 L. J. Com. P. 117, 122, 17 Com. B. (N. S.) 791, 5 N. R. 406, 11 Jur. (N. S.) 223; Dawson v. Atty, 7 East, 367; Price v. Bell, 1 East, 663; Le Cheminant v. Pearson (v. Allnut) 4 Taunt. 367; Bell v. Bromfield, 15 East, 364; Carruthers v. Gray, 3 Camp. 142, 15 East, 35; Bird v. Appleton, 8 Term Rep. 562, 5 R. R. 468, 13 Eng. Rul. Cas. 547. *Examine* Stocker v. Merrimack Ins. Co. 6 Mass. 220; Horneyer v. Lushington, 3 Camp. 85, 15 East, 46, 13 Eng. Rul. Cas. 637; Mayne v. Walter, 3 Doug. 79.

[7] But see 17 & 18 Vict. c. 124, sec. 122. But if the exporter shall fail to deliver to the searcher a shipping bill with duplicates thereof when required of the goods exported by him as prescribed by the customs consolidation act of 1853, he shall be held liable.

[8] Elting v. Scott, 2 Johns. (N. Y.) 157. See Barnewall v. Church, 1 Caines (N. Y.) 217, 2 Am. Dec. 180.

[9] But see Bell v. Carstairs, 14 East, 374, 393, 2 Camp. 544, 12 R. R. 557, 14 Eng. Rul. Cas. 319, per Lord Ellenborough.

[10] 1 Arnould on Marine Ins. (Perkin's ed. 1850) 624, *623; Id. (Maclachlan's ed. 1887) 626 et seq.; Id. (9th ed. Hart & Simey) secs. 661 et seq., pp. 846 et seq. See 17 Earl of Halsbury's Laws of England, sec. 826, p. 421; Wheaton on Maritime Captures and Prizes, 65, 66. See Price v. Bell, 1 East, 663; Baring v. Clagett, 3 Bos. & P. 201, 14 Eng. Rul. Cas. 155; Rich v. Parker, 7 Durn. & E. 705, 14 Eng. Rul. Cas. 149; Garrels v. Kensington, 8 Durn. & E. 230; Bell v. Bromfield, 15 East, 364; Le Cheminant v. Pearson, 4 Taunt. 367. Mr. Marshall enumerates them as follows: 1. The passport, sea brief or sea letter. See Anonymous, Skin. 404. "This document is indispensably necessary to the safety of every neutral ship;" 2. The proofs of property, such as a bill of sale, etc. These proofs are essential: See The Sisters, 5 Rob. Adm. 155, per Lord Stowell; 3. The muster-roll (rôle d' equipage). See Christie v. Secretan, 8 Term Rep. 192; 4. The charter-party. See Saloucci v. Johnson, reported in 1 Marshall on Ins. (ed. 1810) 419, per Ashhurst, J.; 5. The bills of lading; 6. The invoices; 7. The log-book or ship's journal; 8. The bill of health.

evidences the national character of the ship, although not of the goods.[11] If a vessel is described as carrying a "Kniphausen flag," and represented as a "Kniphausen vessel," the warranty is satisfied if she is documented and navigated according to the laws of that state.[12] And where the ship was warranted Danish and she carried Danish colors, and the master conducted himself as the master of a ship of that nationality, the warranty was held satisfied.[13]

A neutral ship which sails under the enemy's flag and pass is impressed with that character. The fact that such a hostile character is assumed presumes that some benefit or advantage is thereby sought, and therefore assured may not disclaim the belligerent character.[14] Neutral goods loaded on board such a ship are not, however, subject to the rule, but the neutral character and ownership may be proven where the goods are so loaded in time of peace, unless the same was done in contemplation of war, and with a design to protect them from hostile capture.[15] It is also held in this country that neutral goods may be lawfully carried on board an enemy's armed ship without being prize of war.[16] This decision

1 Marshall on Ins. (ed. 1810) *406 et seq. The papers required are the sea letters or passports describing and certificates containing the particulars of the cargo and place whence the ship sailed, signed by the officers of the port. Cooper's American Politics (ed. 1884) bk. v. p. 113. As to sea letters, see 6 Wheat. (19 U. S.) Append. 12, 36, 58; Slight v. Rhinelander, 1 Johns. (N. Y.) 192; 2 Laws U. S. c. 339; 3 Laws U. S. c. 329.

[11] The Vrow Elizabeth, 5 C. Rob. 11; The Success, 1 Dod. 132; The Vreede Scholtys, 5 C. Rob. 5n.

Nationality of vessel is determined by the flag. The Tommi; The Rotherband, 84 L. J. P. 85, (1914) p. 251, 1 P. Cas. 16, 112 L. T. 257, 13 Asp. Mar. Cas. 5, 59 Sol. J. 96, 31 T. L. R. 15.

As to use of neutral flag by belligerent, see Phillipson's International Law and The Great War (1915) p. 352. As to correspondence concerning same, see 9 Amer. Jour. Internat. L. (1915) Special number, pp. 88, 96, 97, 99, 106.

As to use of neutral flags on merchant vessels of belligerents, and that the British merchant shipping act authorizes the use of the British flag by foreign merchant vessels in time of war to escape capture, see 9 Amer. Jour. Internatl. Law, pp. 464, 471–472.

[12] Von Tungelyn v. Du Bois, 2 Camp. 151.

[13] Arcangelo v. Thompson, 2 Camp. 620, 12 R. R. 758. See Pollard v. Bell, 8 Term Rep. 434, 5 R. R. 468, per Lord Kenyon.

[14] Schwartz v. Insurance Co. of North America, 3 Wash. (U. S. C. C.) 117, Fed. Cas. No. 12,504; The Ann Green, 1 Gall. (U. S. C. C.) 274, 290, Fed. Cas. No. 414, per Story, J.; Higgins v. Livermore, 14 Mass. 106; Barker v. Phœnix Ins. Co. 8 Johns. (N. Y.) 307, 5 Am. Dec. 339; Slight v. Rhinelander, 1 Johns. (N. Y.) 192; The Success, 1 Dod. Adm. 131, per Sir Wm. Scott; The Ann, 1 Dod. Adm. 221; The Princess, 2 Rob. Adm. 49, per Sir Wm. Scott; The Vigilantia, 1 Rob. Adm. 13, per Sir Wm. Scott.

[15] The Ann Green, 1 Gall. (U. S. C. C.) 274, 286, Fed. Cas. No. 414, per Story, J.; The Vreede Scholtys, 5 Rob. Adm. 5n.

[16] The Nereide, 9 Cranch (13 U.

is, however, criticised by Mr. Duer, on the ground that "it is a premeditated attempt to oppose, if practicable, the right of search, and to this preliminary act the full effect of actual resistance may be justly and legally imputed." [17] But the goods of a neutral may, it is admitted, be carried in a merchant or unarmed ship of the enemy, for the right of capture does not extend to the goods of a friend.[18] The presumption, however, that they are the enemy's goods must be overcome by documents showing their neutral character.[19]

A neutral ship may carry a belligerent cargo, and not by the mere fact of so doing falsify a warranty of neutrality either of the ship or of such part of the cargo as is covered by separate insurance, and is not hostile in character, unless there is an attempt to disguise and carry belligerent goods as neutral.[20] But this rule, although it permits a neutral to carry belligerent goods without a violation of belligerent rights, yet it does not protect such goods from hostile seizure and confiscation, and subjects the vessel not only to detention, but it may also be carried into the captor's port to unload the goods. The custom is to then release the vessel, and in such case freight is usually paid by the captors, as the goods, being enemy's goods, a delivery to the captor is in effect a delivery to the consignee for the purpose of freight, unless the right to freight is destroyed by carrying false papers or by the suppression of papers.[1]

S.) 388, 3 L. ed. 769; The Atalanta, 3 Wheat. (16 U. S.) 409, 4 L. ed. 422. But see The Fanny, 1 Dod. Adm. 443, per Sir Wm. Scott; Kemble v. Rhinelander, 3 Johns. Cas. (N. Y.) 130; 2 Wheaton's International Law, 260–278. The Declaration of Paris of 1856, signed by the representatives of the chief European powers, provides in section 3 that "neutral goods, except contraband of war, are not liable to capture under an enemy's flag."

Adherence to the rules of the Declaration of Paris was declared by the President's Proclamation of April 26, 1898, including the rule that "neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag." The Carlos P. Roses, 177 U. S. 655, 44 L. ed. 929, 20 Sup. Ct. 1903.

[17] 1 Duer on Marine Ins. (ed. 1845) 731, 732, relying on opinion of Story, J., in The Nereide, 9 Cranch (13 U. S.) 388, 3 L. ed. 769.

[18] The Fanny, 1 Dod. Adm. 443, 448; 1 Duer on Marine Ins. (ed. 1845) 732.

[19] See The Flying Fish, 2 Gall. (U. S. C. C.) 374, Fed. Cas. No. 4,892.

[20] Barker v. Blakes, 9 East, 283; Schultz v. Insurance Co. of North America, 3 Wash. (U. S. C. C.) 117, Fed. Cas. No. 12,504; Phœnix Ins. Co. v. Pratt, 2 Binn. (Pa.) 308. See The Nereide, 9 Cranch (13 U. S.) 388, 3 L. ed. 769, per Marshall, C. J.

[1] 2 Wheaton's International Law, 160; The Atlas, 3 Rob. 304n; The Emanuel, 1 Rob. 296; 1 Duer on Marine Ins. (ed. 1845) 530–33. The Declaration of Paris of 1856, signed by the representatives of the chief European powers, provides in section 2 that "the neutral flag covers enemy's

It is held that if the government, for the purpose of protecting from its cruisers the ship of another state, grants it a passport, this does not violate the laws of neutrality, nor impress the ship with the national character of the government from whom the passport is obtained.[2] Where the treaty between France and America of 1778 required that all ships belonging to the subject of either ally should be furnished with passports or sea letters expressing the name, property, and bulk of the ship, and the name and place of habitation of her master, and that such passport should be exhibited, etc., and the ship sailed from London to Guernsey, England then being at war with France, it was held that a warranty of American property was falsified by the ship not having such passport on board, and that a ship which, for want of a necessary document, subjects herself to detention forfeits her neutrality, even though the fact is that she is American property.[3]

Where there was a warranty that the ship was American, and the proof was of American ownership, and the vessel had all the necessary papers except a register, having sailed with a sea letter only, this was held to be a sufficient evidence of a compliance with the warranty.[4] If a ship is warranted American property, and it is represented that she sails under a sea letter or certificate, and that her out cargo is wholly or partly contraband of war, the warranty is not satisfied unless she is neutral for all purposes and properly documented as such, and will so conduct herself as a neutral as not to violate the laws of neutrality.[5] An insurance on a "British brig" is not a warranty that she is British registered, but applies to her ownership, and is satisfied prima facie where she is navigated under a clearance and license from the British custom-house at New Providence, and is owned by a British subject.[6] A copy of the ship's register, unless authenticated by the oath of a witness who has seen the original, is held no evidence that the ship is American, although

goods with the exception of contraband of war."

[2] Hallett v. Jenks, 1 Caines Cas. (N. Y.) 43, s. c. 3 Cranch (7 U. S.) 210, 2 L. ed. 414. See Bulkley v. Derby Fishing Co. 1 Conn. 571; Hayward v. Blake, 12 Mass. 176. But see The Julia, 8 Cranch (12 U. S.) 181, 3 L. ed. 528, 1 Gall. (U. S. C. C.) 605; The Ariadne, 2 Wheat. (15 U. S.) 143, 4 L. ed. 205; Ogden v. Barker, 18 Johns. (N. Y.) 87.

[3] Rich v. Parker, 7 Term Rep. 705, 4 R. R. 552, 14 Eng. Rul. Cas. 149, 2 Esp. 615, reported in 1 Marshall on Ins. (ed. 1810) *409.

[4] Barker v. Phœnix Ins. Co. 8 Johns. (N. Y.) 307, 5 Am. Dec. 339. See Sleght v. Rhinelander, 2 Johns. (N. Y.) 531, reversing 1 Johns. (N. Y.) 192; Griffith v. Insurance Co. of North America, 5 Binn. (Pa.) 464.

[5] Schwartz v. Insurance Co. of North America, 6 Binn. (Pa.) 378.

[6] Mackie v. Pleasants, 2 Binn.

the copy is certified by the collector;[7] but a copy certified by the registrar of the treasury department where the original register is filed, coupled with a certificate under the department seal that he is a registrar, is evidence.[8]

**§ 2129. Description in policy or representation as to national character.**—If the vessel is described in the policy or is represented as an American or British, etc., ship, it is equivalent to a warranty of national character.[9] So where a policy of insurance was effected upon a vessel represented to be American, and furnished with American papers, but in reality owned by Spanish subjects, which fact was not disclosed to the insurers, the policy was held void from the beginning, on the ground both of misrepresentation and concealment, and in such case the insured cannot recover, whether the loss is caused by the misrepresentation or concealment or otherwise.[10] But the representation of the insured that the cargo is American is not falsified by the vessel's carrying the baggage of French passengers.[11] And a representation of property covered as American is substantially complied with if the property be actually American.[12] If the vessel be described in the policy as a prize vessel, and afterward her national character is changed so as to increase the risk, this discharges the underwriters.[13] Where, however, a ship is described or warranted as of a particular national character, this does not mean merely that she is so built, but that she is entitled to all the privileges and immunities to which a ship of the national character specified is entitled.[14]

**§ 2130. Goods shipped from a neutral to a belligerent.**—Goods shipped during war or during peace in contemplation of war from a neutral to a belligerent, to become his property on arrival, are impressed from the commencement of the voyage with the hostile character of the consignee, and are subject during the voyage to

(Pa.) 363. See also Griffith v. Insurance Co. of North America, 5 Binn. (Pa.) 464.

[7] Coolidge v. New York Firemen's Ins. Co. 14 Johns. (N. Y.) 308.

[8] Catlett v. Pacific Ins. Co. 4 Wend. (N. Y.) 75, affirming Catlett v. Keith, 1 Wend. (N. Y.) 561.

[9] Higgins v. Livermore, 14 Mass. 106; Lewis v. Thatcher, 15 Mass. 431, 432; Atherton v. Brown, 14 Mass. 152; Barker v. Phœnix Ins. Co. 8 Johns (N. Y.) 307, 5 Am. Dec. 339; Murray v. United Ins. Co. 2 Johns. Cas. (N. Y.) 168; Vandenheuvel v. Church, 2 Johns. Cas. (N. Y.) 127; Francis v. Ocean Ins. Co. 6 Cow. (N. Y.) 404.

[10] Price v. De Peau, 1 Brev. (S. C.) 452, 2 Am. Dec. 680.

[11] Vasse v. Ball, 2 Yeates (Pa.) 178.

[12] Hughes v. Union Ins. Co. 8 Wheat. (21 U. S.) 294, 5 L. ed. 620.

[13] Seamans v. Loring, 1 Mason (U. S. C. C.) 127, Fed. Cas. No. 12,583.

[14] Rich v. Parker, 7 Term Rep. 705, 4 R. R. 552, 14 Eng. Rul. Cas. 149, 2 Esp. 615, per Ashhurst, J., reported in 1 Marshall on Marine Ins. (ed. 1810) *411.

capture and confiscation, and this rule is not affected by usage to the contrary, nor by any special agreement which in effect would evade the operation of the law, such agreement being held fraudulent. Goods so shipped falsify a warranty of neutral property. The rule also applies to goods contracted in good faith to be shipped during peace, but not shipped until after war is declared, although if shipped bona fide during peace, and subsequent hostilities arise, the neutral ownership of the goods remains unchanged till delivery, and the rule does not apply.[15] This rule is, however, subject to such exceptions as may arise from the exercise of the right of stoppage in transitu.[16]

**§ 2131. Goods shipped from a belligerent to a neutral: transfer after capture.**—Goods shipped during war or during peace in contemplation of war from a belligerent to a neutral country, if belligerent in character at the commencement of the voyage, so continue until delivery in the neutral country, and are subject to capture in transitu. But if it is clearly proven that the title to the

[15] The Venus, 8 Cranch (12 U. S.) 253, 275, 3 L. ed. 553; The Ann Green, 1 Gall. (C. C.) 274, 291, Fed. Cas. No. 414, per Story, J.; The Francis, 1 Gall. (C. C.) 445, Fed. Cas. No. 5,032, per Story, J.; The Anna Catharina, 4 Rob. Adm. 107, per Sir Wm. Scott; The Vrow Margaretha, 1 C. Rob. 336; The Jan Frederick, 4 Rob. 107; The Atlas, 3 Rob. 299; The De Biboa, 2 C. Rob. 134; The Staadt Embden, 1 C. Rob. 26n; The Ringende Jacob, 1 C. Rob. 89; The Sally Griffiths, 3 C. Rob. 303. But see De Wolff v. New York Fire Ins. Co. 2 Cow. (N. Y.) 56, 20 Johns. (N. Y.) 214; Ludlow v. Browne, 1 Johns. (N. Y.) 1, 3 Am. Dec. 277. In this last case a policy of insurance was effected on goods from New York to France, warranted as American property. The goods were purchased and shipped in an American vessel by American merchants to French merchants, under an agreement that the former were to deliver the goods at St. Valleery, for which they were to be allowed a certain commission, taking on themselves all risks; the consignees were to pay the freight on delivery and also for the amount of cargo, in bills on London, guaranteed by a commercial house in that city. During the voyage the goods were captured by the British and condemned as French property. It was held that the property of the goods remained in the consignors until delivery in France, and that the warranty in the policy was not broken in regard to the neutral character of the property, so as to vitiate the policy. See 1 Kent's Commentaries (5th ed.) 86, 87.

As to merchant vessels carrying supplies to belligerent vessels, see circular of Department of State of U. S. 9 Amer. Jour. of Internat. L. (1915) Suppl. p. 122. See also Id. p. 124.

As to "Importance of old prize rules lessened by modern conditions of transportation business and law" enemy goods in neutral bottoms, see Bordwell's Law of War (ed. 1908) p. 220.

As to belligerent destination see Taylor's Internat. L. (ed. 1904) p. 743, sec. 665.

[16] See The Constantia, 6 Rob. 321, 330, per Sir Wm. Scott; Dutton v. Solomonson, 3 Bos. & P. 582.

property was acquired and was also absolutely and unconditionally vested in the neutral consignee, and the goods delivered to him or his agent at the time of shipment, the neutral character of the property continues in transitu. Less evidence is required, however, to prove the neutral character where the title is so acquired and the goods are shipped during peace and subsequent hostilities arise. If, however, the consignee is not obligated to accept the goods, as in case of an election to take them, or if the property is under the dominion or control of the consignor in transitu, it does not lose its belligerent character, for the property must be devested out of the shipper, and absolutely and unconditionally vested in the neutral consignee at the commencement of the transit.[17] A warranty of neutrality is broken by transfer on the part of the insured, after capture of a part of the subject insured, to a subject of the belligerent, for a breach as to part vitiates the whole.[18]

Notwithstanding the rule first stated, it is said "that in order to constitute an effectual transfer of the property there must be either an order for the goods or an effectual acceptance of them by the consignee prior to the capture. If the capture takes place where no order has been given, and before the goods have been accepted, they must be considered as the property of the persons who have so consigned them." [19] Both Mr. Phillips and Mr. Duer deduce from the quoted statement an exception to the rule in substance as follows: If goods are shipped conditionally, and the neutral complies with the conditions and accepts the goods in transitu before capture, they become neutral in character from that time.[20] The principal rule first given in this section is subject to such exceptions as may arise from the exercise of the right of stoppage in transitu.[1]

[17] The Frances, 8 Cranch (12 U. S.) 354, 3 L. ed. 587, 9 Cranch (13 U. S.) 183, 189, 3 L. ed. 698, 1 Gall. (C. C.) 445, Fed. Cas. No. 5,032; The Merrimack, 8 Cranch (12 U. S.) 318, 3 L. ed. 575; The Venus (M'Gee's Claim) 8 Cranch (12 U. S.) 251, 275, 3 L. ed. 553; The Sally, 3 C. Rob. 300n; The Aurora, 4 Rob. 218; The Atlas, 3 C. Rob. 299; The Margaretha, 1 Rob. 336; The Noyd Gedacht, 2 Rob. 137; The Anna Catharina, 4 C. Rob. 107; The Carl Walter, 4 Rob. 207; The Carolina, 1 Rob. 304; The Twende Venner, 6 Rob. 329n. *Examine* The Danecke-baar Africana, 1 Rob. 107 (the rule stated in the text was that in England prior to the Declaration of Paris of 1856); 1 Arnould on Marine Ins. (Maclachlan's ed. 1887) 625. See also Maclachlan on Shipping, 560.

[18] Goold v. United Ins. Co. 2 Caines (N. Y.) 73.

[19] The Cousinne Marianne, 1 Edw. Adm. 346, per Sir Wm. Scott.

[20] 1 Duer on Marine Ins. (ed. 1845) 435, sec. 33; 1 Phillips on Ins. (3d ed.) 439, sec. 795. *Examine* The Francis, 9 Cranch (13 U. S.) 183, 3 L. ed. 698, argument of counsel and opinion of court.

[1] The Constantia, 6 Rob. 330, per Sir Wm. Scott, and cases *cited* under last note under preceding section

Under a late English case a claim was made by reason of a change of ownership of the goods, seized, between the dates of seizure and the claim, the property being in neutrals when seized, thereafter the shippers, German agents, claimed the goods against the underwriters for a total loss, said goods having been insured against war risks by enemy underwriters in Hamburg. The underwriters paid in full, thereby becoming owners of the goods, and the claim filed by the shippers in fact was made on behalf of the underwriters. The claim was disallowed and the proceeds of the sale of the goods was condemned as enemy property.[2]

§ 2132. **Agreement to claim property as neutral in case of capture.**—The agreement to claim property as neutral in case of capture is held so far legal that the insured cannot recover if he refuses to assert such claim where the property is captured, and it is no excuse that this refusal is on the ground that it would render him guilty of perjury so to do.[3]

§ 2133. **Neutral vessels employed in belligerent service.**—A neutral vessel cannot, without being subject to forfeiture, engage in any service or employment of a belligerent which will aid or assist him in warding off the pressure of war, or in favoring its offensive projects. The vessel must not subject herself to the belligerent's orders, or identify herself with the interests of such belligerent. Thus, being engaged in the transport service of the enemy, or in carrying military persons in his employ, or the transportation of military stores, whether immediately connected with the active service of the belligerent or not, or the conveyance of dispatches for a belligerent, all render the vessel so engaged subject to confiscation, and all property of the owner is subject to the penalty where he is in privity or has knowledge of the conveyance of hostile dispatches.[4] And it is a high misdemeanor either to fit out, arm, or employ a vessel against people at peace with this country.[5]

See The Twende Venner, 6 Rob. 329n.

[2] The Palm Branch (1916) L. R. Prob. Div. 230, 115 L. T. 557, 32 L. T. R. 725. See The Sorfareren, 85 L. J. P. 121, 1 P. Cas. 589, 114 L. T. 46, 13 Asp. M. C. 223, 32 T. L. R. 108.

[3] Coolidge v. Blake, 15 Mass. 429.

[4] The Commereen, 1 Wheat. (14 U. S.) 382, 4 L. ed. 116, per Story, J.; The Atalanta, 6 Rob. 440, 454, per Sir Wm. Scott; The Friendship, 6 Rob. 420, per Sir Wm. Scott; The Carolina, 4 Rob. 256; The Rapid, 1 Edw. 228; The Orozembo, 6 Rob. 430, per Sir Wm. Scott.

[5] The Monte Allegro, 7 Wheat. (20 U. S.) 520, 5 L. ed. 513; The Estrella, 4 Wheat. (17 U. S.) 298, 4 L. ed. 574; United States v. Rayburn, 6 Pet. (31 U. S.) 352, 8 L. ed. 424; United States v. Guinet, 2 Dall. (2 U. S.) 321, 1 L. ed. 398; The Salvador, L. R. 3 P. C. App. Cas. 218. But see British Consul v. Ship Mermaid (Adm. 69, 71). For other reasons relating to this point see The Gran Para, 7 Wheat. (20 U. S.) 471, 5 L. ed. 302; United States v.

The rule does not, however, preclude carrying dispatches by a neutral vessel between an ambassador in a neutral state and his own country; although a belligerent, such act does not constitute a breach of the warranty of neutrality, nor subject the vessel to confiscation, although she may be liable to detention.[6] One marked distinction, however, seems to be made between the cases of carrying dispatches of a belligerent and other belligerent employment, and that is, that in the former case the knowledge of the owner or of the master is an important factor, since the mere fact of belligerent dispatches being on board does afford a ground for enforcing the penalty where no knowledge of the fact exists on the part of the owner or master, while in other cases of belligerent employment it has been held that the ignorance or knowledge or privity of the master or owner is an immaterial matter.[7]

§ 2134. **May neutrals avail themselves in time of war of a trade prohibited during peace?**—In England, what was known as the rule of 1756 prohibited neutrals during war to engage in a colonial or coasting trade of a belligerent state, from which they were excluded in time of peace;[8] for although a belligerent under an entire inability to supply his colonies in time of war affects to open

Quincy, 6 Pet. (31 U. S.) 445, 8 L. ed. 458. The Bello Corrunes, 6 Wheat. (19 U. S.) 152, 5 L. ed. 229; The Santa Maria, 7 Wheat. (20 U. S.) 490, 5 L. ed. 505, 3 Atty. Gen. Opin. 738. And *examine* Rev. Stats. U. S. sec. 5,283.

[6] The Commercen, 1 Wheat. (14 U. S.) 382, 4 L. ed. 116; The Madison, 1 Edw. 224; The Caroline, 1 Rob. 461, per Sir Wm. Scott.

[7] The Caroline, 6 Rob. 461; The Hope, 6 Rob. 463n; The Orozembo, 6 Rob. 430, per Sir Wm. Scott.

[8] In 1756, when war between Great Britain and France was declared, what was known as the Rule of 1756 was enforced. It was in direct opposition to the law of nations, as well as to the principle declared by Frederick the Great, "that goods of an enemy cannot be taken from on board the ships of a friend," and in direct violation of the treaty between England and Holland. 2 Lossing's Harper's Cyclopedia of United States History (ed. 1893) 1232, tit. "Rule 1756." The French Convention, by decree, 1793, allowed to neutral vessels the privileges of French ships, and the British government refused to recognize the trade as neutral between France and her West India colonies. The rule of 1756 was revived, and British cruisers were ordered to seize and bring in all vessels loaded with breadstuffs and bound for France, even though both vessel and cargo were neutral, but, on proof of neutrality, they were not to be forfeited. The cargo was to be paid for and the vessel released on bond being given to land in countries friendly to Great Britain. Taken from 1 Lossing's Harper's Cyclopedia of United States History (ed. 1893) 160, tit., "British Interference with the Rights of Neutrals." "In 1793, the British government issued instructions to its public and private ships of war 'to detain and bring in for adjudication' all neutral vessels laden with the produce of any colony of France or carrying provisions or other supplies for the use of such colonies.'" 1 Duer on Marine Ins. (ed. 1845) 717.

them to neutrals, nevertheless it is held that it still continues a privileged trade, and that neutrals may not avail themselves of the concession, and embark in such trade without thereby identifying themselves with the belligerent and impressing the trade with such hostile character, and that in effect, by so interposing, the neutral relieves the belligerent from the condition into which the other belligerent had reduced him. This rule was subsequently modified, and was strictly enforced by English tribunals during the great maritime wars from 1792 to 1815,[9] although it was not only not admitted by the United States to be an established principle of the law of nations, but was declared to be utterly opposed thereto, and this government vigorously remonstrated, rejecting the rule and denouncing the doctrine as an unjust, arbitrary, and violent innovation. In its modified form the rule covered only the trade on a direct voyage from a colonial port of lading to the mother country, and permitted a direct trade between the colonies and the neutral country, and an exportation thence to the mother country, provided the voyage of importation and exportation did not constitute one entire voyage, and the importation to the neutral country was bona fide, and not with an original intention on the part of the importer to reship the goods and thereby evade the operation of the rule.[10]

[9] "And the confiscation of a vast number of American ships with valuable cargoes of colonial produce was the fruit of this decree." 1 Duer on Marine Ins. (ed. 1845) 701, 721.

[10] 1 Arnould on Marine Ins. (Perkins' ed. 1850) 629 et seq.; Id. (Maclachlan's ed. 1887) 631 et seq.; Id. (8th ed. Hart & Simey) sec. 660, p. 816, sec. 664, pp. 823 et seq., sec. 771, p. 931; 1 Phillips on Ins. (3d ed.) 448, sec. 816; 1 Duer on Marine Ins. (ed. 1845) 699–725, 762–770, where this subject is exhaustively treated by the writer, who denies the authority of the rule, and considers and cites numerous cases and other references, among which are the following: Berons v. Rucker, 1 Wm. Black. 313, per Lord Mansfield; The Princessa, 2 Rob. 52; The Vrow Anna Catharina, 5 Rob. 15; The Rendsburg, 4 Rob. 121; Sir Wm. Scott's opinion in The Immanuel, 2 Rob. 200–204, and his argument in The Emmanuel, 1 Rob. 296; The Phœnix, 3 Rob. 186; The Joanna Tholen, 6 Rob. 72; The Rebecca, 2 Rob. 101; The Jonge Thomas, 3 Rob. 233n; Argument of counsel for claimant in The Wilhelmina, 4 Rob. Append. 5; The Polly, 2 Rob. 361; The Essex, 5 Rob. 369; The Maria, 5 Rob. 365; The Katharina, 5 Brown P. C. (Tomlyn's ed.) 328; 1 Wheat. (14 U. S.) Append. 507; 2 Wheat. (15 U. S.) Append. 29; Mr. Munroe's letter to Lord Mulgrave, Sept. 23, 1805; Mr. Madison's letter to Messrs. Monroe & Pinckney, May 11, 1806; 1 Kent's Commentaries (5th ed.) 84, 85n; Lord Liverpool's "Discourse on the Conduct of the Government of Great Britain;" Ward on the Rights and Duties of Belligerents and Neutrals; Mr. Stephen's pamphlet, "War in Disguise;" Mr. Madison's "Examination of the British Doctrine;" 5 American State Papers, 330, 355.

§ 2135. **Vendee of vessel.**—The fact that a vessel has been sold by a belligerent to a neutral in time of war does not impress her with a neutral character, unless the sale is absolute and the title totally divested out of the belligerent vendor, and her subsequent trade and conduct must also be of such a character as to place the transfer above the suspicion of being merely colorable and in fraud of belligerent rights. If the belligerent vendor retains a contingent interest, dependent upon the performance or nonperformance of any condition whereby the title or any interest therein is to revert to him at some future time, or if he holds a lien thereon for any part of the purchase money, or if the vessel be employed by the neutral vendee in the enemy's trade, or continues under the control and management of the belligerent vendor, the vessel has not such a neutral character as to protect her from capture. This is in substance what has been held by the English admiralty.[11] If a vessel is transferred to an alien under such conditions that the title is not devested out of the vendor, an American citizen, as where the property, although it is to be paid for, at all events is not to be transferred until a future day, this will satisfy the warranty on the part of the vendor of American property.[12] It has also been held by the English admiralty that the absolute sale to a neutral of an armed belligerent vessel in a neutral port, in which she was forced to take refuge by the other belligerent, is not such a valid transfer as will protect her thereafter from capture, although the rule is otherwise as to a merchant ship.[13] The fact that the vendee of a vessel sold in an American port may, perhaps, use her in the service of a belligerent, is not a violation of neutrality.[14]

§ 2136. **Neutrality violated by breach of blockade.**—It may be stated as a general rule that a breach of blockade by a neutral

[11] The Vigilantia, 1 Rob. 1; The Noyd Gedacht, 2 Rob. 137n; The Endraught, 1 Rob. 18; The Vrow Herminia, 1 Rob. 163; The Lechs Geschwinstein, 4 Rob. 100; The Embden, 1 Rob. 16. See also The Benito Estranger, 176 U. S. 568, 20 Sup. Ct. 489, 44 L. ed. 592.

The British ships transfer restriction act, 1916 (5 Geo. V. c. 21, act Aug. 23, 1916 [54 Brit. Stat. 1916, pp. 124, 125]) provides: "Where after the passing of the act, any person who is the owner or mortgagee of a British ship ceases to be a British subject or becomes a foreign contraband company, that ship, or, in the case of a mortgagee of a ship, the interest of the mortgagee shall be subject to forfeiture under part I of the merchant shipping act 1894." See also 53 British Stat. (1914–15) p. 41 (act 16 March, 1915).

As to American registry and restriction on transfer of ship, see shipping act 1916, U. S. Stat. 1915–16, pp. 728 et seq.

[12] Mugatroyd v. Crawford, 3 Dall. (3 U. S.) 491, 1 L. ed. 692.

[13] The Minerva, 6 Rob. 399, and note.

[14] The Santissima Trinidad, 7 Wheat. (20 U. S.) 283, 5 L. ed. 454; The Betsey, Bee Adm. 67, Fed. Cas. No. 17,750; The Meteor, 3 Am. Law Rev. 173.

violates his neutrality. But the blockade must be one of which notice, actual or constructive, has been given; it must also have been duly and sufficiently instituted and properly maintained, for although a belligerent has the right to exclude neutral commerce by an investment of the enemy's port with a naval force, yet such exclusion should be held operative only when done and maintained strictly in accordance with the rules of law and the right of war. In brief, there must be an actual blockade, intended to exclude all communication with the invested port, and to suspend its commerce both as to its import and export trade; it must also be properly maintained, and there ought to be some clear act of violation by the neutral.[15]

**§ 2137. Notice to neutral of blockade required.**—There must be a knowledge of the existence of a blockade, either actual or constructive, on the part of a neutral. Actual personal notice is conclusive, without regard to its immediate source, especially where by due inquiry it might have been confirmed.[16] Again, under the English admiralty decisions and upon other high authority a blockading nation has, as a general rule, the right to conclusively presume that a notification to a neutral government is a personal notification to each subject and resident entitled to claim its neutral character and protection, and this is true as to the blockading power, irrespective of the neglect of the neutral government to make publication of the notice received.[17] It is declared, however,

[15] The Juffrou Maria Schroeder, 3 Rob. 147; The Frederick Molke, 1 Rob. 86; The Webraart Van Pillau, 2 C. Rob. 128; Harratt v. Wise, 9 Barn. & C. 712, 7 L. J. (O. S.) K. B. 309, per Lord Tenterden; The Gute Edwartung, 6 C. Rob. 182; The Vrow Judith, 1 Rob. 150, per Sir Wm. Scott; The Maria, 5 C. Rob. 365; The Haabet, 6 Rob. 58; The Mercurius, 1 Rob. 82, per Sir Wm. Scott; 1 Marshall on Ins. (ed. 1810) *80.

See § 2139 and *compare* § 2139a herein.

Attempt to leave blockaded port subjects vessel and cargo to condemnation. The Johann Maria, 10 Moore's Privy Council 70, Scott's Cas. on Internat. L. p. 803.

As to contracts involving breach of neutrality: same as to supply of munitions of war and of blockade breach, see 2 Wharton's Conflict of Laws (3d ed.) sec. 496, 497, pp. 1183, 1184.

[16] The Tutela, 6 Rob. 177; Winder v. Wise, Dawson & Lloyd's Mercantile Cases, 238. In this case there had been a publication of the notice in the London Gazette after the captain had sailed on his voyage and an insurance on goods abroad. The Rolle, 6 Rob. 364.

Blockade must be known to exist. The Olinde Rodrigues, 174 U. S. 510, 43 L. ed. 1065, 19 Sup. Ct. 851.

[17] The Neptunas, 2 Rob. 110, and cases id. 109, 111, 131, 298; The Tutela, 6 Rob. 177; Harratt v. Wise, 9 Barn. & C. 712, 7 L. J. (O. S.) K. B. 309, per Lord Tenterden; The Adelaide, 2 C. Rob. 111n; 1 Kent's Commentaries, 147 et seq.; opinion of Kent, C. J., in Radcliff v. United Ins. Co. 7 Johns. (N. Y.) 38; Maclachlan on Shipping, 569 et seq.; 1 Arnould on Marine Ins. (Perkins'

that the rule is open to some qualification and relaxation for the furtherance of justice and the benefit of commerce; as in case the master sails on his voyage before notice is published of the blockade, and also that the presumption of knowledge from such notification is open to rebuttal in insurance cases, and it becomes a question of fact for the jury whether there was actual knowledge or not.[18]

**§ 2138. Where existence of blockade is notorious or has long continued.**—Where the fact of the existence of the blockade is so open and notoriously known at the port of departure that it may reasonably be presumed that the neutral must have been informed of its existence, he is presumed to have knowledge thereof. This rule has also been applied to a vessel seeking egress from a blockaded port with a cargo loaded after the commencement of the blockade; so to a case where notice has been given to a neighboring state, and a sufficiently reasonable time has elapsed thereafter, and also where an important commercial port has been blockaded and the hostile investment has long continued.[19]

**§ 2139. What constitutes a blockade.**—A blockade must have been duly and sufficiently established either directly by the sovereign power, or by express or implied delegation of power, or presumably by adoption and ratification, except that where a blockade has been declared by the sovereign authority, it is thereby limited in its extent, and no discretionary power exists in the blockading force to enlarge its terms as against a neutral.[20] A blockade of an enemy's port may also be established without any proclamation by the President, by the commander of the naval forces, as an adjunct to naval operations against other blockaded ports and the enemy's fleet.[1]

There must not only be an actual de facto blockade, but it must

ed. 1850) 744, sec. 276; 1 Phillips on Ins. (3d ed.) 457, 458, secs. 829, 830; 1 Marshall on Ins. (ed. 1810) *80; 1 Duer on Marine Ins. (ed. 1845) 648 et seq. See also 1 Duer on Marine Ins. (ed. 1845) 691–698, where this writer fully examines the note to Olivera v. Union Ins. Co. 3 Wheat. (16 U. S.) 183, 196, 4 L. ed. 365, and appendix, and also reviews the authorities relied on and rejects, as not expressing the law, the rule there stated, viz., that notification to a neutral minister is not notice to his government or its citizens according to the recognized doctrine here.

[18] Harratt v. Wise, 9 Barn. & C. 712, 7 L. J. (O. S.) K. B. 309, per Lord Tenterden.

[19] The Vrow Judith, 1 Rob. 150; The Adelaide, 2 Rob. 111 n, per Sir Wm. Scott; The Frederick Molke, 1 Rob. 86; The Calypso, 2 Rob. 298; The Hutige Hane Dahl, 3 Rob. 328.

[20] The Rolla, 6 Rob. 364, per Sir Wm. Scott; The Henrick, 1 Rob. 146. See § 2139a herein.

[1] The Adula, 176 U. S. 361, 44 L. ed. 505, 20 Sup. Ct. 432.

be properly maintained. It must be of such a character and be maintained by such an actually existing adequate force before the port that every vessel which attempts egress or ingress is imminently liable to capture; for it must be intended to suspend commerce with the blockaded port by so far encircling it at sea that all communication is effectually cut off.[2] And no blockade exists as to

[2] King v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 300, Fed. Cas. No. 7,788; Radcliff v. United Ins. Co. 7 Johns. (N. Y.) 38; Williams v. Smith, 2 Caines (N. Y.) 1, 2 Am. Dec. 209; The Mercurius, 1 Rob. 67; The Betsey, 1 C. Rob. 93, 5 Eng. Rul. Cas. 187; The Vrow Judith, 1 Rob. 150, per Sir Wm. Scott; 2 Wheaton's International Law, 228, 233; 1 Kent's Commentaries (5th ed.) 144 et seq. See Treaties of United States and Chili, 1822; United States and Peru, 1830, and July 22, 1856; United States and Russia, July 22, 1854; United States and Two Sicilies, Jan. 13, 1855; 7 Journ. Congress, 241, Dec. 1871. On May 16, 1806, England, by orders in council, declared the whole coast of Europe, from Elbe in Germany to Brest in France, in a state of blockade, when it could not spare a sufficient naval force from other points of service to enforce the blockade over more than a small proportion of the territory. On November 21, 1806, Napoleon issued the Berlin Decree, declaring the British islands in a state of blockade, although he had no naval force, in fact hardly a ship, with which to enforce the decree. This was the beginning of the "Continental System" and was in effect intended as a retaliatory measure; Great Britain, in January, 1807, by order in council, restrained trade by neutrals between belligerent ports, a commerce generally allowed prior thereto, and covered substantially the same territory as the former order, and again, on November 17, 1807, she prohibited all neutral trade between France and her allies, except through Great Britain. Napoleon's retaliatory measure, or Milan Order of December 17, 1807, and like decrees issued by Spain and Holland, declared that every vessel should be forfeited and denationalized if found on the high seas on a voyage to or from any British port, or which should submit to search by British cruisers, or which should pay any license money, tax, or duty to that government. The Berlin Decree was not at first enforced against American vessels by the French. The American minister having been informed by the French authorities that they would not be molested, but after July 7, 1807, it was announced that American vessels laden with British merchandise or the merchandise of her colonies would be seized, and in November, 1807, the American ship Horizon was actually seized and her cargo condemned as of British origin, and thereafter other American vessels and their cargoes were also seized. In the same year, Great Britain, after a formal demand for the surrender of the Danish fleet at Copenhagen, seized their vessels and took them to England, and by an order in council, November 11, 1807, she made another retaliatory order in council, prohibiting neutral trade except through Great Britain with France or her allies. The retaliatory orders in council of Great Britain were, although a plain violation of the law of nations, defended by Sir William Scott, although he had previously declared it to be "monstrous to suppose that because one country has been guilty of an irregularity every other country is let loose from the law of nations." The Flad Oyen, 1 Rob. 142; The Fox, Edw. Adm. 311. The greater part of the above note is taken in substance from 2 Lossing's Harper's Cyclopedia of United States

any marine channel left open.[3] And the legal effect of a lawful and sufficient blockade is the closing of the port and an interdiction of the entrance of all vessels, of whatever nationality or business.[4]

Whether the fact that a port is merely besieged and not invested by sea, prevents transportation there by neutrals of goods by sea, has been questioned by Chief Justice Marshall. If, however, the goods so transported were within the class known as contraband of war, or of a nature to aid the inhabitants in continuing resistance, it might be reasonably assumed that the act of transportation was a breach of neutrality,[5] although it is held that it is not a violation

History (ed. 1893) 1034, title "Orders and Decrees," 966, title "Neutrals, Rights of Attacked," and in part from 1 Duer on Marine Ins. (ed. 1845) 644, and note b. In 1810 Congress passed an act, the purpose of which was to obtain a revocation of British and French orders, but it proved unsuccessful: 2 Lossing's Harper's Cyclopaedia of United States History (ed. 1893) 1215, tit. "Revocation of British 'Orders' and French 'Decrees' Sought."

What constitutes an effective blockade: test of effectiveness, see The Olinde Rodrigues, 174 U. S. 510, 43 L. ed. 1065, 19 Sup. Ct. 851.

"A blockade (that is a war blockade as distinguished from a 'pacific blockade') may be defined as 'an act of war carried out by the warships of a belligerent detailed to prevent access to or departure from a defined part of the enemy's coast.' The preventive measures are enforced against vessels of all nations. The earlier text-writers all require that the siege or blockade should actually exist and be carried out by an adequate force, and not merely declared by proclamation, in order to render commercial intercourse with the port or place unlawful on the part of neutrals. . . . A blockade being thus an infringement of maritime rights its operation is not to be extended further than the actual circumstances of the case render necessary. . . . A blockade must also be absolute, that is, it must interdict all commerce whatever within the blockaded port." Wheaton's Elements of International Law (5th Eng. ed. 1916) pp. 767 et seq. covering also the points of what must be proved to constitute a violation of blockade; actual presence of blockading force; temporary interruption; effectiveness of blockade; knowledge of the party; extent of notice; cessation of blockade and notice; violation of blockade, etc.

*Compare* § 2139a herein.

As to blockades, see Taylor's Internat. L. (ed. 1904) pp. 759 et seq., secs. 674 et seq. That blockades to be binding must be effective, see Id. pp. 766 et seq., secs. 678 et seq.

As to necessity of blockade being effective, etc., and as to rights of neutral vessels to sail in good faith to blockaded ports, etc.: naval war code of 1900; doctrine of continuous voyage, etc., Art. 19 of Declaration of London. See Article "Some Phases of the Laws of Blockade" by Alexander Holtzoff, 10 Amer. Jour. Internat. L. (1916) pp. 52–64.

Absence of blockading fleet excuses entry and departure during such absence. The Nancy, 1 Acton, 57, Scott's Cas. on Internat. L. p. 817.

[3] The Ocean, 3 C. Rob. 297; The Jonge Pieter, 4 C. Rob. 79.

[4] The Adula, 176 U. S. 361, 44 L. ed. 505, 20 Sup. Ct. 432.

[5] Letter to American minister at London, Sept. 20, 1800; 3 Wheat. (16 U. S.) Append. 41; 1 Duer on Marine Ins. (ed. 1845) 656, 658, sec. 32. Although it is said "all commerce is absolutely prohibited with a town or place besieged, invested, or

of a maritime blockade for a neutral to export goods from a port not blockaded, to which they had been conveyed overland from the blockaded port.[6] Again, the condemnation of a vessel by a foreign court of admiralty, for a breach of blockade, is conclusive evidence of that fact, in an action for insurance.[7]

**§ 2139a. Same subject: British Orders in Council, etc.**—The exigencies of the present Great War have brought about what may be designated as an entirely new kind of blockade not within the conception of what all jurists and text-writers on international law and kindred subjects have heretofore denominated blockades. These efforts have not been called by the technical name of blockade but have been respectively declared to be military areas and war zones by the different belligerents promulgating or decreeing their existence.[8] On October 17, 1914, Russia gave warning that navigation would be

even blockaded." 1 Marshall on Ins. (ed. 1810) *80.

[6] The Ocean, 3 Rob. 297.

[7] Croudson v. Leonard, 4 Cranch (8 U. S.) 434, 2 L. ed. 670. *Cited* in:

*United States.*—Hilton v. Guyot, 159 U. S. 167, 40 L. ed. 109, 16 Sup. Ct. 139; Cushing v. Laird, 107 U. S. 79, 27 L. ed. 395, 2 Sup. Ct. 196; The Mary, 9 Cranch (13 U. S.) 142, 3 L. ed. 684; Tompkins v. Tompkins, 1 Story (U. S. C. C.) 553, Fed. Cas. No. 14,091; The Parkhill, Fed. Cas. No. 10,755a; Dunham v. New England Mutual Ins. Co. 1 Low. Dec. 254, Fed. Cas. No. 4,152; De Lovio v. Bolt, 2 Gall. (U. S. C. C.) 474, Fed. Cas. No. 3,776; Cushing v. Laird, 6 Ben. (U. S. C. C.) 461, Fed. Cas. No. 3,509; Clark v. United States, 2 Wash. (U. S. C. C.) 524, Fed. Cas. No. 2,837; Bradstreet v. Neptune Ins. Co. 3 Sumn. (U. S. C. C.) 605, Fed. Cas. No. 1,793.

*Connecticut.*—Fisher v. Fielding, 67 Conn. 128, 32 L.R.A. 247, 52 Am. St. Rep. 270, 34 Atl. 714.

*Iowa.*—Melhop v. Doane, 31 Iowa, 401, 7 Am. Rep. 147.

*Minnesota.*—Farrell v. City of St. Paul, 62 Minn. 274, 29 L.R.A. 780, 54 Am. St. Rep. 641, 64 N. W. 809.

*New Hampshire.*—Beach v. Workman, 20 N. H. 383.

*New Mexico.* — United States v. Maxwell Land Grant Co. 5 N. Mex. 307, 3 L.R.A. 753, 21 Pac. 153.

*New York.* — Ocean Ins. Co. v. Francis, 2 Wend. 68; New York Firemen Ins. Co. v. De Wolf, 2 Cow. 66.

*Pennsylvania.*—Cheriot v. Foussat, 3 Binn. 260.

*South Carolina.*—Groning v. Union Ins. Co. 1 Nott & McC. 540.

*Tennessee.*—Brown v. Brown, 86 Tenn. 319, 7 S. W. 640; Williams v. Saunders, 5 Coldw. 78; Pinson v. Ivey, 1 Yerg. 350.

*Virginia.* — Tilson v. Davis, 32 Gratt. 104.

[8] "Another striking feature of the present war is the absence of blockade formally declared and applied in the way in which that doctrine had been previously recognized, namely by actual patrol of the enemy's coasts and waters with a sufficient number of cruisers to prevent ingress and egress. In its place 'military areas' or 'war zones,' depending for their effectiveness upon submarine mines and torpedo boats have been established not only within the enemy's waters, but upon the high seas. The penalty meted out to neutrals for entering these zones is not the penalty which may be legitimately invoked for breach of blockade, namely, confiscation of vessel or cargo after

dangerous in certain zones. On February 4, 1915, and on January 31, 1917, Germany declared certain waters to be war zones. And as to Great Britain we quote the following: "The Secretary of the Admiralty makes the following announcement:—During the last week the Germans have scattered mines indiscriminately in the open sea on the main trade route from America to Liverpool via the North of Ireland. Peaceful merchant ships have already been blown up with loss of life by their agency. The White Star liner Olympic escaped disaster by pure good luck. But for the warning given by British cruisers, other British neutral merchant and passenger vessels would have been destroyed. These mines cannot have been laid by any German ship of war. They have been laid by some merchant vessel flying a neutral flag which has come along the trade route as if for the purpose of peaceful commerce and while profiting to the full by the immunity enjoyed by neutral merchant ships, has wantonly and recklessly endangered the lives of all who travel on the sea, regardless of whether they are friend or foe, civilian or military in character. Mine laying under a neutral flag and reconnaisance conducted by trawlers, hospital ships, and neutral vessels are the ordinary features of German naval warfare. In these circumstances, having regard to the great interests intrusted to the British Navy, to the safety of peaceful commerce on the high seas, and to the maintenance within the limits of International Law of trade between neutral countries, the Admiralty feel it necessary to adopt exceptional measures appropriate to the novel conditions under which the war is being waged.

"They therefore give notice that the whole of the North Sea must be considered a military area. Within this area merchant shipping of all kinds, traders of all countries, fishing craft and all other vessels will be exposed to the gravest dangers from mines which it has been necessary to lay, and from warships searching vigilantly by night and day for suspicious craft. All merchant and fishing vessels of every description are hereby warned of the dangers they encounter by entering this area except in strict accordance with admiralty directions. Every effort will be made to convey this warning to neutral countries and to vessels on the sea, but from the 5th of November onward the Admiralty announce that all ships

condemnation by a prize court, but, in case a neutral ship comes in contact with a mine or is encountered by a submarine, it must almost inevitably be sunk with its cargo regardless of whether either be guilty or innocent, and the passengers and crew, whether combatants or non-combatants, left to the precarious fate of saving their own lives in the ship's boats or of being rescued by vessels which may happen along at that time." 9 Amer. Jour. of Intl. Law (1915) pp. 462 et seq. (Editorial comment).

passing a line drawn from the northern point of the Hebrides through the Faroe Islands to Iceland do so at their own peril.

"Ships of all countries wishing to trade to and from Norway, the Baltic, Denmark, and Holland are advised to come, if inward bound, by the English Channel and the Straits of Dover. There they will be given sailing directions which will pass them safely, so far as Great Britain is concerned, up the East Coast of England to Farn Island, whence a safe route will if possible be given to Lindesnaes Lighthouse. From this point they should turn north or south to their destination, keeping as near the coast as possible. The converse applies to vessels outward bound. By strict adherence to these routes the commerce of all countries will be able to reach its destination in safety so far as Great Britain is concerned, but any straying, even for a few miles from the course thus indicated, may be followed by fatal consequences." [9]

[9] London Times, Nov. 3, 1914, p. 6, col. 5.

Another reason for the mining of the North Sea by England and its declaration of the whole North Sea as a military area also applies as follows; In the House of Commons Sir G. Parker asked the Prime Minister whether in view of the anxiety of public opinion in the United States he would make a general explanatory statement of the policy of Great Britain as to certain matters of which the mining of the North Sea was the principal one. Mr. Asquith stated that as to laying of mines by the Germans in the North Sea outside of territorial limits upon the trade routes, there was a belief that in many cases they were laid by fishing or merchant vessels disguised as neutrals and ostensibly following their ordinary pursuits in breach of the Hague convention of 1907. Mr. Asquith further said that "His Majesty's government deliberately abstained and abstained entirely from the use of mines during the first two months of the war outside British Territorial waters, but eventually found it necessary to adopt counter measures in order to cope with the German policy of mine laying combined with their submarine atrocities. A mine field was therefore laid across the Southern portion of the North Sea in such a way as to guard the approaches to the English channel and due public warning was given in accordance to the Hague Convention. . . . The menace to peaceful shipping presented by these wholly illegal methods of waging war is so great that His Majesty's Government have been compelled to adopt the only possible means of protection—namely, to declare the whole North Sea to be a military area and to restrict all shipping crossing it to a narrow passage, along which the strictest supervision can be exercised. Access to the coasts of Great Britain and neutral countries has been made as safe as it is in the power of the British Navy to make it, and although this has been done at the price of certain inconveniences and delay to shipping through its inability to follow its accustomed routes, the price cannot in the circumstance of the case be considered a high one. His Majesty's Government are fully aware of the anxiety prevailing in the United States and other neutral countries on these subjects, and they trust that this policy will be fully understood. They are confident that public opinion in neutral countries will appreciate their earnest desire that there should be

§ 2140. **Continuance of blockade.**—Although as a general rule, the presumption exists that a blockade by notification continues until notification that it is raised, and the blockading power should

no interference with neutral trade provided the vital interests of Great Britain, which are at stake in the present conflict, are adequately maintained. Any interference by the British Navy is directed not to increase British trade or to diminish the trade of any neutral foreign country, but solely to prevent goods from reaching the enemy which would increase his power in the war against the British and allied forces." London Times Nov. 18th 1914.

See § 2569a, and appendix F herein.

As to blockades during the present Great War see Art. by James W. Garner, 10 Amer. J. of Intl. L. (1915) pp. 818–857.

As to the legitimacy of closing the North Sea, by Great Britain it is said that "this action introduced a new species of blockade rendered both possible and necessary on account of the great part played by mines and submarines in the present war;" and as to memorandum of Berlin of February 4th 1915, aimed at England by way of retaliation. "If this pronouncement was intended to be a declaration of blockade to take effect on February 18, then it is quite obvious that it could be no more than a 'paper' blockade. Germany did not possess the naval resources necessary to maintain an effective blockade in the seas surrounding Great Britain and Ireland, nor could she at this juncture of the war establish what may be called a quasi-blockade by means of scattering mines in those waters; for mines may be gathered by any passing vessel and freedom of navigation reestablished if her warships be not present to prevent such action. The Memorandum, quoted in part above, contains certain particulars required by international law for the purpose of instituting a blockade. It makes the necessary declaration, and notifies it to the neutral Powers. It states when it will begin, the limits of the coasts to be blockaded, and how long neutral vessels will be allowed in order to come out. No time is fixed by international law; but a reasonable amount of time is necessary. Very frequently a fortnight's delay has been allowed, as is the case under British practice; and this is the delay allowed by Germany in the present case. Even all these and other conditions be fulfilled, yet a blockade cannot be regarded as binding unless it is effective, that is unless it is maintained by a sufficient force which is really able to prevent any approach to a departure from the enemy coast, and expose to danger and probable capture any neutral vessel attempting to get through. If no such adequate force is present, the alleged blockade is no real blockade at all. To proclaim it on the chance of capturing here and there a neutral vessel, so that other neutral merchantmen may cease making voyages to British ports, is illegitimate. Indeed, failing an effective blockade, any forcible interference with a neutral vessel that has no contraband and is not engaged in unneutral service will constitute an act of war against the neutral state concerned.

"This threatened procedure on the part of Germany has been generally characterized as piracy. Though if carried out it will amount to a flagrant breach of international law and a crime against the entire society of states, it will not be piracy in the sense contemplated by the law of nations. In this sense piracy is an act of depredation or violence committed on the high seas by a private vessel without authorization from any state." Phillipson's Interna-

give prompt notice of discontinuance,[10] yet other acts will justify the presumption that the blockade is raised. Thus, if a neutral receives information from one of the blockading powers on whom he is justified in relying, such notice, though erroneous, will excuse his proceeding to or attempting to enter the blockaded port.[11] So the blockade must be uniform, constant, and general as to all vessels not privileged by law, not permitting some to pass and excluding others under like circumstances, otherwise it may be justly inferred that the blockade is raised;[12] and the blockade may be discontinued by the blockading force being dispersed or driven away by the enemy, in which case, if resumed, another notice is required.[13] There must be an adequate force present. The animus revertendi of the blockading fleet does not continue the blockade, nor is the entry of a neutral, after being notified, a breach of his neutrality if the blockading force be not before the port.[14] But an accidental or temporary removal of a blockading fleet by winds or storms, the commander intending to return at once, and using due diligence to effect the same, does not suspend the blockade, and if the neutral, with notice or knowledge of the cause of its absence, attempts to enter it is a breach of the blockade.[15] The blockade of a port is not terminated by the fact that the mouth of the bay is in the complete possession and control of the blockading fleet, when the enemy's port is still in the possession of the enemy's forces, as are several other positions in the neighborhood, and the port is eighteen miles from the mouth of the bay, and access to it is obtained either by a small river emptying into the upper bay or by rail from another town on the bay.[16]

**§ 2141. Effect of sailing for blockaded port: intention to enter: breach of blockade: what is and is not.**—There is declared to be

tional Law and The Great War (1915) p. 384.

As to the status of converted merchantmen and defensively armed merchantmen, see Phillipson's International Law and the Great War (1915) pp. 125 et seq.

As to Legality of Blockades Instituted by Napoleon's Decrees, and The British Orders in Council, 1806–1813, see Art. by Archibald H. Stockder, in Vol. 10 Amer. Jour. Intl. L. (1916) pp. 492–508.

[10] The Neptunus, 1 C. Rob. 170, 5 Eng. Rul. Cas. 183. See The Betsey, 1 Rob. 332; The Shepherdess, 5 Rob. 262.

[11] The Neptunus, 2 Rob. 112; Northcote v. Douglass, 10 Moore P. C. 37; The Courier, 1 Edw. 249. See Oldden v. M'Chesney, 5 Serg. & R. (Pa.) 71.

[12] The Rolla, 6 C. Rob. 364, per Sir Wm. Scott. See Oldden v. M'Chesney, 5 Serg. & R. (Pa.) 71.

[13] The Hoffnung, 6 Rob. 112, 117; The Triheten, 6 Rob. 65.

[14] Williams v. Smith, 2 Caines (N. Y.) 1, 2 Am. Dec. 209.

[15] The Hoffman, 6 Rob. 116. See The Margeretha, 6 Rob. 62; The Neptunus, 1 Rob. 170, 5 Eng. Rul. Cas. 183; The Vrow Johanna, 2 Rob. 109.

[16] The Adula, 176 U. S. 361, 44 L. ed. 505, 20 Sup. Ct. 432.

a difference between a de facto blockade arising from mere maritime investment of the port, and one in which the blockading power has duly notified all neutral states, since in the former case the ignorance of the neutral in sailing to a blockaded port may be proven, whereas in the latter case the act of a neutral ship in sailing for the blockaded port with knowledge of the blockade is a breach thereof; at least, such is the opinion of Sir William Scott.[17] But the rule is generally thus stated: The mere act of sailing for a blockaded port with knowledge that it is such must be coupled with the intent to evade the blockade.[18] If, however, the mere sailing with knowledge of the blockade is an overt act evidencing the beginning of the execution of the intention to evade the blockade, and is so far conclusive evidence of the intent, then it would be a breach from the departure of the vessel,[19] and so construed there is substantially little, if any, difference between the two rules. But if the intent to evade the blockade depends upon other evidence than the mere act of sailing with knowledge of its existence, such a construction makes the last rule entirely different in its effect from that first noted. Thus, it is expressly held in New York that a mere sailing for a port understood to be blockaded is not such a breach of neutrality as affects a policy of insurance.[20] The doctrine of the New York cases is, however, criticised by Mr. Duer as opposed to the authorities.[1] It is also held in the Federal Supreme Court that the sailing of a vessel with a premeditated attempt to violate a blockade is ipso facto a violation of the blockade, and renders

[17] The Vrow Johanna, 2 Rob. 109, and opinion of Sir Wm. Scott, 111, 114, 116, 124, 128, 131; 1 Marshall on Ins. (ed. 1810) *81; 1 Duer on Marine Ins. (ed. 1845) 669, sec. 44.

[18] Fitzsimmons v. Newport Ins. Co. 4 Cranch (8 U. S.) 185, 199, 2 L. ed. 591, per Marshall, C. J.; The Nereide, 9 Cranch (13 U. S.) 388, 440, 3 L. ed. 769, per Story, J.; The Columbia, 1 Rob. 154, 5 Eng. Rul. Cas. 194; The Neptunus, 2 Rob. 110; The Betsey, 1 C. Rob. 334; The Shepherdess, 5 C. Rob. 262; The Vrow Johanna, 2 Rob. 109; The James Cooke, Edw. Adm. 261; The Irene, 5 Rob. 81, per Sir Wm. Scott; 1 Arnould on Marine Ins. (Perkins' ed. 1850) 747; Id. (8th ed. Hart & Simey) sec. 668, p. 827, sec. 760, p. 917, secs. 766 et seq., pp. 926 et seq.; 1 Phillips on Ins. (3d ed.) 459, secs. 831, 833; 1 Duer on Marine Ins. (ed. 1845) 666, 667, secs. 41, 42, 690–98.

[19] Yeaton v. Fry, 5 Cranch (9 U. S.) 335, 3 L. ed. 117; 1 Kent's Commentaries, (5th ed.) 147 et seq.

[20] Vos v. United Ins. Co. 1 Caines Cas. (N. Y.) VII., 2 Johns. Cas. (N. Y.) 469, rev'g 2 Johns. Cas. (N. Y.) 180; Liotard v. Graves, 3 Caines (N. Y.) 226. See also Sperry v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 243, Fed. Cas. No. 13,236; Medeiros v. Hill, 8 Bing. 231, per Tindal, C. J., noted below.

[1] Duer on Marine Ins. (ed. 1845) 696 et seq. See also 1 Duer on Marine Ins. 664 et seq., and criticism (1 Duer on Marine Ins. 691 et seq.) of note to Oliveria v. Union Ins. Co. 3 Wheat. (16 U. S.) 183, 196, 4 L. ed. 365, appendix, and cases *cited.*

the vessel subject to capture from the moment she leaves the port of departure.[2] Again, it is held that a vessel might lawfully sail for a port in the West Indies known to be blockaded until she was warned off, according to the British orders of April, 1804, relating to blockades in the West Indies. She was not bound to make inquiry elsewhere than of the blockading force.[3] It is also intimated that a vessel may, with knowledge of the fact of blockade, sail from the United States to a blockaded port in Europe under instructions to ascertain if it has been raised, or under the expectation that it might be raised, intending to proceed to another port if it has not, and also that the intent to evade the blockade must not only exist, but must be coupled with some act in furtherance thereof.[4] But if the intent to violate the blockade has been given up and the course changed, the ground for seizure no longer exists.[5]

If insurance be against all risks, blockaded ports excepted, a vessel sailing for a blockaded port, not knowing that it is blockaded, is covered by the policy. The exception is not of the port, but of the risk of capture for breaking the blockade; and a vessel sailing ignorantly to a blockaded port is not liable to capture under the law of nations. She is entitled to notice and warning from the blockading belligerent not to proceed;[6] but if after such notice she deliberately proceeds, regardless of the warning, and the intent is clear, she is subject to seizure.[7] And if information be obtained of the existence of the blockade at a port at which the vessel touches on the voyage, this is such a notice as that her neutrality is forfeited if she then proceeds to the blockaded port or attempts to enter;[8] although it is held that mere intention to enter a blockaded port, without any actual attempt after being warned off, is no breach of the blockade, and no cause for condemnation either

[2] The Adula, 176 U. S. 361, 44 L. ed. 505, 20 Sup. Ct. 432.

[3] Maryland Ins. Co. v. Woods, 6 Cranch (10 U. S.) 29, 3 L. ed. 143.

[4] Fitzsimmons v. Newport Ins. Co. 4 Cranch (8 U. S.) 185, 2 L. ed. 591, per Marshall, C. J.; Calhoun v. Insurance Co. 1 Binn. (Pa.) 293, per Brackenridge, J.; Sperry v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 243, Fed. Cas. No. 13,236. See The Shepherdess, 5 Rob. 264; Dalgleish v. Hodgson, 7 Bing. 495, 5 M. & P. 407, 9 L. J. (O. S.) C. P. 138; Medeiros v. Hill, 8 Bing. 231, 1 M. & Sc. 311, 5 Car. & P. 182; Naylor v. Taylor, 9 Barn. & C. 718, M. & W. 205, 31 R. R. 731.

[5] The Trende Lostre, 6 C. Rob. 290 n.; The Imina, 3 C. Rob. 168; The James Cook, 1 Edw. Adm. 261.

[6] Yeatin v. Fry, 5 Cranch (9 U. S.) 335, 3 L. ed. 117. See The Columbia, 1 Rob. 156; Fitzsimmons v. Newport Ins. Co. 4 Cranch (8 U. S.) 185, 2 L. ed. 591, 200; Treaty between United States and Great Britain, 1794, sec. 18, providing for notice in case vessels sailed without port blockaded.

[7] The Apollo, 5 Rob. 256; The Adonis, 5 C. Rob. 228; The Tutela, 6 C. Rob. 177.

[8] Winder v. Wise, Dan. & Ll. Merc. Cas. 23; The Columbia, 1 Rob. 130.

by international law or by the treaty between the United States and Great Britain, and that where an American vessel and cargo were condemned by a British court of admiralty for persisting in an intention to enter a blockaded port, the condemnation was illegal, and the insurers were liable.[9] So persisting in an intention to enter is not an attempt to enter under a treaty which provides that "the ship may be turned away, but she shall not be detained if cargo is not contraband nor be confiscated, unless after notice she shall again attempt to enter." [10] Lingering about the place as if waiting for an opportunity to enter, or, in some instances, not making immediately for another port, or perhaps a clearly evidenced purpose to carry out a declaration of a resolution to break the blockade after warning, or approaching so closely as to be enabled to slip in if opportunity affords might be evidence of an attempt to enter the blockaded port.[11] If a master have actual notice of a blockade, he is not at liberty even to approach the blockaded port for the purpose of making inquiries of the blockading vessels since such liberty would not fail to lead to an attempt to violate the blockade under pretext of approaching the port for the purpose of making such inquiries.[12] Nor may the vessel be permitted to proceed to the very port or mouth of the harbor for the purpose of ascertaining if the blockade be raised. The vessel has no right to inquire of the blockading squadron, but is bound to make inquiry at a neighboring port.[13] A direction to enter a blockaded harbor, given by

[9] Williamson v. Tunno, 1 Brev. (S. C.) 151, 2 Am. Dec. 654. See also Sperry v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 243, Fed. Cas. No. 13,236.

[10] Fitzsimmons v. Newport Ins. Co. 4 Cranch (8 U. S.) 185, 2 L. ed. 591 (under treaty between the United States and Great Britain).

[11] Fitzsimmons v. Newport Ins. Co. 4 Cranch (8 U. S.) 185, 2 L. ed. 591, 199, per Marshall, C. J. See The Apollo, 5 Rob. 256, per Sir Wm. Scott; The Charlotte Christina, 6 Rob. 101; The Elizabeth, 1 Edw. Adm. 198; The Neutralitet, 6 Rob. 30; The Arthur, 1 Edw. Adm. 202; The Columbia, 1 C. Rob. 154, 5 Eng. Rul. Cas. 194.

[12] The Adula, 176 U. S. 361, 44 L. ed. 505, 20 Sup. Ct. 432. See the Olinde Rodrigues, 174 U. S. 510, 43 L. ed. 1065, 19 Sup. Ct. 851; The Newfoundland, 176 U. S. 97, 114, 20 Sup. Ct. 274, 44 L. ed. 386.

[13] The Spes, 5 Rob. 76, per Sir Wm. Scott; The Juno, 2 C. Rob. 116; Maryland Ins. Co. v. Woods, 6 Cranch (10 U. S.) 45, 48, 3 L. ed. 143. But see Sperry v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 243, Fed. Cas. No. 13,236, per Washington, J. It is declared that no case "has laid it down that the mere act of sailing to a port which is blockaded at the time the voyage is commenced is any offense against the law of nations, where there is no premeditated intention of breaking the blockade if it shall be found to continue in force when the ship arrives off the port," as it might be of the utmost importance to a merchant to introduce his goods into that port at the very first moment the blockade is raised: Medeiros v. Hill, 8

the commanding officer of one of the blockading vessels, which has hailed an approaching ship, cannot be construed as a permission to violate the blockade as such permission would not be within the scope of his authority.[14] And entry may in certain cases of physical necessity, such, perhaps, as stress of weather, be justified,[15] or a license or express or implied permission may be given.[16] Where the insurers "take no risk of a blockaded port, but if turned away the insured to be at liberty to proceed to a port not blockaded," they will not be liable for any loss happening in consequence of the blockade, whether such blockade is strictly legal or not,[17] and a neutral vessel permitted by the blockading force to enter may have egress with her original cargo.[18] So a vessel within a port blockaded after the commencement of her voyage, and prevented from proceeding on it, sustains a loss by a peril within that clause of the policy insuring against "arrests and restraints," and if the vessel so prevented be a neutral cargo laden before the institution of the blockade, the restraint is unlawful.[19] And the egress may perhaps be justifiable where the cargo has been actually delivered to the master before the blockade was established. But, in other cases, attempting egress with a cargo wholly or partly laden after the blockade is established, and if its existence ought to have been known, violates the blockade.[20] So egress of a neutral ship in ballast exempts from condemnation, even though she is purchased from an enemy, provided the sale is bona fide and delivery made before the blockade was established, but otherwise where such purchase was made after the blockade was commenced.[1] And a neutral ship may leave with a cargo, the proceeds of funds of neutral owners, where the necessity of saving the goods from confiscation by reason of impending war is imminent and pressing.[2] It is

Bing. 231, per Tindal, C. J., *relying* on the Shepherdess, 5 Rob. 264; Naylor v. Taylor, 9 Barn. & C. 718, per Lord Tenterden, and denying that The Neptunus, 2 Rob. 110, decides otherwise.

[14] The Adula, 176 U. S. 361, 44 L. ed. 505, 20 Sup. Ct. 432.

[15] The Charlotta, 1 Edw. Adm. 252; The Fortuna, 5 Rob. 27. But see The Shepherdess, 5 Rob. 262; The Hurtige Dane, 2 Rob. 124; The Arthur, 1 Edw. Adm. 202.

[16] The Juffrow Maria Schroeder, 3 Rob. 147; The Juno, 2 Rob. 116.

[17] Radcliff v. United Ins. Co. 7 Johns. (N. Y.) 38.

[18] The Maria Schroeder, 4 Rob. 89n.

[19] Olivera v. Union Ins. Co. 3 Wheat. (16 U. S.) 183, 4 L. ed. 365. See also Oldden v. M'Chesney, 5 Serg. & R. (Pa.) 71; The Juno, 2 Rob. 118; The Vrow Judith, 1 C. Rob. 150.

[20] The Rolla, 6 Rob. 371; The Neptunus, 1 Rob. 170, 5 Eng. Rul. Cas. 183; The Calypso, 2 Rob. 298; The Vrow Judith, 1 Rob. 150.

[1] The Potsdam, 4 Rob. 89; The Frederick Molke, 1 C. Rob. 88; The General Hamilton, 6 Rob. 61.

[2] The Drie Vrienden, 1 Dod. 270; The Wassen Hundt, 1 Dod. 271n.

declared in a Federal Supreme Court case where certain claims were made in reliance upon a foreign treatise on international law, that "We cannot, however, accept this opinion as overruling in any particular the prior decisions of this court . . . to the effect that a departure for a blockaded port with intent to violate the blockade renders the vessel liable to seizure. When Congress has spoken upon this subject it will be time enough for this court to act. We cannot change our rulings to conform to the opinions of foreign writers as to what they suppose to be the existing law upon this subject."[3] And where under an insurance effected during the Civil War the vessel proceeded on her voyage and was stopped by the enemy's squadron blockading Chesapeake Bay, and sent back to port, it was held not to be a loss of the voyage within the policy;[4] for it is held that a blockade is not an unlawful restraint.[5]

§ 2142. **Simulated or false papers: concealment, suppression, or spoliation of papers.**—If unlawful goods or their destination, or the unlawful employment of the ship, is sought to be covered by false or simulated papers, or belligerent goods are attempted to be disguised and carried as neutral under such papers, the act will generally amount to a breach of the warranty of neutrality, and will involve those who are parties or privies to the fraud, as well as principals to whom may be imputed the acts of their agents. If done without permission of the underwriters given in the policy, and the property is condemned on that account, the insurers are discharged, and this is so held even though it is the only means by which that trade can be carried on, and the risk is in fact diminished thereby, and probably so where the risk is not excluded by warranty or representation;[6] although so far as the under-

[3] The Adula, 176 U. S. 361, 371, 44 L. ed. 505, 20 Sup. Ct. 432, per Mr. Justice Brown.

[4] Patterson v. Marine Ins. Co. (Patterson v. Baltimore Ins. Co.) 5 Har. & J. (Md.) 417. In this case Wirt, attorney general of the United States, contended that as the vessel was stopped by the enemy's blockading squadron and sent back in good order, there was no right to abandon under a clause in the policy wherein the assurers assumed responsibility for "unlawful arrests or detention." It was held in this case that capture was made with a view to prize, but arrest with a view to restoration. See also Hodkinson v. Robinson, 3 Bos. & P. 388.

[5] Brewer v. Union Ins. Co. 12 Mass. 170, 7 Am. Dec. 53; McCall v. Marine Ins. Co. 8 Cranch (12 U. S.) 59, 3 L. ed. 487.

[6] The Fortuna, 3 Wheat. (16 U. S.) 236, 245, 4 L. ed. 379; The Betsey, 2 Gall. (U. S. C. C.) 377, 384, Fed. Cas. No. 1,364; The Ann Green, 1 Gall. (U. S. C. C.) 274, Fed. Cas. No. 414; The Alexander, 1 Gall. (U. S. C. C.) 532, 536; The St. Nicholas, 1 Wheat. (14 U. S.) 417, 4 L. ed. 125; Livingston v. Maryland Ins. Co. 7 Cranch (11 U. S.) 506, 533, 536, 3 L. ed. 430; Blagge v. New York Ins. Co. 1 Caines (N. Y.) 549, 565; Schwartz v. Insurance Co. of North

writer's liability is concerned, it is doubtful whether his permission would not be implied from a well-known and general usage to carry false papers, or so where the nature of the voyage is such that the carrying of such papers is indispensable, and it has been so expressly declared by high authority.[7] If the general agent of ship and cargo covers enemy's property on board the warrant of neutrality is violated.[8] And where goods were warranted American in a policy, it was held that the insured could not recover after an attempt by their captain or general agent to cover foreign goods, though such foreign goods were covered without the consent of the insured and could easily be distinguished from the American.[9] It is a breach of warranty of neutrality that a vessel and cargo, warranted American property, shall be navigated and claimed as Spanish property, and that all evidence to prove the neutrality of the vessel and cargo is concealed from the captors. In case of such warranty it is not only necessary that the cargo should be in truth neutral, but also that no act of commission or of omission should be performed to jeopardize the claim to a neutral character, whether by the owner or by his agents.[10]

America, 6 Binn. (Pa.) 378; Phœnix Ins. Co. v. Pratt, 2 Binn. (Pa.) 308; Pratt v. Phœnix Ins. Co. 1 Browne (Pa.) 152; Horneyer v. Lushington, 15 East, 46, 3 Camp. 85, 13 Eng. Rul. Cas. 637; The Nancy, 3 Rob. 122; The Graaff Bernstorf, 3 Rob. 109; The Eeuron, 2 Rob. 9; The Rosalie, 2 Rob. 343; The Juffrou Anna, 1 Rob. 124; The Eliza, 6 Rob. 192; The Carolina, 3 Rob. 75; The Calypso, 2 Rob. 154; The Phœnix, 3 Rob. 186; Steele v. Lacy, 3 Taunt. 284.

In general, concealment of papers amounts to a breach of warranty. Livingston v. Maryland Ins. Co. 7 Cranch (11 U. S.) 506, 3 L. ed. 421.

[7] Livingston v. Maryland Ins. Co. 7 Cranch (11 U. S.) 506, 3 L. ed. 421, per Marshall, C. J.; Planche v. Fletcher, Doug. 283, per Lord Mansfield. See also Maryland Ins. Co. v. Bathurst, 5 Gill & J. (Md.) 159; Galbraith v. Gracie, 1 Wash. (U. S. C. C.) 219, Fed. Cas. No. 2,296; Buck v. Chesapeake Ins. Co. 1 Pet. (26 U. S.) 151, 7 L. ed. 90; 1 Phillips on Ins. (3d ed.) 444, secs. 809–811. It is said by Emerigon that: "If the simulation is concealed from the insurers, they will not be responsible for the confiscation of the effects insured. . . . It results . . . that the insurers answer for the capture if the simulation or the 'for account' has been declared to them in the policy. . . . There is no doubt that the insurers will then be responsible for the loss if the effects insured are captured and confiscated by the enemy." Emerigon on Ins. (Meredith's ed. 1850) c. xii. secs. 20, 367; 1 Arnould on Marine Ins. (Perkins' ed. 1850) 631, sec. 233; Id. (Maclachlan's ed. 1887) 633, 634, 685; Id. (8th ed. Hart & Simey) sec. 666, p. 825, sec. 732, p. 893; 1 Duer on Marine Ins. (ed. 1845) 738–745, 637–640.

[8] Schwartz v. Insurance Co. of North America, 6 Binn. (Pa.) 378; Pratt v. Phœnix Ins. Co. 1 Browne (Pa.) 152.

[9] Phœnix Ins. Co. v. Pratt, 2 Binn. (Pa.) 308.

[10] Galbraith v. Gracie, 1 Wash. (U. S. C. C.) 219, Fed. Cas. No. 2,296.

The warranty in a policy of insurance that the property belongs to the insured is falsified by his having concealed papers on the vessel at the time of capture, having practiced artifice to prevent their detection, and by the use of fictitious names for the purpose.[11] But the concealment or spoliation of papers is not proof of enemy's property sufficient of itself to warrant a condemnation, although it may justify a detention and, unexplained, may warrant confiscation, dependent upon all the circumstances, although if the destruction of papers is entire, the presumption against innocent goods is stronger than otherwise.[12] As to spoliation of documents it is declared that the destruction, by deliberate act of a person, of a document which, according to what its contents may have been, would have told strongly either for or against him, raises the strongest possible presumption that if it had been produced it would have told against him; and even if the document is destroyed by said persons own act, but under circumstances in which the intention to destroy evidence may fairly be considered rebutted, still he has to suffer. He is in the position in which he is without the corroboration which might have been in his case. This is applied to the destruction of the signal log and many other documents by the captain of a captured German ship fitted out as a hospital ship, but largely beyond her requirements as such with signalling apparatus, wireless installations, etc., and which was condemned as prize.[13]

**§ 2142a. Same subject: "liberty to run blockade:" seizure.**—In a Federal case the policy in question, issued by an English company, described the risk as excluded by the warranted free from capture, seizure, and detention clause, and covered the voyage from the port of San Francisco to Vladivostok, while there, and thence back to a safe neutral port. Vladivostok was then the principal naval station and base of supplies of Russia in its war with Japan, and was closely invested by the Japanese. A heavy premium, undoubtedly by reason of said war, was fixed and paid, with a stipulation for certain returns under specified conditions. Assured was expressly given "liberty to run blockade." For the purpose of evading capture a false clearance was taken of the ship for a port

[11] Carrere v. Union Ins. Co. 3 Har. & J. (Md.) 324, 5 Am. Dec. 437. See also Livingston v. Maryland Ins. Co. 7 Cranch (11 U. S.) 506, 536, 3 L. ed. 421, per Marshall, C. J.

[12] Livingston v. Maryland Ins. Co. 7 Cranch (11 U. S.) 506, 544, 545, 3 L. ed. 421; The Romeo, 6 Rob. 351; The Ann Green, 1 Gall. (C. C.) 274, 281, Fed. Cas. No. 414, per Story, J.; The Pizarro, 2 Wheat. (15 U. S.) 227, 241, 4 L. ed. 226; The Rising Sun, 2 Rob. 108; The Polly, 2 Rob. 362; The Hunter, 1 Dod. 480.

[13] The Ophelia, 85 L. J. R. N. S. (1916) 169 (Priv. Coun.) L. R. 2 App. Cas. [1916] 206, aff'g [1915] p. 129, 84 L. J. P. 131.

in Japan. The ship was seized by the Japanese, abandoned to insurers, condemned on the ground of using false papers, and sold. It was held that both by the law of England and of the United States insurers were liable under the policy. A question was also raised upon the point whether the contract was executed in London or San Francisco, but the court in view of the above conclusion held this point unimportant. It was further declared by the court that it assumed that the trial court was in error in refusing to determine and declare to the jury what the law of England was upon the subject and in leaving to it the determination of that matter as a question of fact, but that it was harmless error inasmuch as the jury decided correctly.[14]

§ 2143. **Carrying contraband goods: contraband of war: breach of neutrality.**—Carrying goods contraband of war prohibited by treaty with the government to which the neutral shipowner belongs is a breach of neutrality extending to freight, and probably to the ship, where the terms of the treaty are clear and it is clearly violated.[15] And the carrying of contraband generally constitutes a breach of neutrality, attended with loss of freight, except in certain cases where the shipowner also owns the cargo, or all the owners of ship and cargo are concerned in the act under special circumstances which may entail the greater loss of both ship and cargo.[16] A breach of express warranty against carrying contraband of war will avoid the policy,[17] but in a policy on commissions upon lawful goods, the warranty against contraband goods is not broken, though the assured is captain and the contraband goods are shipped without the knowledge of the insurer.[18] In a Maryland case, in an action upon an open policy of insurance on a cargo, it appeared that the vessel and cargo had been condemned on account of contraband trade, but that neither the insured nor insurer knew of the contraband articles being on board. There was no representa-

[14] Maritime Ins. Co. Ltd. v. M. S. Dollar Steamship Co. 177 Fed. 127, 100 C. C. A. 547, 39 Ins. L. J. 1074, aff'g 149 Fed. 616. See Northwestern Steamship Co. v. Maritime Ins. Co. 161 Fed. 166.

That underwriter presumed to know causes which occasion political perils, see § 1808 herein.

As to concealment: ship's papers: false clearance, etc., see §§ 1832, 2142 herein.

[15] The Neutralitet, 3 Rob. 295.

[16] The Richmond, 5 Rob. 290; The Commerceen, 1 Wheat. (14 U. S.) 382, 388, 4 L. ed. 116, per Story, J., 2 Gall. (U. S. C. C.) 264; The Mercurius, 1 Rob. 288; The Jonge Tobias, 1 Rob. 330; The Franklin, 3 Rob. 217; The Ringende Jacob, 1 Rob. 89; The Jemima, 3 Rob. 168. See The Charlotte, 5 Rob. 277; The Jonge Margaretha, 1 Rob. 189.

[17] Seymour v. London & Provincial Marine Ins. Co. 41 L. J. Com. P. 193, 27 L. T. 417.

On effect of warranty against contraband or illicit trade in marine insurance policy, see note in 5 B. R. C. 64.

[18] De Peyster v. Gardner, 1 Caines (N. Y.) 492.

tion or warranty that either vessel or cargo were neutral. It appeared also that the interest of the assured greatly exceeded the amount insured, and it was held that the plaintiff was entitled to recover.[19]

§ 2144. **Breach of neutrality from resistance to lawful right of search.**—The resistance to the right of search in time of war, lawfully exercised for a lawful purpose, constitutes a breach of neutrality. It must be exercised by a lawfully commissioned cruiser of the belligerent, or by his ships of war, and extends only to private merchant ships, and not to public ships of war. The object of search is limited to enemy's property contraband of war, or men in the military or naval service of the enemy. The law of nations also impresses upon belligerents the duty to show their colors, or make known their belligerent character and the cause of detention, otherwise the neutral is not only justified in resisting, but is obligated so to do, and the rescue of a neutral ship from a belligerent is such a breach of neutrality that the insurers will be exonerated in case of loss. Nor will resistance to the right of search be justified by instructions or orders of the government of the neutral. The above rule is subject to treaty stipulations with the neutral power.[20] Although the right of search should be lawfully exercised, with due regard to the rights of the master and crew and safety of the ship, yet if the authority and cause of detention be made known, it seems to be the duty of the neutral master to submit, upon remonstrance, to even gross misconduct not menacing life, relying upon his right to redress from the belligerent for damages. But if no authority be made known, the right and duty to resist exists, for in such case neither the owners nor the government to which the neutral belonged could demand indemnity.[1] Where a ship was

[19] Baltimore Ins. Co. v. Taylor, 3 Har. & J. (Md.) 198.

[20] The Mariana Flora, 11 Wheat. (24 U. S.) 1, 42, 6 L. ed. 405; The Pizarro, 2 Wheat. (15 U. S.) 227, 4 L. ed. 226; The Anna Maria, 2 Wheat. (15 U. S.) 327, 332, 4 L. ed. 252, per Marshall, C. J.; The Nereide, 9 Cranch (13 U. S.) 388, 427, 3 L. ed. 769; M'Lellan v. Maine Fire & Marine Ins. Co. 12 Mass. 246; Robinson v. Jones, 8 Mass. 536, 5 Am. Dec. 114; Wilcocks v. Union Ins. Co. 2 Binn. (Pa.) 574, 4 Am. Dec. 480; Snowden v. Phœnix Ins. Co. 3 Binn. (Pa.) 457; The Elsabe, 4 Rob. 408; The Maria, 1 Rob. 340, per Lord Stowell; The Despatch, 3 Rob. 279. June 25, 1792, an act was passed by Congress authorizing resistance to and the taking as prize of French vessels attempting search and seizure of merchant vessels of the United States and the rescue of vessels seized by the French with benefit of salvage; 2 Lossing's Harper's Cyclopaedia of United States History (ed. 1893) 1201, tit. "Resistance to Search."

[1] See the Anna Maria, 2 Wheat. (15 U. S.) 327, 328, 4 L. ed. 252; M'Lellan v. Maine Fire & Marine Ins. Co. 12 Mass. 246; 1 Duer on Marine Ins. (ed. 1845) 727, sec. 12; 1 Kent's Commentaries (ed. 1844) 156, note a.

warranted Danish property, and she was seized and sent into port for examination, her rescue by the master and crew was held a breach of the warranty; and the same would be true of an attempt to rescue.[2] If the right of search is attempted in neutral waters, it may be resisted, for it cannot be lawfully exercised there.[3] The United States denies the right of search for seamen or subjects of the belligerent, although it was once insisted on by Great Britain.[4]

[2] Garrels v. Kensington, 8 Term Rep. 230; Wilcocks v. Union Ins. Co. 2 Binn. (Pa.) 574, 4 Am. Dec. 480: The Despatch, 3 C. Rob. 278.

[3] The Topaz, 2 Act. App. Cas. 20. As to the capture in territorial waters of a neutral, see The Bangor, 85 L. J. P. 218 [1916] p. 181, 2 P. Cas. 206, 114 L. T. 1212, 32 T. L. R. 590.

[4] October 17, 1807, commanders of British ships of war were authorized by proclamation to seize all British mariners on board foreign merchant vessels: 2 Lossing's Harpers' Cyclopaedia of United States History (ed. 1893) 1186, tit. "Recall of British Seamen," "Impressment," "impress, The Treaty of 1806."

# CHAPTER LXII.

## SEAWORTHINESS.

§ 2151. Warranty of seaworthiness implied: voyage policy: general rule.
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§ 2182. Policy at and from vessel sailing unseaworthy: may defect be remedied before loss?
§ 2183. Vessel becoming unseaworthy after commencement of risk and defect cured before loss.

**§ 2151. Warranty of seaworthiness implied: voyage policy: general rule.**—It is well settled that there is an implied warranty in every contract of marine insurance under a voyage policy on ship, cargo, or freight, that the vessel is seaworthy and competent to perform her voyage at the time she sails. She must be tight, staunch, and strong, properly manned and equipped, and otherwise fit and in a navigable state for the service and voyage contemplated. If she is not seaworthy for the service and voyage intended, and not fit to encounter ordinary perils, no matter what the cause, or however innocent the assured may be, the underwriter on the ship or on the goods conveyed therein, or on the freight, is not liable.[1]

[1] *United States.*—M'Lanahan v. Universal Ins. Co. 1 Pet. (26 U. S.) 183, 7 L. ed. 98; Stetson v. Insurance Co. of North America (U. S. D. C.) 215 Fed. 186, 44 Ins. L. J. 554; Long Dock Mills & Elevator Co. v. Mannheim Ins. Co. 116 Fed. 886, aff'd 123 Fed. 861, 59 C. C. A. 668; Pacific Coast Steamship Co. v. Bancroft-Whitney Co. 94 Fed. 180, 36 C. C. A. 135, rev'd on other points in Queen of the Pacific, 180 U. S. 49, 45 L. ed. 419, 21 Sup. Ct. 278; Seamen v. Enterprise Fire & Marine Ins. Co. 21 Fed. 778, note 58 Am. Dec. 671–74; Ward v. China Mutual Ins.

Nor is this warranty confined in a sailing vessel to the sufficiency of the hull, but it extends also to the sails and rigging.[1a] "In a voyage policy there is an implied warranty that at the commence-

Co. 4 Fed. 43; Prescott v. Union Ins. Co. 2 Wash. (U. S. C. C.) 152, 480, Fed. Cas. No. 17,284.

*Connecticut.*—Hoxie v. Home Ins. Co. 32 Conn. 2, 85 Am. Dec. 240.

*Illinois.*—Merchants' Ins. Co. v. Morrisson, 62 Ill. 242, 14 Am. Rep. 93.

*Louisiana.*—Donnally v. Merchants' Mutual Ins. Co. 28 La. Ann. 939, 26 Am. Rep. 129 (on freight); Dupeyre v. Western Marine & Fire Ins. Co. 2 Rob. (La.) 457, 38 Am. Dec. 218; Southern v. Memphis Ins. Co. 3 La. Ann. 474, 48 Am. Dec. 462.

*Maryland.*—Field v. Insurance Co. of North America, 3 Md. 244.

*Massachusetts.*—Deshon v. Merchants Ins. Co. 11 Met. (52 Mass.) 199, per Hubbard, J.; Starbuck v. New England Ins. Co. 19 Pick. (36 Mass.) 198; Paddock v. Franklin Ins. Co. 11 Pick. (28 Mass.) 227; Merchants' Ins. Co. v. Clapp, 11 Pick. (28 Mass.) 56; Hoxie v. Pacific Mutual Ins. Co. 7 Allen (89 Mass.) 211; Taylor v. Lowell, 3 Mass. 331, 3 Am. Dec. 141.

*Mississippi.*—Natchez Ins. Co. v. Stanton, 2 Smedes & M. (10 Miss.) 340, 41 Am. Dec. 592.

*New York.*—Thebaud v. Great Western Ins. Co. 155 N. Y. 516, 519, 50 N. E. 284, 27 Ins. L. J. 756, O'Brien, J.; Van Wickle v. Mechanics' & Traders' Ins. Co. 97 N. Y. 350; Rogers v. Sun Mutual Ins. Co. 46 N. Y. Sup. Ct. 65; American Ins. Co. v. Ogden, 15 Wend. (N. Y.) 532; Walden v. Firemen's Ins. Co. 12 Johns. (N. Y.) 128; Talcot v. Commercial Ins. Co. 2 Johns. (N. Y.) 124, 3 Am. Dec. 406; Talcot v. Marine Ins. Co. 2 Johns. (N. Y.) 130; Silva v. Low, 1 Johns. Cas. (N. Y.) 184; Barnewall v. Church, 1 Caines (N. Y.) 217, 2 Am. Dec. 180.

*South Carolina.*—Hudson v. Williamson, 3 Brev. (S. C.) 342, 1 Tread. (S. C.) 360; Ingraham v. South Carolina Ins. Co. 2 Tread. Const. (S. C.) 707.

*England.*—Dudgeon v. Pembroke, 46 L. J. Ex. 409, 2 App. Cas. 284, 36 L. T. 382, 25 W. R. 499, 3 Asp. M. C. 393, 14 Eng. Rul. Cas. 105, 1 Q. B. D. Ex. 96; Forshaw v. Chabert, 3 Brod. & B. 158, 6 Moore, 369, 23 R. R. 596; Koebel v. Saunders, 17 Com. B. N. S. 71, 33 L. J. Com. P. 310, 10 L. T. 695; Quebec Marine Ins. Co. v. Commercial Bank of Canada, L. R. 3 P. C. 234, 39 L. J. P. C. 53, 22 L. T. 559, 18 W. R. 769; Wedderburn v. Bell, 1 Camp. 1, 10 R. R. 615, per Lord Ellenborough; Wilkie v. Geddis, 3 Dow. 57, 60, 15 R. R. 17, per Lord Redesdale; Dixon v. Sadler, 5 Mees. & W. 415, 9 L. J. Ex. 48, 14 Eng. Rul. Cas. 58, 8 Mees. & W. 895, 14 Eng. Rul. Cas. 63, per Parke, B.; Gibson v. Small, 4 H. L. Cas. 353, 17 Jur. 1131, per Erle, J.; Christie v. Secretan, 8 Term Rep. 192, per Lawrence J.; Oliver v. Cowley, reported in 1 Marshall on Ins. (ed. 1810) *160; Shoolbred v. Nutt, reported in 1 Marshall on Ins. (ed. 1810) *475; Lill v. Beach, reported in 1 Marshall on Ins. (ed. 1810) *160.

[1a] Stetson v. Insurance Co. of North America (U. S. D. C.) 215 Fed. 186, 44 Ins. L. J. 554.

"In every marine insurance upon ship or freight or freightage, or upon anything which is the subject of marine insurance, a warranty is implied that the ship is seaworthy:" Deering's Annot. Civ. Code Cal. sec. 2681. See Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 38, pp. 444–63; c. vi. sec. 4, p. 138.

*Presumption as to seaworthiness* and unseaworthiness; burden of proof, see §§ 3786 et seq. herein.

ment of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured." [2]

So it is a good defense on a general average bond that the loss was caused by the unseaworthiness of the vessel.[3] The warranty does not mean, however, that the cargo itself is seaworthy, but that the ship in which it is conveyed is seaworthy, and the warranty applies although the shipper of the goods may be innocent and has no interest in the ship.[4] And it is decided that the implied warranty of seaworthiness on the part of the shipowner exists and is a condition precedent to performance by the shipper in every charter-party or contract of affreightment, and if a vessel chartered to carry a cargo is not seaworthy at the date of the charter and the delivery of the cargo, there is such a nonperformance of the condition precedent by the shipowner that the shipper is released, and may recover possession of his property and such damages as he may have sustained by such breach.[5]

**§ 2152. Whether warranty of seaworthiness implied in time policies: the English rule.**—Although there was formerly some doubt in England, it seems to be the finally settled doctrine that the law does not, in the absence of special stipulations in the contract, imply any warranty in time policies that the vessel shall be seaworthy at any particular time.[6] Notwithstanding this rule, it is

[2] Marine insurance act 1906 (6 Edw. VII. c. 41) sec. 39 (1); Butterworth's Twentieth Century Stat. (1900–1909) p. 408. See Appendix C herein.

[3] Cheraw & Salisbury Railroad Co. v. Broadnax, 109 Pa. St. 432, 58 Am. Rep. 733, 1 Atl. 228.

[4] Oliver v. Cowley, reported in 1 Marshall on Ins. (ed. 1810) *160; 1 Park on Ins. 470; Koebel v. Saunders, 17 Com. B. N. S. 71, 33 L. J. Com. P. 310, 10 Jur. (N. S.) 920, 10 L. T. 695, 12 W. R. 1106; Acatos v. Burns, L. R. 3 Ex. D. 282, 47 L. J. Ex. 566, 26 W. R. 624, 24 Eng. Rul. Cas. 306.

[5] The Director, 34 Fed. 57 (annotated case), 36 Fed. 335. See McAdams v. Severick, 35 Fed. 305 (annotated case).

[6] Dudgeon v. Pembroke, L. R. 2 App. Cas. 284, 1 Q. B. D. L. R. 96, 9 Q. B. 581, 36 L. T. 382, 31 L. T. 31, 46 L. J. Q. B. 409, 43 L. J. Q. B. 220, 25 W. R. 499, 22 W. R. 914, 3 Asp. M. C. 393, 14 Eng. Rul. Cas. 105, per Lord Penzance, quoting Lord Campbell; Gibson v. Small, 4 H. L. Cas. 353, 17 Jur. 1131, 94 R. R. 138, 14 Eng. Rul. Cas. 86, aff'g Small v. Gibson, 16 Q. B. 141, rev'g 16 Q. B. 128, 19 L. J. Q. B. 147, 14 Jur. 368. In this case, the question was exhaustively considered for the first time (1849); Thompson v. Hopper, 6 El. & B. 172, 25 L. J. Q. B. 240, per Lord Campbell, El. B. & E. 1038, 27 L. J. Q. B. 441, 26 L. J. Q. B. 22, 5 W. R. 83, 6 W. R. 857; Fawcus v. Sarsfield, 6 El. & B. 192, 25 L. J. Q. B. 249, 2 Jur. N. S. 665; Jenkins v. Heycock, 8 Moore, P. C. 351, 1 C. L. R. 406; Michael v. Tredwin, 17 Com. B. 551, 25 L. J. Com. P. 83; West India & Panama Telegraph Co. v. Home & Colonial Marine Ins. Co. 6 Q. B. D. 51, 62. In Sadler v. Dixon, 8 Mees. & W. 895, 9 L. J. Ex. 48, 11 L. J. Ex. 435, 52 R. R. 774, 14 Eng. Rul. Cas. 63, affirming 5 Mees. & W. 405, 14 Eng.

intimated in an English case that a vessel under a time policy which has been for a long time on a distant voyage must, although her crew has been reduced by death or desertion, have a sufficient crew for some of the objects of the voyage and for navigating the ship home.[7] It is, however, there provided by the marine insurance act of 1906, that "In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness." [8]

**§ 2153. Whether warranty of seaworthiness in time policies in this country.**—Although such is the settled law of England, resting upon the statute, the rule stare decisis and public policy,[9] nevertheless the law in this country cannot be said to be settled upon this point at the present time. It is decided in an Illinois case that under a time policy there is no implied warranty of seaworthiness when the vessel starts on her first voyage.[10] Under a Massachusetts decision, where the vessel is at sea it is held that there is no implied warranty that the ship is seaworthy at the commencement of the risk.[11] But in another case in the same state it was held that if the vessel is at sea, there is an implied warranty that she has sailed in a seaworthy condition, and is then so far safe and existing as a vessel as to be properly a subject for insurance at the time the risk attaches, and is capable of being made navigable by suitable repairs in port on arrival, and that the owners will make her seaworthy if possible. But if she has ceased to exist as a vessel at the time the policy would

Rul. Cas. 58, Tindal, C. J., declared in substance that there was no distinction between time and voyage policies with regard to providing a competent master and crew and nonresponsibility for their subsequent improper conduct. This case must, however, be considered overruled. See also to same effect, Hollingsworth v. Brodrick, 7 Ad. & E. 40, 2 N. & P. 608, 8 L. J. Q. B. 80, 1 Jur. 430. "It is settled law that there is no implied warranty of seaworthiness in any time policy. . . . If, however, a vessel insured under a time policy sail in an unseaworthy state and incur loss consequent thereupon, and not directly attributable to a peril insured against, such loss will not be recoverable:" McArthur on Marine Ins. (ed. 1890) 15.

[7] Hucks v. Thornton, Holt N. P. 30, 17 R. R. 594.

[8] Marine insurance act 1906 (6 Edw. VII. c. 41), sec. 39(5); Butterworth's Twentieth Century Stat. (1900–1909) p. 408.

[9] Dudgeon v. Pembroke, L. R. 2 App. Cas. 284, 43 L. J. Q. B. 220, 46 L. J. Ex. 409, 36 L. T. 382, 31 L. T. 31, L. R. 9 Q. B. 581, 1 Q. B. D. 96, 22 W. R. 914, 25 W. R. 499, 3 Asp. M. C. 393, 14 Eng. Rul. Cas. 105, per Lord Penzance, quoting Lord Campbell.

[10] Merchants' Ins. Co. v. Morrison, 62 Ill. 242, 14 Am. Dec. 93 (decided 1871).

[11] Macy v. Mutual Marine Ins. Co. 12 Gray (78 Mass.) 497.

otherwise attach, and is incapable by reasonable and suitable repairs of being made navigable, or if she sails from a subsequent port in such an unseaworthy condition that the loss is immediately attributable thereto, either wholly or partly, no recovery can be had, although if the loss does not proceed from such default in making her navigable, but happens from a peril insured against, a recovery may be had.[12] Again, in that state it is held that under a policy on unlimited time the insurer is discharged if the vessel becomes unseaworthy,[13] and also that under a time policy on a vessel in a foreign port, if full repairs may be made, that there is an implied warranty of seaworthiness both in port and in setting out therefrom. The court, however, declares that it does not decide anything beyond the precise case before it,[14] and also expressly disclaims stating any rule which would imply a warranty of seaworthiness under a time policy on a vessel at sea, on the ground that the insured has no means of knowing her actual condition, or of restoring her to a seaworthy condition if not so at the time the policy is to attach, and the contract is fully entered into with a precise understanding of the situation, and therefore the circumstances tend to rebut any implied warranty that the vessel is seaworthy when the risk attaches.[15] In Connecticut, it is held that the warranty of seaworthiness is a necessary incident to all contracts of marine insurance, and applies to time as well as voyage policies.[16] In New York, seaworthiness at the inception of the risk is declared to be a condition precedent in every policy where the vessel is insured in port,[17] and in another case in that state a vessel insured on time was unseaworthy when leaving an intermediate port, and a recovery was not permitted, though the loss was not occasioned by such unseaworthiness, and although she had sailed in a seaworthy condition after the commencement of the

[12] Capen v. Washington Ins. Co. 12 Cush. (66 Mass.) 517, per Shaw, C. J. The court limited its ruling to the exact question before it.

[13] Cleveland v. Union Ins. Co. 8 Mass. 308.

[14] Hoxie v. Pacific Mutual Ins. Co. 7 Allen (89 Mass.) 211. The English cases relied on are Small v. Gibson, 16 Q. B. 128, 141; Hucks v. Thornton, Holt, N. P. 30, 17 R. R. 594. Hollingsworth v. Brodrick, 7 Ad. & E. 40, 2 N. P. 608, 8 L. J. Q. B. 80; Sadler v. Dixon, 8 Mees. & W. 895, 11 L. J. Ex. 435, 14 Eng. Rul. Cas. 63. But as to these cases see the rule in England first stated under this section.

[15] Hoxie v. Pacific Mutual Ins. Co. 7 Allen (89 Mass.) 211, per Bigelow, C. J. See Paddock v. Franklin Ins. Co. 11 Pick. (28 Mass.) 227, per the court; Martin v. Fishing Ins. Co. 20 Pick. (37 Mass.) 389, 32 Am. Dec. 220.

[16] Hoxie v. Home Ins. Co. 32 Conn. 21, 85 Am. Dec. 240. See also Dallam v. Insurance Co. 6 Phila. (Pa.) 15.

[17] Berwind v. Greenwich Ins. Co. 114 N. Y. 231, 234, 21 N. E. 151.

risk.[18] And in the United States court it is held that under a time policy "lost or not lost," the vessel being in a distant sea, there is no implied warranty of seaworthiness, but otherwise where the policy is in the home port, and if the vessel enters upon her first voyage in an unseaworthy condition the insurers are discharged.[19] And this rule has been extended to the case where the vessel is in, or has arrived at a distant port before or after the commencement of the risk, and might or ought to have been repaired, and the vessel leaves such port and is lost in consequence of her unseaworthy condition, although it is also held that there is no absolute implied warranty of seaworthiness in a time policy.[20] In Maine the implied warranty of seaworthiness applies to time policies, except where the vessel is at sea when the risk attaches.[1]

**§ 2154. Same subject: conclusion.**—In England, prior to the marine insurance act of 1906, given under a preceding section,[2] in the case of Dudgeon v. Pembroke,[3] Lord Penzance quoted from Lord Campbell as having declared that there was no implied warranty of seaworthiness in any time policy,[4] and said that this law rested upon a course of decisions extending upwards of twenty years, and that it was too late to change the rule, except by legislative authority. We have, therefore, the two extremes of the English rule and that of the Connecticut decision above noted. There are certainly many serious objections to the doctrine of the Connecticut case, and, as to the English rule, outside of the principle stare decisis, Lord Penzance tacitly admits its objectionable grounds.[5] But even then the difficulty which the courts have experienced in attempting to formulate a definite, intermediary rule is obvious.

[18] American Ins. Co. v. Ogden, 20 Wend. (N. Y.) 287. See Hathaway v. Sun Mutual Ins. Co. 8 Bosw. (N. Y.) 33.

[19] Ronse v. Insurance Co. 3 Wall. Jr. (U. S. C. C.) 367, Fed. Cas. No. 12,089.

[20] Jones v. Insurance Co. 2 Wall. Jr. (U. S. C. C.) 278, Fed. Cas. No. 7,470, per Grier, J.

[1] Plummer v. Insurance Co. of North America, 114 Me. 128, 95 Atl. 605.

[2] See § 2152 herein.

[3] 2 App. Cas. 284, 46 L. J. Ex. 409, 31 L. T. 31; 36 L. T. 382, 25 W. R. 499; L. R. 9 Q. B. 581, 1 Q. B. 96, 46 L. J. Q. B. 409, 43 L. J. Q. B. 220, 3 Asp. M. C. 393, 14 Eng. Rul. Cas. 105.

[4] Lord Campbell *cited* Gibson v. Small, 44 L. C. 353, 14 Eng. Rul. Cas. 86; Thompson v. Hopper, 6 El. & Bl. 172.

[5] He says: "Whatever may be argued as to the soundness of the conclusions then arrived at, or however desirable it may be, as a matter of public policy and concern, that some such obligation of keeping his vessel, as far as it is within his power, seaworthy, should be cast upon the shipowner, the law must . . . be considered as settled:" Dudgeon v. Pembroke, 2 App. Cas. 284, 31 L. T. 31, 36 L. T. 382, 25 W. R. 499, L. R. 7 Q. B. 581, 1 Q. B. 96, 46 L. J. Q. B. 409, 43 L. J. Q. B. 220, 3 Asp. M. C. 393, 14 Eng. Rul. Cas. 105.

It is pertinent to inquire whether in time policies, by reasonable construction, the nature and subject matter of the contract and the intention of the parties, coupled with the circumstances attending the making of the contract, rebut or tend to rebut the presumption of an implied warranty of seaworthiness. The situation of the ship at the time the policy is to attach becomes an important factor, as well as the fact whether she is so situated that she can be so prepared and fitted as to make her seaworthy, reference being had to the nature, extent, and necessities of the voyage and the service required. If at the time the risk is to attach, the vessel is at sea, and the assured has no means of ascertaining her actual condition, or of changing it and making her seaworthy in case she is then unseaworthy, both parties are assumed to have had knowledge, and to have entered into the contract with reference thereto, and the presumption of an implied warranty of seaworthiness is necessarily rebutted. But this is not the case in all time policies. If the vessel is in port when the insurance is effected, the same reasons do not exist as in the last case for holding that the implied warranty is rebutted, and it is difficult to conceive why the vessel should not be seaworthy at the time of sailing, although the policy is to attach on a certain date prior to her actual departure. To say that the vessel may leave port in an unseaworthy condition in such case seems opposed to the fundamental principles of the contract of insurance and inconsistent with its reasonable construction. But assume a case where the vessel has left port on the day preceding that named for the commencement of the risk, and is at sea when the risk attaches. Does the law then require that the ship shall be seaworthy at the commencement of the risk? Can the insurer avail himself of the fact that the ship was not absolutely seaworthy when she left port, provided she is safely at sea on the day named? These questions are qualifiedly answered in a Massachusetts case,[6] where the court asserts in effect that there is no absolute warranty of seaworthiness in such case, but if the risk attaches when the vessel first sails from port, that it is implied that she is then seaworthy, and if she is at sea, that she has only sailed in such a seaworthy condition as to be safe; that is, a proper subject of insurance. This declaration implies no more than this, that the vessel must so far exist as a vessel that the policy may attach, not that she must be seaworthy for the voyage, and it could hardly be asserted that the policy has a retrospective effect, so as to incorporate into it a warranty by implication that a vessel which had sailed from port and was at sea before the policy attached was absolutely seaworthy at the time of sailing from port. But the courts of that state have

[6] Capen v. Washington Ins. Co. 12 Cush. (66 Mass.) 517.

declared that under a policy at and from all ports and places to which the ship may proceed in the coasting trade for six months or a year, no difficulty can be experienced in making her seaworthy for the time insured.[7] Again, if during the existence of the risk the vessel arrives at a port in such a condition that she may not leave port with reasonable safety, it would seem only consistent with the requirements of the contract of marine insurance that the vessel should be made in some degree seaworthy for proceeding on her voyage, even though the policy be on time, although it might be questioned whether the liability of the insurer would exist, in case of loss, unless the act of knowingly sending the ship to sea was the immediate cause of the loss, and the question might arise whether, if the action was barred it would not be because of the wrongful act whereby the loss was occasioned, rather than unseaworthiness.[8] It will be seen, therefore, that although a time policy is a contract of marine insurance, and has primarily incorporated therein an implied warranty of seaworthiness, yet there are numerous cases where such a warranty would be inconsistent with the very nature of the contract and the intention of the parties, evidenced by the circumstances attendant upon making the contract, and therefore in such cases the implied warranty is rebutted. It is also evident from the words of Lord Campbell and Lord Penzance above noted that the English rule rests mainly upon the principle stare decisis. Some obligation should certainly exist under a time policy whereby the vessel should be seaworthy. The extent to which this obligation should be enforced must rest with the courts, and to some extent upon legislative action. But it would seem that there is nothing in the nature of the contract itself, or in the usual circumstances attendant upon making it, which would rebut the presumption that the vessel is seaworthy when, at the beginning of her voyage, she sails from a port where the policy has attached. Beyond these points a difficulty arises. If the vessel is at sea when the risk attaches, having left port a short time prior thereto, events may have happened between leaving such port and the commencement of the risk which would cause the vessel to be not absolutely seaworthy, and nevertheless she might still be safe at sea, and a proper subject for the attachment of the risk. If a vessel insured under such a policy be obligated to repair at an intermediate port, the question is not then solved, for although it would seem consistent that she

[7] Hoxie v. Pacific Mutual Ins. Co. 7 Allen (89 Mass.) 211, per Bigelow, C. J.; instancing Martin v. Fishing Ins. Co. 20 Pick. (37 Mass.) 389, 32 Am. Dec. 220.

[8] See Thompson v. Hopper, El. B. & E. 1038, 96 Eng. C. L. 1038; 27 L. J. Q. B. 441, 6 El. & B. 172, 25 L. J. Q. B. 240; Capen v. Washington Ins. Co. 12 Cush. (66 Mass.) 517. But see § 2161 herein.

should be made in some degree seaworthy for her voyage, yet the question arises as to the degree of seaworthiness necessary, and as above stated, if she left an intermediate port in such an unseaworthy condition as not to be reasonably safe for a sea voyage, if such act was the immediate cause of loss, the issue might rest not upon her unseaworthiness, but upon wrongful disregard of duty causing the loss.[9] It is doubtful, therefore, whether the decisions, in the absence of some statutory provision, will ever be reconciled upon any intermediary rule that extends beyond the two cases above noted, except possibly upon the ground in some court of stare decisis in that particular state.

**§ 2155. Implied warranty of seaworthiness in time policies: code provisions: stipulation.**—In a case in the Federal courts the construction of the California code relative to seaworthiness under time policies arose. The code of that state provides that there is an implied warranty of seaworthiness in every policy of marine insurance,[10] and also that "when the insurance is made for a specified length of time, the implied warranty is not complied with unless the ship be seaworthy at the commencement of every voyage she may undertake during that time."[11] The vessel was insured on time at and from a California port, and it was stipulated that the provisions of the code of that state relating to the warranty of seaworthiness should be conclusive and binding upon the parties. The vessel was not provided at the commencement of the voyage with ground tackle reasonably fit for the services and exigencies of the voyage, and was consequently totally lost, and the action, a libel on the policy, was dismissed.[12]

**§ 2155a. Warranty of seaworthiness: policy on cargo or freight.**—Although it was not usual in England for underwriters on cargo to rely on the defense of unseaworthiness, as it generally paid the cargo owner and availed itself of the latter's rights against the ship owner by subrogation, still an implied warranty of seaworthiness in a policy on cargo has been held the same as that on a ship, which is that she shall be seaworthy for the venture when she starts, and with reference to a warranty on cargo the ship must be fit for the proposed service, that is, fit in respect to all those things appertaining to the safe carriage of cargo to its destination.[13] Under the

[9] But see §§ 2161, 2167, 2177 herein.

[10] Deering's Annot. Civ. Code Cal. sec. 2681.

[11] Deering's Annot. Civ. Code Cal. sec. 2683.

[12] Pope v. Swiss Lloyd Ins. Co. 6 Saw. (U. S. C. C.) 533, 4 Fed. 153, *citing* Gibson v. Small, 4 H. L. Cas. 353, 14 Eng. Rul. Cas. 86; Jones v. Insurance Co. 2 Wall. Jr. (U. S.) 278, Fed. Cas. No. 7,470, opinion of Grier, J. See also Cox v. United States, 6 Pet. (31 U. S.) 181, 203, 8 L. ed. 363, 1 Gall. (U. S. C. C.) 371, Fed. Cas. No. 16,871.

[13] Sleigh v. Tyser [1900] 2 Q. B. 333, 336, 69 L. J. Q. B. 626, 5 Coml.

marine insurance act of 1906, however, there is no implied warranty that goods or movables are seaworthy "(1) In a policy on goods or other movables there is no implied warranty that the goods or movables are seaworthy. (2) In a voyage policy on goods or other movables there is an implied warranty that at the commencement of the voyage the ship is, not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other movables to the destination contemplated by the policy." [14] In a Federal case the chartered owner subchartered a steamship's carrying capacity for a cargo of livestock for a voyage, total amount of freight to be a lump sum, one-half prepaid, and the bills of lading called for freight at a fixed rate on each animal delivered. The subcharterer took out certificates of insurance under running policies for the precise amount of the bill of lading freight on each head of livestock including the risk of mortality. Two of the running policies under which the certificates were issued, were upon cargo, but it was held that the subject of the insurance being freight said policies must be read with the substitution of freight for cargo. The charterers were to supply feed and fodder for the livestock, also fittings therefor, furnish cattlemen, etc. Owing to the fodder not being of a kind digestible by the cattle, there was an extraordinary mortality among them, and it was claimed that this amounted to unseaworthiness of the vessel for the voyage. It was decided, however, that said fodder was not an appurtenance of the vessel, but of the cargo, and that there was no such implied warranty of the fitness of the cargo, and also that as the libelant, who sued as holder of the certificates, had nothing to do with the fodder, the insurance on freight was not affected by the character of the fodder and that said libelant was entitled to recover for the bill of lading freight lost on livestock which was not delivered.[15] And in case of cargo on board ship or ships on condition of declaring the ship on the policy to the underwriter as soon as known, the ship must be seaworthy or the policy will not attach.[16]

**§ 2156. Innocence of assured: unknown defects.**—It is not necessary that fraud be imputable to the assured; he may be innocent

Cas. 271, 16 T. L. R. 404, 9 Asp. M. C. 97, Bigham, J.

[14] Marine insurance act 1906 (6 Edw. VII. c. 41) secs. 40(1), 40(2); Butterworth's Twentieth Century Stat. (1900–1909) p. 408.

[15] Tweedie Trading Co. v. Western Assurance Co. of Toronto, 179 Fed. 103, 102 C. C. A. 397, 39 Ins. L. J. 1342, aff'g 168 Fed. 962; Sleigh v. Tyser, L. R. [1900] 2 Q. B. D. 333, 69 L. J. Q. B. 626, 9 Asp. M. C. 97, 82 L. T. 804.

[16] Orient Mutual Ins. Co. v. Wright, 23 How. (64 U. S.) 401, 16 L. ed. 524; Sun Mutual Ins. Co. v. Wright, 23 How. (64 U. S.) 412, 16 L. ed. 529.

and believe that the vessel is seaworthy, yet if she is unseaworthy at the time of sailing, the policy is void, nor does it excuse him that there are unknown defects, nor that he has taken precautions to make her seaworthy; if it subsequently appears that she was not in fact seaworthy.[17] And an instruction is erroneous which makes immaterial the owner's knowledge of the vessel's unseaworthiness.[18] So where a floating dock was insured, it was held that a loss arising from inherent defects, such as weakness or rottenness of timbers, insufficiency of machinery, or defective construction of valves, released the insurers;[19] and where it appeared that before the cargo was loaded the ship's timber holds were in a defective condition, by which water could enter, and that had the leak been known in time the vessel could have been kept clear by pumping, the ship was held unseaworthy.[20] Again, inasmuch as in every contract for the carriage of goods by sea, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and his undertaking to safely carry the goods cannot be discharged because the want of fitness in the vessel is the result of latent defects.[1]

**§ 2157. Effect of exception of losses occasioned by unseaworthiness: knowledge.**—If a policy of insurance excepts losses occasioned by unseaworthiness, the effect of such an exception is a warranty

[17] The Southwark, 191 U. S. 1, 48 L. ed. 65, 24 Sup. Ct. 1 (so prior to Harter act, 27 Stat. 445, *explained* in The Wilderoft, 201 U. S. 378, 386, 50 L. ed. 794, 26 Sup. Ct. 467); Marcy v. Sun Ins. Co. 11 La. Ann. 748; M'Cargo v. Merchants' Ins. Co. 10 Rob. (La.) 334; Oliver v. Cowley, reported in 1 Marshall on Ins. (ed. 1810) *160; 1 Park on Ins. 470; Douglass v. Scougall, 4 Dow, 269, 16 R. R. 69, per Lord Eldon; Lee v. Beach, reported in 1 Marshall on Ins. (ed. 1810) *160; 1 Park on Ins. 468; 1 Marshall on Ins. (ed. 1810) *161. See Richelieu & Ontario Navigation Co. v. Boston Marine Ins. Co. 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. 934; Mills v. Roebuck, reported in 1 Marshall on Ins. (ed. 1810) *162, is opposed to law. See Watson v. Clark, 1 Dow, 344, 14 R. R. 73, 14 Eng. Rul. Cas. 50; Parker v. Potts, 3 Dow. 23, 27, 15 R. R. 1.

*Examine* §§ 2169–2169c herein.

[18] Eureka Fire & Marine Ins. Co. v. Purcell, 19 Ohio Cir. Ct. R. 135, 10 O. C. D. 528.

[19] Marcy v. Sun Ins. Co. 11 La. Ann. 748.

[20] Standard Refinery Co. v. Schooner Centennial, 2 Fed. 409, *citing* Monticello v. Mollison, 17 How. (58 U. S.) 152, 15 L. ed. 68; Commercial Ins. Co. of Cincinnati v. The C. D. Jr. 1 Woods (U. S. C. C.) 72; Fed. Cas. No. 7,051; Amazon Ins. Co. v. The Steamboat Iron Mountain, 1 Flip. (U. S. C. C.) 616, Fed. Cas. No. 270, 4 Cent. L. J. 103.

[1] Pacific Coast Steamship Co. v. Bancroft-Whitney Co. 94 Fed. 180, 36 C. C. A. 135, rev'd on other points in Queen of the Pacific, 180 U. S. 49, 45 L. ed. 419, 21 Sup. Ct. 278, *citing* The Caledonia, 43 Fed. 681, 685, aff'd 157 U. S. 124, 39 L. ed. 644, 15 Sup. Ct. 537; Work v. Leathers, 97 U. S. 379, 24 L. ed. 1012; The Edwin I. Morrison, 153 U. S. 199, 210, 38 L. ed. 688, 14 Sup. Ct. 823.

that the loss shall not be caused thereby, and it is not material in such case whether the vessel's unseaworthiness was known or unknown.[2]

§ 2158. **Effect of previous survey: certificate of seaworthiness: subsequent survey: condemnation.**—The fact that the vessel was surveyed before she sailed, and pronounced by carpenters to be competent, does not excuse the assured if she proves, in the course of the voyage, not to be seaworthy;[3] and although ship's carpenters certified that the repairs made were all that were necessary to enable her to proceed on her voyage, and it afterward appeared that she was unseaworthy as to her ironwork, her lower deck beams, and knees, by reason of which she was unable to withstand the ordinary perils of the sea, it was held that recovery could not be had.[4] Although in the Federal court, where a vessel proceeded to a certain port for repairs, and upon survey being had it was declared that no repairs were necessary, and that she was seaworthy for the voyage, and therefore no repairs were made, it was held that a recovery could be had for a loss on such voyage, although the circumstances cast the burden of proof of seaworthiness on assured.[5] And in another case in that court it was decided that, unless overcome by competent evidence, the report of the surveyors of a port is sufficient evidence that the vessel is seaworthy.[6] Where the rules of a mutual society required yearly surveys of the hull and materials of insured ships, and the providing of such repairs and stores as were deemed necessary by the underwriters, such requirement being a condition precedent, the ship was declared unseaworthy for noncompliance in furnishing the necessary repairs and stores.[7] And a survey of the vessel by the underwriter's surveyors is not a waiver of compliance with the warranty nor does it preclude them from showing that the vessel was unseaworthy.[8] A vessel was surveyed in a port of distress, pronounced unfit for sea, sold as a wreck, purchased and repaired, again surveyed, and pronounced

[2] Richelieu & Ontario Nav. Co. v. Boston Marine Ins. Co. 136 U. S. 408, 10 Sup. Ct. 934, 34 L. ed. 398. *Cited* in The Irrawady (Flint v. Cristall) 171 U. S. 187, 190, 43 L. ed. 130, 131, 18 Sup. Ct. 831; The Caledonia, 157 U. S. 124, 140, 39 L. ed. 644, 649, 15 Sup. Ct. 537; Flint & P. M. R. Co. v. Marine Ins. Co. 71 Fed. 210, 215; Pride v. Providence-Washington Ins. Co. 6 Pa. Dist. R. 227, 232. See §§ 2169–2169b herein.

[3] Warren v. United Ins. Co. 2 Johns. Cas. (N. Y.) 232, 1 Am. Dec. 164.

[4] Douglass v. Scougall (The North Star) 4 Dow, 269, 16 R. R. 69.

[5] Lunt v. Boston Marine Ins. Co. 19 Blatchf. (U. S. C. C.) 151, 6 Fed. 562, s. c. 17 Fed. 411.

[6] Batchelder v. Insurance Co. of North America, 30 Fed. 459.

[7] Stewart v. Wilson, 12 Mees. & W. 11, 13 L. J. Ex. 27, 7 Jur. 1020.

[8] Danson v. Cawley, Newf. Rep. (1817–1828) 377.

competent for the voyage and insured; she made water rapidly after sailing and was surveyed and condemned. It was held that she was unseaworthy, although the surveyors reported that her defective and injured condition was not in any degree occasioned by decay or rottenness of her materials.[9] But where for the purpose of showing that the vessel was seaworthy before she left her home port the certificate of a marine inspector was offered in connection with his oath, who stated that although he had no independent and distinct recollection of the facts therein stated, yet, so far as he remembered, the statements therein contained were true at the date thereof, such certificate was held competent evidence of the facts therein stated; it being declared that it was in its nature a semi-official document, and although not made in pursuance of any positive enactment or rule of law, nevertheless it ranked with entries made by bank clerks, messengers, and other similar agents.[10]

Although a vessel is seaworthy at the time of sailing on the insured voyage, still the insurer is discharged where upon a regular survey she is found at a subsequent period of the voyage, leaky and in a very decayed condition and "altogether unworthy of being repaired, and that she ought to be condemned as being unsafe and unfit ever to go to sea again," where it is stipulated that if said vessel upon a regular survey should be thereby declared unseaworthy "by reason of her being unsound or rotten." But the survey in such case is not conclusive evidence of unseaworthiness if it declares the vessel unseaworthy for any additional cause, besides being "unsound or rotten."[11] And under a policy providing for the discharge of the insurer if the vessel, "after a regular survey, should be condemned for being unsound and rotten," a certificate of the port wardens declaring the vessel to be so decayed that the repairs would cost more than her value when repaired, and stating that the vessel is condemned as not seaworthy and unworthy of repair, is conclusive evidence to discharge the insurer, although the condemnation was not specially authorized by any state law, where such condemnation was obtained by the master as the agent of the owners and afterwards adopted by them as proof of the facts stated.[12] Again, a stipulation that the fittings and condition of cattle are to

[9] Parker v. Potts, 3 Dow, 23, 15 R. R. 1.

[10] Perkins v. Augusta Insurance & Banking Co. 10 Gray (76 Mass.) 312, 71 Am. Dec. 654. See Berwind v. Greenwich Ins. Co. 114 N. Y. 231, 21 N. E. 151.

[11] Dorr v. Pacific Ins. Co. 7 Wheat. (20 U. S.) 581, 5 L. ed. 528. See this case also for what constitutes a "regular survey."

[12] Janney v. Columbian Ins. Co. 10 Wheat. (23 U. S.) 411, 6 L. ed. 354, *cited* in The Dawn, 1 Ware (U. S. C. C.) 487, Fed. Cas. No. 3,665; Potter v. Ocean Ins. Co. 3 Sumn. (U. S. C. C.) 42, Fed. Cas. No. 11,335.

be approved by Lloyds agent's surveyor does not supersede the implied warranty of seaworthiness.[13]

§ 2159. **Different degrees of seaworthiness.**—That there are different degrees of seaworthiness dependent upon the character of the vessel, its construction, its navigation and service required, the length and nature of the voyage, the season of the year, its trade, and other factors, is clearly evidenced by the cases.[14] Thus, a "steamship" or vessel capable of being propelled by steam or sails must be seaworthy with reference to its character, service, and navigation required; she must be fully equipped, manned, and provisioned as a steamer and sailing vessel.[15] A flatboat navigating the Mississippi must be seaworthy with reference to its navigation and service required.[16] So a voyage may require a different complement of men or state of equipment in different parts or stages; as in case of one down a canal or river and thence to the open sea.[17] And the rule as to the nature of the services required applies where only the ordinary perils of waters in or near a harbor instead of the ordinary perils of the sea are liable to be encountered.[18] If a vessel is built for river service and not for open sea navigation and is insured for a voyage to a place where it is intended to be used and said voyage necessitates navigating the open sea for at least a part thereof, a recovery for the loss of the vessel shortly after putting to sea, cannot be defeated on the ground of an implied warranty of seaworthiness for the sea voyage where assurer, before assuming the risk is put in possession of all information concerning the con-

[13] Sleigh v. Tyser [1900] 2 Q. B. 333, *considered* under § 2169b herein.

[14] M'Lanahan v. Universal Ins. Co. 1 Pet. (26 U. S.) 170, 184, 7 L. ed. 518; Chase v. Eagle Ins. Co. 5 Pick. (22 Mass.) 51. See Bell v. Reed, 4 Binn. (Pa.) 127, 5 Am. Dec. 398; Annen v. Woodman, 3 Taunt. 299, 12 R. R. 663; Watt v. Morris, 1 Dow, 32; Clapham v. Langton, 34 L. J. Q. B. 46, 10 C. T. 875, 12 W. R. 1011; Burgess v. Wickham, 3 B. & S. 669, 33 L. J. Q. B. 17, 8 L. T. 47; Knill v. Hooper, 2 Hurl. & N. 277, 26 L. J. Ex. 377, 5 W. R. 791; Woolf v. Claggett, 3 Esp. 257, 6 R. R. 830; Parker v. Potts, 3 Dow, 23, 15 R. R. 1, and in fact the cases throughout this chapter. See § 1767 herein.

The degrees of seaworthiness are various; and the rates of premiums are varied by the underwriters according to the character and qualities of the vessels to which they relate. Orient Mutual Ins. Co. v. Wright, 23 How. (64 U. S.) 401, 16 L. ed. 524; Sun Mutual Ins. Co. v. Wright, 23 How. (64 U. S.) 412, 16 L. ed. 529.

[15] Howard v. Orient Mutual Ins. Co. 2 Rob. (N. Y.) 539; also, Myers v. Girard Ins. Co. 26 Pa. St. 192.

[16] Donnelly v. Merchants' Mutual Ins. Co. 28 La. Ann. 939, 26 Am. Rep. 129.

[17] Dixon v. Sadler, 5 Mees. & W. 405, 9 L. J. Ex. 48, 14 Eng. Rul. Cas. 58, aff'd 8 M. & W. 895, 11 L. J. Ex. 435, 14 Eng. Rul. Cas. 63, per Parker, B.

[18] Farmers' Feed Co. v. Insurance Co. of North America, 166 Fed. 111, 92 C. C. A. 95, aff'g 162 Fed. 379.

struction and character of the vessel, the plans and specifications thereof and has knowledge through its engineer of the extent of the hazard and accordingly exacts double the ordinary premium charged for sea going vessels, so that the nature of the service for which she was intended is fully known to both parties.[19]

This question of degree has become one of special importance at the present day. Although the principle underlying the doctrine of seaworthiness has not changed, nevertheless the modern vessel must undoubtedly possess many qualifications required by her construction, intended service, and safe navigation as necessary to her seaworthiness which could not have been formerly contemplated, and it is probably equally true that the standard of nautical skill on the part of those to whom the navigation of the vessel of the present is intrusted has been raised to a higher degree than formerly.[20]

It is, however, held to be peculiarly within the province of the jury to determine upon the evidence as to the question of seaworthiness in the particular case before it.[1] In a New York case a steamer was insured under a time policy and about twelve hours after she left port, at near two o'clock in the morning, she began to leak, and because of inability to stop the leakage she was run ashore, where she sank. Upon being raised it was found that an after porthole in the starboard alleyway was open and that there were no other holes or breaks in the hull. The evidence showed that the vessel was properly constructed and was in a perfectly seaworthy condition when the policy was issued, and it was insisted that a presumption of unseaworthiness arose from the fact of the entry of water through the open port shortly after sailing without encountering any storm. Evidence to rebut this presumption was given and it was held that the question of seaworthiness then became one for the jury upon the evidence, as it was impossible as a matter of law to entirely exclude the inference that some one on the vessel opened the deadlight and that a charge to the jury was properly given which permitted it to consider upon the evidence

[19] Thebaud v. Great Western Ins. Co. 155 N. Y. 516, 50 N. E. 284, 27 Ins. L. J. 756.

[20] See Tidmarsh v. Washington Fire & Marine Ins. Co. 4 Mason (U. S. C. C.) 439, Fed. Cas. No. 14,024, per Story, J. That the old rule as to sailing vessels is still involved, see § 2160 herein, at end thereof.

[1] Fuller v. Alexander, 1 Brev. (S. C.) 149; M'Lanahan v. Universal Ins. Co. 1 Pet. (26 U. S.) 170, 184, 7 L. ed. 518; Thebaud v. Great Western Ins. Co. 155 N. Y. 516, 50 N. E. 284, 27 Ins. L. J. 756; Voisin v. Providence-Washington Ins. Co. 68 N. Y. Supp. 333, 51 App. Div. 553. As to questions for jury, see § 3710a herein. Palmer v. Great Western Ins. Co. 116 N. Y. 599, 23 N. E. 5, 27 N. Y. St. Rep. 675; Prescott v. Union Ins. Co. 1 Whart. (Pa.) 399, 30 Am. Dec. 207.

whether or not it was a fair inference that some one on the vessel opened the deadlight without criminal intent though with mistaken judgment. It was also decided, upon the claim of unseaworthiness because of the inadequacy of the pumps to meet the emergency, that said question was properly submitted to the jury where the evidence sufficiently established that the vessel was well fitted with pumps, adapted to all ordinary conditions, or to such as could reasonably be anticipated, so that if they were inadequate under the circumstances it was because the occasion and circumstances were extraordinary and such as could not reasonably have been anticipated.[2]

**§ 2160. What constitutes seaworthiness.**—It is difficult to formulate a rule as to what constitutes seaworthiness that will apply to every case, although it may be generally stated that the vessel is seaworthy if she is fit to perform the voyage insured as to ordinary perils, reference being had to the nature of the service required, the character of the navigation, the trade in which she is engaged, and to the season of the year in which the voyage is to be made. She must be tight, staunch, and strong enough to resist the ordinary perils of the sea, in a fit state of repairs, properly manned and equipped, and supplied with whatever is required for the safe and secure navigation of the vessel, and necessary to meet the ordinary exigencies of the voyage;[3] and as we have before stated, in case of

[2] Starbuck v. Phenix Ins. Co. 62 N. Y. Supp. 264, 47 App. Div. 621, aff'd (mem.) 166 N. Y. 593, 59 N. E. 1130, s. c. 54 N. Y. Supp. 293, 34 App. Div. 293, s. c. 45 N. Y. Supp. 995, 19 App. Div. 139, s. c. 41 N. Y. Supp. 901, 10 App. Div. 198, 75 N. Y. St. Rep. 1270.

[3] *United States.*—Watson v. Insurance Co. of North America, 2 Wash. (U. S. C. C.) 480, Fed. Cas. No. 17,-285; Ross v. Sloop Active, 2 Wash. (U. S. C. C.) 226, Fed. Cas. No. 12,-071; The Lillie Hamilton, 18 Fed. 327; Pope v. Swiss Lloyd Ins. Co. 4 Fed. 153; The Washington, 3 Blatchf. (U. S. C. C.) 276, Fed. Cas. No. 17,-220, per Nelson, J.

*Louisiana.*—Whitney v. Ocean Ins. Co. 14 La. Ann. 485, 32 Am. Dec. 595; McDowell v. General Mutual Ins. Co. 7 La. Ann. 684, 56 Am. Dec. 619.

*Maine.*—Plummer v. Insurance Co. of North America, 114 Me. 128, 95 Atl. 605.

*Massachusetts.*—Kettel v. Wiggin, 13 Mass. 68.

*New York.*—Draper v. Commercial Mutual Ins. Co. 4 Duer (N. Y.) 234, 21 N. Y. 378; Walden v. New York Firemen's Ins. Co. 12 Johns. (N. Y.) 128, aff'd 12 Johns. (N. Y.) 513; Fontaine v. Phœnix Ins. Co. 10 Johns. (N. Y.) 58; Treadwell v. Union Ins. Co. 6 Cow. (N. Y.) 270.

*Pennsylvania.*—Brown v. Girard, 4 Yeates (Pa.) 115, 1 Binn. (Pa.) 40, 2 Am. Dec. 400; Prescott v. Union Ins. Co. 1 Whart. (Pa.) 399, 30 Am. Dec. 207.

*England.*—Watt v. Morris, 1 Dow, 32; Daniels v. Harris, L. R. 10 Com. P. 1, 44 L. J. C. P. 1, 31 L. T. 408, 23 W. R. 86; Douglass v. Scougal, 4 Dow, 269, 16 R. R. 69; The Gentleman, Ole. Adm. 110, Fed. Cas. No. 5,324, rev'd 1 Blatchf. (C. C.) 196, Fed. Cas. No, 5,323.

"It is meant that she shall be in a fit state, as to repairs, equipment,

a sailing vessel this warranty covers not only the sufficiency of the hull but extends also to the sails and rigging.[3a]

**§ 2161. What constitutes seaworthiness and unseaworthiness: cases.**—The implied warranty of seaworthiness extends to the machinery of a steamer, to its construction, and power required for its navigation;[4] and a defect in her boiler although not apparent when she left port, makes the vessel unseaworthy.[5] But where the boilers of a vessel stand the standard test before commencement of the voyage and except for some unforeseen peril, she would have completed her voyage in safety, the fact that said boilers begin to leak soon after beginning the voyage, after the vessel has grounded, does not prove her unseaworthiness.[6] So her engines must, when delivered, be fit to perform the service for which the vessel is engaged.[7] And the vessel must not be without necessary firewood, oil, and candles;[8] and medicines and neces-

and crew and in all other respects, to encounter the ordinary perils insured:" Dixon v. Sadler, 5 Mees. & W. 415, 9 L. J. Ex. 48, 14 Eng. Rul. Cas. 58, aff'd 8 M. & W. 895, 14 Eng. Rul. Cas. 63, per Parke, B. A ship "is seaworthy if it is fit in the degree which a prudent owner uninsured would require to meet the perils of the service it is then engaged in, and would continue so during the voyage unless it meet with extraordinary dangers:" Gibson v. Small, 4 H. L. Cas. 353, 1 C. L. R. 363, 7 Jur. 113, 114 Eng. Rul. Cas. 86, per Earle, J. "Seaworthiness imports, in the law of insurance, a relation between the condition of the ship and the perils she may have to encounter in the situation in which she may be placed;" and the court also adds to this the definition in the last cited case: Hoxie v. Pacific Mut. Ins. Co. 7 Allen (89 Mass.) 211, per Bigelow, C. J. "A ship is seaworthy when reasonably fit to perform the services and to encounter the ordinary perils of the voyage contemplated by the parties to the policy:" Deering's Annot. Civ. Code Cal. sec. 2682; "A warranty of seaworthiness extends, not only to the condition of the structure of the ship itself, but requires that it is properly laden and provided with a competent master, a sufficient number of competent officers and seamen, and the requisite appurtenances and equipments, such as ballast, cables and anchors, cordage and sails, food, water, fuel, lights, and other necessary or proper stores and implements for the voyage:" Deering's Annot. Civ. Code Cal. sec. 2684.

"A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured." Marine insurance act 1906 (6 Edw. VII. c. 41) sec. 39 (4); Butterworth's Twentieth Century Stat. (1900–1909) p. 408.

[3a] Stetson v. Insurance Co. of North America (U. S. D. C.) 215 Fed. 186, 44 Ins. L. J. 554.

[4] Myers v. Girard Ins. Co. 26 Pa. St. 192.

[5] Quebec Marine Ins. Co. v. Commercial Bank of Canada, 3 L. R. P. C. 234, 39 L. J. P. C. 53, 22 L. T. 559, 7 Moore, P. C. N. S. 1.

[6] St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co. 157 Fed. 625, 87 C. C. A. 14, 14 L.R.A. (N.S.) 1161.

[7] McAdams v. Severich, 35 Fed. 305 (annotated case). See the Director, 34 Fed. 57 (annotated case), 36 Fed. 335.

[8] Fontaine v. Phœnix Ins. Co. 10

saries for the voyage may be required.[9] The ship may be unseaworthy for want of the necessary ground tackle.[10] So she must be provided with all necessary stores,[11] and must have sufficient coal for the voyage.[12] And the failure at the time of sailing to have a sufficient supply of coal for the voyage for which a vessel is chartered, renders her unseaworthy; and this applies where the master sails with such insufficient supply intending to stop at an intermediate port and refill the bunkers, but owing to inability from said cause to reach said port he is compelled to put into another harbor and the vessel is stranded. And in such case where she is released and towed to her port of original destination and certain salvage charges are paid by assurer and it sues therefor, making the shipowner a party, it is decided that the charterer is liable for said breach of contract occasioned by said unseaworthiness, whether considered as a common or special carrier.[13] The vessel must also be sufficiently tight, staunch, and strong to resist the ordinary action of the seas, without injury to her cargo;[14] and she should be sufficiently seaworthy as to be able to encounter ordinarily rough weather, without being compelled to jettison her deck cargo.[15] But it is held that a vessel is none the less seaworthy because it is necessary to jettison a deck load, which is carried within the intent of the policy.[16] The vessel must not be unduly laden or overloaded.[17] So where the insurance was upon a cargo of lumber and the policy permitted a deck load, but owing to the loading the barge was top heavy and cranky from the start and was therefore unseaworthy, it was held that there could be no recovery.[18] It is held, however, that reference must be had to the capacity of the boat or craft, and not to the depth of the river over the shoals or bars.[19] So improper stowage of her cargo or furniture, whereby it becomes

Johns. (N. Y.) 58, *cited* in 1 Duer (N. Y.) 175, 3 Rob. 208, 476.

[9] Woolf v. Claggett, 3 Esp. 257, 258, 6 R. L. 830.

[10] Pope v. Swiss Lloyd Ins. Co. 4 Fed. 153; Wilkie v. Geddes, 3 Dow, 57, 15 R. R. 17.

[11] Fontaine v. Phœnix Ins. Co. 10 Johns. (N. Y.) 48.

[12] Howard v. Orient Mutual Ins. Co. 2 Rob. (N. Y.) 539.

[13] British & Foreign Marine Ins. Co. v. Kilgour Steamship Co. Ltd. (U. S. D. C.) 184 Fed. 174.

[14] The Lillie Hamilton, 18 Fed. 327; Wilkie v. Geddes, 3 Dow, 57, 15 R. R. 17.

[15] Daniels v. Harris, L. R. 10 Com. P. 1, 31 L. T. 408, 23 W. R. 86, 2 Asp. M. C. 413.

[16] Granger v. Providence Washington Ins. Co. 200 Fed. 730, 119 C. C. A. 174.

[17] Weir v. Aberdeen, 2 Barn. & Ald. 320, 20 R. R. 450; Cincinnati Mutual Ins. Co. v. May, 20 Ohio, 211.

[18] Anderson Lumber Co. v. Greenwich Ins. Co. 79 Fed. 125.

[19] Cincinnati Mutual Ins. Co. v. May, 20 Ohio, 211. This case may be questioned so far as it is qualified by the depth of the water.

displaced, and the ship injured or lost, makes her unseaworthy. Usage may, however, be a factor in determining what is proper stowage.[20] And the requirement of seaworthiness is held to extend to boats or lighters necessarily and customarily used in transporting goods across the isthmus in a voyage from New York to Chagres, and thence across the isthmus to California, but this is on the ground of three distinct voyages,[1] although it has also been declared that it does not extend to lighters for transshipment of goods to the shore.[2] (And it is decided that the warranty of seaworthiness does not extend to a barge used for lightening the cargo where the policy includes "the risk of craft and/or raft to and from the vessel." [3] So negligence in not properly calking a deck may make the vessel unseaworthy.[4] So the ship is unseaworthy if her condition is "rotten," although she might have performed the voyage in good weather; [5] so a boat which is very old and in bad condition, although patched up, which sinks while in dock, under a not excessive deck load, is inherently weak and unseaworthy.[6] And unseaworthiness is proven by evidence that upon boring, no sound wood, but only mud and rotten wood was found,[7] and a vessel is unseaworthy where her "timbers" are decayed and ironwork loose,[8] if her sails are defective,[9] or if the compass is defective, whereby it is rendered unsafe and unsuitable for use.[10] Although the fact that the compass did not register accurately at the time of the loss is not sufficient to sustain a finding that a schooner was unseaworthy at the time of the insurance.[11] So the manner of a vessel's construction and materials may enter into the question of seaworthiness,[12] and a vessel although constructed for inland navigation

[20] Kopetoff v. Wilson, 1 Q. B. D. 377, 45 L. J. Q. B. 436, 34 L. T. 677, 24 W. A. 706. See also Weir v. Aberdeen, 2 Barn. & Ald. 320, 20 R. R. 450; Chase v. Eagle Ins. Co. 5 Pick. (22 Mass.) 51; Warren v. Manufacturers' Ins. Co. 13 Pick. (30 Mass.) 518, 25 Am. Dec. 341.

[1] Van Valkenburg v. Astor Mutual Ins. Co. 1 Bosw. (14 N. Y.) 61.

[2] Lane v. Nixon, L. R. 1 Com. P. 412, 35 L. J. C. P. 243, 12 Jur. (N. S.) 392, 14 W. R. 641.

[3] Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co. Ltd. (U. S. D. C.) 210 Fed. 958.

[4] The Thomas Melville, 31 Fed. 486.

[5] Hudson v. Williamson, 3 Brev. (S. C.) 342, 1 Tread. (S. C.) 360.

[6] Long Dock Mills & Elevator Co. v. Mannheim Ins. Co. 116 Fed. 886, aff'd 123 Fed. 861, 59 C. C. A. 668.

[7] Morse v. St. Paul Fire & Marine Ins. Co. (U. S. C. C.) 122 Fed. 748, s. c. (U. S. C. C.) 124 Fed. 451, s. c. (U. S. C. C.) 129 Fed. 233.

[8] Douglass v. Scougall, 4 Dow, 269, 16 R. R. 69.

[9] Wedderburn v. Bell, 1 Camp. 1, 10 R. R. 615.

[10] Richelieu & Ontario Nav. Co. v. Boston Marine Ins. Co. 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. 934. See M'Loskie v. Glasgow & Clyde Marine Ins. Co. 6 Cas. Ct. Sess. (Bell & Murray) 2.

[11] Allen v. McFall (U. S. C. C.) 89 Fed. 463.

[12] Watt v. Morris, 1 Dow, 32; Bell

must be made as far as possible seaworthy for sea service, if insured therefor;[13] and if she is originally seaworthy, it makes no difference that the peril was an extraordinary one, which she was not built to encounter.[14] So the ship may be unseaworthy where her timber holds are defective.[15] And it is held that the vessel must be in a condition to carry a full cargo.[16] So sufficient anchors and cables are necessary;[17] but an anchor is not necessary to the seaworthiness of a flatboat navigating the Mississippi river.[18] So sailing with insufficient ballast makes the vessel temporarily unseaworthy.[19] But the fact that a vessel during a storm lends a cable and small anchor to another vessel, and is afterward driven ashore, does not necessarily make her unseaworthy, and the jury having found for the insured, the verdict was not disturbed.[20] The implied warranty of seaworthiness has also been held to extend to the sufficiency of a tugboat employed in towing the insured boats,[1] but the fact that the towing ropes were decayed is held no evidence of unseaworthiness.[2] A party insuring a floating dock warrants that it is seaworthy and fit for the work for which it is designed, properly equipped with efficient machinery, and protected against accidents from the ordinary effects of water.[3] But a tug, although she may be rendered unseaworthy for propelling herself, by reason of breaking a shaft, may nevertheless be seaworthy for being towed to her home port.[4] A vessel is not unseaworthy from failure to carry a ship's carpenter on a voyage from New York to Liverpool.[5] Nor is the amount of premium paid a factor to be considered in determining the degree of seaworthiness

v. Reed, 4 Binn. (Pa.) 127, 5 Am. Dec. 398.

[13] Turnbull v. Janson, 36 L. T. N. S. 635, 3 Asp. M. C. 433. See Clapham v. Langton, 34 L. J. Q. B. 46, 10 L. T. 875, 12 W. R. 1011; Knill v. Hooper, 2 Hurl. & N. 277, 26 L. J. Ex. 377, 5 W. R. 791; Burgess v. Wickham, 3 Best & S. 669, 33 L. J. Q. B. 17, 8 L. T. 47.

[14] Lockwood v. Sauganus Ins. Co. 46 Mo. 71.

[15] Standard Refinery Co. v. Schooner Centennial, 2 Fed. 409.

[16] Abbott v. Broome, 1 Caines (N. Y.) 292, 2 Am. Dec. 187.

[17] Wilkie v. Geddes, 3 Dow, 57, 15 R. R. 17. See Harrison v. Douglass, 3 Ad. & E. 396, 6 N. M. 180, 1 H. & W. 380.

[18] Donnally v. Merchants' Mutual Ins. Co. 28 La. Ann. 939, 26 Am. Rep. 129.

[19] Deblois v. Ocean Ins. Co. 16 Pick. (33 Mass.) 303, 28 Am. Dec. 245. See Merchants' Mutual Ins. Co. v. Sweet, 6 Wis. 670.

[20] Patrick v. Commercial Ins. Co. 11 Johns. (N. Y.) 9.

[1] Merchants' Ins. Co. v. Algeo, 31 Pa. St. 446. This is certainly a broad extension of the doctrine of seaworthiness.

[2] Stone v. Aberdeen Marine Ins. Co. 11 Cas. Ct. Sess. (Y. T. & F.) (1848) 1041.

[3] Marcy v. Sun Ins. Co. 11 La. Ann. 748.

[4] Union Ins. Co. v. Smith, 124 U. S. 405, 31 L. ed. 497, 8 Sup. Ct. 534.

[5] Walsh v. Washington Ins. Co. 3 Rob. (N. Y.) 202, 203.

of the vessel.[6] A provision in a charter party that the vessel shall be seaworthy, or tight, staunch, strong and in every way fitted and provided for the contemplated voyage, does not imply a warranty of insurability at the ordinary rates for the cargo and voyage, and the refusal of the insurance while evidence of unseaworthiness of greater or less weight, dependent upon the circumstances and the condition of the vessel is not of itself conclusive evidence.[7] Prima facie the term "unseaworthiness" in a bill of lading covers not only the unseaworthiness of the ship in the sense that it was not fit to meet the perils of the sea, but also in the sense that the ship was not in a fit condition to carry the cargo.[8]

**§ 2161a. Seaworthiness: refrigerating plant: insurance on insulation for.**—A refrigerating plant in vessels employed in the dressed beef trade must be reasonably fit for the purposes and uses for which it is intended and it is included in the warranty of seaworthiness of the vessel.[9] In another case an action was brought on a policy of marine insurance for voyages out and home between England and Australia, on the insulation of a steamship which was intended to bring home frozen meat and miscellaneous cargo the insulation was required for refrigeration; it consisted of timber casing lined with charcoal and cooled by currents of cold air. For the efficiency of this part of the apparatus it was necessary that the charcoal should be kept dry. She leaked on her outward voyage and the insulation had to be replaced and damage occurred from leakage on the homeward voyage. There was no weather to account for the leakage. She discharged her cargo in good condition and on subsequent voyages there was leakage again notwithstanding repairs. It was held that leakage was accounted for by reason that the vessel was so constructed that there was danger of panting and that the injury to the insulation consequent upon the leakage was traceable thereto and that the absence of panting beams rendered the vessel unseaworthy.[10]

**§ 2161b. Loss of vessel while moored: duty of assured: negligence:**—Where assured did not, either before or after launching a yacht insured under a time policy, examine her appliances, and provided neither an anchor watch or caretaker, and the vessel filled while moored there, negligence is thereby shown.[11]

[6] Hoxie v. Home Ins. Co. 32 Conn. 21, 85 Am. Dec. 240.

[7] J. J. Moore & Co. v. Cornwall, 144 Fed. 22, 75 C. C. A. 180.

[8] Rathbone Brothers & Co. v. D. McIver Sons & Co. [1903] 2 K. B. 378, [1903] W. N. 128.

[9] The Southwark, 191 U. S. 1, 48 L. ed. 65, 24 Sup. Ct. 1, *explained* in The Wilderoft, 201 U. S. 374, 50 L. ed. 794, 26 Sup. Ct. 467, under Harter act, 27 U. S. Stat. 445.

[10] Lund v. Thames & Mersey Marine Ins. Co. Ltd. 17 T. L. R. 566.

[11] Plummer v. Insurance Co. of North America, 114 Me. 128, 95 Atl. 605.

**§ 2162. Effect of noncompliance with statute.**—The stowing on deck of the water on board a vessel does not make her unseaworthy, nor cast the burden of proof upon the assured to show her seaworthiness, although such act is contrary to the statute of the United States of 1790,[12] requiring all vessels bound on a voyage across the Atlantic to have on board, secured under deck, a certain quantity of water, and imposing a penalty on the master or owner in case the crew or passengers are put on short allowance through failure to comply with its requirements.[13] It is also held that the noncompliance with a statute does not make the vessel per se unseaworthy,[14] and it is held that the noncompliance with a statute as to the complement of men required may be excused when compliance is impossible.[15]

**§ 2162a. Injury in collision as evidence of unseaworthiness: statute.**—And it is held in California that the fact that a vessel had been injured in a collision may be shown as a circumstance to prove that she was unseaworthy and the implied warranty violated, so that no liability on the part of assurer would attach within the meaning of the code of that state, which provides that there is an implied warranty of seaworthiness in every marine insurance contract and that the vessel is seaworthy when reasonably fit to perform the services and to encounter the ordinary perils of the voyage contemplated.[16]

**§ 2163. Effect of usage upon seaworthiness of foreign vessel in foreign port.**—If a policy is taken out upon a vessel belonging to a foreign country, it has been declared by high authority that the underwriter must be assumed to be cognizant of the common usages of trade in the foreign country or of the port to which the vessel belongs, as to the equipment of vessels of that class for the intended voyage.[17] This ruling is approved by Mr. Arnould, Mr. Maclachlan, Mr. Hart, Mr. Simey, Mr. Phillips, and Mr. Parsons.[18] And it

[12] Chapter 56, sec. 9.

[13] Warren v. Manufacturers' Ins. Co. 13 Pick. (30 Mass.) 513, 25 Am. Dec. 341; Deshon v. Merchants' Ins. Co. 11 Met. (52 Mass.) 199. See Cunard v. Hyde, El. B. & E. 670, 2 El. & E. 1, 27 L. J. Q. B. 408; Redmond v. Smith, 7 Man. & G. 457.

[14] Sherlock v. Globe Ins. Co. 1 Cin. Sup. Ct. (Ohio) 193, 13 Ohio Dec. 495. See also § 2168 herein, as to employment of pilot.

[15] Suart v. Powell, 1 Barn. & Adol. 266, 8 L. J. (O. S.) K. B. 391.

[16] California Canneries Co. v. Canton Insurance Office, Ltd. 25 Cal. App. 303, 143 Pac. 549, 44 Ins. L. J. 685.

[17] Tidmarsh v. Washington Ins. Co. 4 Mason (U. S. C. C.) 439, Fed. Cas. No. 14,024, per Story, J.

[18] 1 Arnould on Marine Ins. (Perkins' ed. 1850) 677, *675; Id. (Maclachlan's ed. 1887) 670; Id. (8th ed. Hart & Simey) sec. 711, p. 873. "This rule appears full of good sense and equity, and worthy of an option in our own jurisprudence." Id. 1 Phillips on Ins. (3d ed. 391) § 719;

is held that where the owner in New York of a vessel, which was there at the time of effecting the policy, obtained an insurance thereon from an underwriter in Boston, and described the vessel as a "coppered" ship, that term should be construed according to the usages of the port of New York, and not those of Boston, on the ground that the assured could not be presumed to know the usages of the port of Boston.[19] Where a bark was insured from Clyde to Havana, and it was usual in Nova Scotia, where she was built and belonged, to have only one suit of sails for boats of that class, it was held that as the place of making and enforcement of the contract was Scotland, the custom of Greenock must prevail, as to the degree of seaworthiness, in respect to what constituted sufficient sails for a vessel of that character for the voyage insured.[20]

§ 2163a. **Overloading: effect of practice or custom to understate measurements.**—While the measurement of a permitted deck cargo is correctly stated in the policy and the assurer is protected because of the warranty of seaworthiness and is discharged where there is an excess of cargo actually loaded over that stated in the bill of lading thereby occasioning loss, still the fact that it had been the practice to understate the footage of dressed lumber for freight purposes by deducting so much of the footage as the vessel carried in excess of the footing of rough lumber which she could have carried, is not material to the risk, but the test is, whether reasonable underwriters would be influenced in assuming the risk if advised of such practice, and this would also depend upon each particular underwriter, and a policy otherwise legal would not be invalidated because insurer was not advised of such practice, so that said practice or custom does not constitute a defense to recover the value of a portion of the cargo jettisoned.[1]

§ 2164. **Manning vessel.**—It is one of the requirements of the implied warranty of seaworthiness that the ship shall, at the commencement of the voyage, be sufficiently manned by a master, officers, and crew of competent skill and ability to navigate her. If the warranty is not complied with in this respect, the policy will be avoided,[2] even though it be exceedingly difficult or even impos-

1 Parsons on Marine Ins. (ed. 1868) 386.

[19] Hazard v. New England Marine Ins. Co. 8 Pet. (33 U. S.) 557, 8 L. ed. 1043, rev'g 1 Sum. (U. S. C. C.) 218, Fed. Cas. No. 6,282.

[20] Cook v. Greenock Marine Ins. Co. 5 Cas. Ct. Sess. 246, 15 Scot. Jur. 611.

[1] Granger v. Providence Washington Ins. Co. 200 Fed. 730, 119 C. C. A 174.

[2] M'Lanahan v. Universal Ins. Co. 1 Pet. (26 U. S.) 170, 183, 7 L. ed. 98; The Gentleman, Ole. Adm. 110, Fed. Cas. No. 5,324, rev'd 1 Blatchf. (U. S. C. C.) 196, Fed. Cas. No. 5,323; Caldwell v. Western Marine & Fire Ins. Co. 19 La. 42, 36 Am. Dec. 667; St. Louis Ins. Co. v. Glasgow,

sible to obtain such sufficient crew.[3] The master must be of competent skill, prudence, and discretion. An unusual degree of skill, however, is not required; it is sufficient if he has ordinary prudence and skill, reference being had to the navigation and voyage intended,[4] and it is also held that he must be of general good character, although facts or information as to his carelessness, extravagance, or want of economy are not material to the risk of barratry, and need not be disclosed.[5] If a departure from the course of the voyage is the result of not employing a master of the requisite skill, the underwriter is discharged.[6] And where the master had not been to sea for twenty years, it was held that such deficiency went to that general condition of efficiency of the ship known as seaworthiness, which was the subject of warranty and there was no obligation to disclose said fact, but where it was shown that the master had the requisite qualifications of seamanship throughout the voyage, and there is no proof of his incompetency, the owners are not put in breach of the warranty of seaworthiness.[7] The rule as to competency of the master has been very strictly enforced in one case, where it was held that there was a breach of the warranty of seaworthiness where the master was incompetent, although the navigation of the vessel was under the entire charge of a competent navigator and sailing master, and it was not intended that the master should have any part in navigating the ship.[8] The warranty of seaworthiness in respect to master, officers, and crew is not broken by laying the boat on the dock for repairs and giving her over to the control of workmen or laborers,[9] nor is the warranty broken by the occasional temporary absence of one of the crew to procure water or provisions, or upon other duties incidental to the voyage, especially where the loss is in no way attributable thereto,[10] and

8 Mo. 713, 41 Am. Dec. 661; Draper v. Commercial Mutual Ins. Co. 4 Duer (N. Y.) 234; Silva v. Low, 1 Johns. Cas. (N. Y.) 184; Treadwell v. Union Ins. Co. 6 Cow. (N. Y.) 270.

[3] The Gentleman, Ole. Adm. 110, Fed. Cas. No. 5,324; 1 Blatchf. 196, Fed. Cas. No. 5,323; Forshaw v. Chabert, 3 Brod. & B. 158, 6 Moore, 369, 23 R. R. 596.

[4] Riggin v. Patapsco Ins. Co. 7 Har. & J. (Md.) 279, 16 Am. Dec. 303; Walden v. New York Firemen's Ins. Co. 12 Johns. (N. Y.) 128, aff'd 12 Johns. (N. Y.) 513; St. Louis Ins. Co. v. Glasgow, 8 Mo. 713, 41 Am. Dec. 661.

[5] Walden v. New York Firemen's Ins. Co. 12 Johns. (N. Y.) 128, aff'd 12 Johns. (N. Y.) 513.

[6] Riggin v. Patapsco Ins. Co. 7 Har. & J. (Md.) 279, 16 Am. Dec. 302.

[7] "Gunford" Ship Co. Ltd. v. Thames & Mersey Marine Ins. Co. Ltd. [1910] Sess. Cas. 1072.

[8] Draper v. Commercial Mutual Ins. Co. 4 Duer (N. Y.) 234, 21 N. Y. 378.

[9] St. Louis Ins. Co. v. Glasgow, 8 Mo. 713, 41 Am. Dec. 661.

[10] Caldwell v. Western Ins. Co. 19 La. 42, 36 Am. Dec. 667; Busk v. Royal Exch. Assur. Co. 2 Barn. & Ald. 73, 20 R. R. 350, 14 Eng. Rul. Cas. 332, per Bayley, J.; Lapene v.

where the master was neither incompetent nor insufficient as a crew and the vessel was otherwise seaworthy the temporary absence of the master does not aid the assurer in case of loss or injury by stranding which was a peril insured against,[11] nor is it requisite that the vessel should be officered and manned when laid up in port,[12] and a mate is sufficient for a vessel frozen up for the season.[13] And the warranty, even though arising from express stipulation, may be affected by usage; as in case of a custom to discharge a part of the hands employed on a flatboat before the termination of the voyage.[14] It is undoubtedly true that different degrees of seaworthiness exist in reference to the competency of the officers and sufficiency of the crew as in other cases, for one voyage may necessitate a greater degree of competency and discretion and nautical knowledge than another,[15] and it is declared that there must be sufficient skill in the captain and crew for the purposes of the voyage insured, and if loss results from the employment of a master not acquainted with the usual course of navigation on the insured voyage, and so far incompetent as to be unable to safely navigate the vessel through ordinary perils of the voyage, she is unseaworthy.[16] So a master and one hand is held insufficient to navigate a vessel of about thirty-five tons' burden on a voyage from New York to Edenton, South Carolina.[17] The crew must, at the time of sailing on the voyage, be adequate and competent to perform the usual duties and meet the ordinary perils to which the vessel may be exposed on that voyage.[18]

**§ 2165. Whether inferior officers must be competent to fill master's position.**—As high an authority as Chief Justice Shaw declares that "a vessel cannot be deemed seaworthy which has not on board some person capable of navigating her besides the master," and that it is presumed that a mate is appointed who is competently skilled to take the office of master in case of emergency,[19] relying

Sun Mutual Ins. Co. 8 La. Ann. 1, 58 Am. Dec. 668.

[11] Lewis v. Aetna Ins. Co. (U. S. D. C.) 123 Fed. 157, aff'd on same opinion 129 Fed. 1006, 64 C. C. A. 210, certiorari denied in 195 U. S. 629, 49 L. ed. 352, 25 Sup. Ct. 787.

[12] Bell v. Western Marine & Fire Ins. Co. 5 Rob. (La.) 423, 39 Am. Dec. 542.

[13] Busk v. Royal Exch. Assur. Co. 2 Barn. & Ald. 73, 20 R. R. 350, 14 Eng. Rul. Cas. 332.

[14] Grant v. Lexington Fire, Life & Marine Ins. Co. 5 Ind. 23, 61 Am. Dec. 74.

[15] See Treadwell v. Union Ins. Co. 6 Cow. (N. Y.) 270.

[16] Tait v. Levi, 14 East, 481, 13 R. R. 289.

[17] Dow v. Smith, 1 Caines (N. Y.) 32.

[18] Hunter v. Potts, Selw. N. P. (1811) 1017, per Lord Ellenborough; Hucks v. Thornton, Holt, N. P. 30; Forshaw v. Chabert, 3 Brod. & B. 158, 6 Moore, 369; Shore v. Bentall, 7 Barn. & C. 798, 1 M. & Ry. 111, 31 R. R. 289.

[19] Copeland v. New England Marine Ins. Co. 2 Met. (43 Mass.) 432.

upon an English decision substantially to that effect, the case being a policy upon an East India voyage, where the question whether the vessel was properly manned for an East India voyage was left to the jury.[20] It certainly would not seem unreasonable to require the enforcement of such a rule in case of steamships and other large vessels, or in cases where the voyage is a long one, although it is an extension of the rule as generally understood and received, and it could be urged that a requirement resting upon an implied warranty ought to be so well established that the contract may be deemed to have been made in reference thereto.[1]

**§ 2166. Whether vessel must when she sails have a full complement of men engaged for whole voyage.**—The warranty of seaworthiness generally contemplates that when a vessel sails on her voyage she must then have a full complement of men sufficient for the whole of that particular voyage, and this is evidently the English rule strictly enforced, except possibly in those cases where a liberty is reserved to touch and stay in the course of the voyage; it being also held that the fact that the deficiency was supplied in due course of the voyage did not aid assured.[2] And in this country where at the time of sailing the crew consisted of but ten persons,

[20] Clifford v. Hunter, 1 Moody & M. 103, 3 Car. & P. 16.

[1] M'Lanahan v. Universal Ins. Co. 1 Pet. (26 U. S.) 170, 184, 7 L. ed. 98; The Niagara v. Cordes, 21 How. (62 U. S.) 7, 16 L. ed. 41; Treadwell v. Union Ins. Co. 6 Cow. (N. Y.) 270; Draper v. Commercial Ins. Co. 4 Duer (N. Y.) 234, 21 N. Y. 378; Gillespie v. Forsyth, 2 L. R. Q. B. (Quebec) 257; see 3 Kent's Commentaries (5th ed.) 287n. 1 Arnould on Marine Ins. (Perkins ed. 1850) 685, 686, *683; Id. (Maclachlan's ed. 1887) 675; Id. (8th ed. Hart & Simey) sec. 722, p. 882. "The skill in navigation of the master or other persons on board requisite to seaworthiness must depend upon the particular voyage:" 1 Phillips on Ins. (3d ed.) 385, sec. 708.

[2] 1 Arnould on Marine Ins. (Perkins' ed. 1850) 687, 688, *684; Id. (Maclachlan's ed. 1887) 676, 677; Id. (8th ed. Hart & Simey) sec. 723, p. 883. *Citing* Forshaw v. Chabert, 3 Brod. & B. 158, 6 Moore, 369. In this case the policy was "at and from" on a homeward risk. The full complement of men required was ten, but owing to the loss of some of the crew and inability to obtain others, the vessel sailed with only eight men engaged for the whole voyage and two for a part of the voyage. The captain landed the two men at the place agreed and shipped two others for the remainder of the voyage, and the vessel was held unseaworthy because the ten men had not been engaged for the whole voyage. Mr. Phillips criticises this case on the ground that as some of the hands were lost at the loading port, the master could employ necessary means to remedy the deficiency, and also that the warranty is less strictly construed where the voyage commences from a foreign port: 1 Phillips on Ins. (3d ed.) 387, *citing* Cruder v. Philadelphia Ins. Co. 2 Wash. (U. S. C. C.) 262, Fed. Cas. No. 3,453; Motteux v. London Assurance Co. 1 Atk. 545. See also 17 Earl of Halsbury's Laws of England, secs. 833 et seq., pp. 424 et seq.

and the master intended to stop at a specified place to procure seamen, and before that point was reached the ship foundered, it was held that the intention to stop evidenced either that the crew was not sufficient, or that they were not engaged for the whole voyage.[3] But the rule is qualified in those cases where a different complement of men is required for different parts of the voyage or stages of the navigation.[4] The general rule would, therefore, subject to such qualifications as are above noted, be probably enforced in this country.[5] In applying the rule, however, it should be remembered that the English doctrine as to subsequent seaworthiness differs from that in this country, and that under a policy "at and from" a question has arisen whether, if an unseaworthiness exists at the time of sailing, it may be remedied before loss; therefore, if the vessel's complement of men be sufficient for a voyage to an intermediate port, although not engaged for the whole voyage, and it is almost certain at the time of sailing that the defect could be and it is remedied there before loss, such facts might be entitled to much consideration. Usage may also be an important factor. The fact that the steamer did not carry a night crew on a run that was to be made wholly by daylight does not tend to show that the steamer was unseaworthy.[6]

§ 2167. **Negligence or misconduct of master or crew: continuing warranty.**—If the assured has employed a competent master and crew, and the vessel at the beginning is seaworthy in this respect, the warranty is complied with, for the assured does not warrant that they shall continue to do their duty, and if the loss has been immediately caused by a peril insured against, the underwriters are liable, even though unseaworthiness subsequent to the sailing may have arisen primarily from the negligence, carelessness, or other misconduct of the master and crew, and though the loss may be remotely caused thereby, and this is true whether the fault be of omission or commission, and whether the insurance be against barratry or not. In brief, the insurers are liable for a loss remotely arising from negligence of the master and mariners, but proximately from a peril insured against.[7] Thus, it does not avail the

[3] Silva v. Low, 1 Johns. Cas. (N. Y.) 184. See also Cruder v. Philadelphia Ins. Co. 2 Wash. (U. S. C. C.) 262, Fed. Cas. No. 3,453.

[4] Dixon v. Sadler, 5 Mees. & W. 415, 9 L. J. Ex. 48, 14 Eng. Rul. Cas. 58, per Parke, B.; Treadwell v. Union Ins. Co. 6 Cow. (N. Y.) 270.

[5] See Cruder v. Philadelphia Ins. Co. 2 Wash. (U. S. C. C.) 262, Fed. Cas. No. 3,453.

[6] Louisville Ins. Co. v. Monarch, 99 Ky. 578, 36 S. W. 563, 564.

[7] *United States.* — Columbia Ins. Co. v. Lawrence, 10 Pet. (35 U. S.) 507, 517, 9 L. ed. 512; Patapsco Ins. Co. v. Coulter, 3 Pet. (28 U. S.) 222, 7 L. ed. 659; M'Lanahan v. Universal Ins. Co. 1 Pet. (26 U. S.) 170, 184, 7 L. ed. 98, per Story, J.; General Mut. Ins. Co. v. Sherwood, 14 How. (55 U. S.) 351, 14 L. ed. 452;

underwriter that if the master and crew had acted with proper diligence the loss by fire might have been averted and the cargo saved, nor does the fact that the fire originated from the master's carelessness prevent recovery,[8] nor is it material that the boat was negligently managed where the loss arose from an explosion of the boilers.[9] And where the captain, the vessel being aground, ordered brandy in barrels loaded on deck to be thrown overboard, and the crew, not being able to do this, knocked in the barrel heads, it was held that the loss was by the perils of the sea, and that there was no such unskillfulness or misconduct of the master as would excuse

Sperry v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 243, Fed. Cas. No. 13,236; The Titania, 19 Fed. 101.

*Kentucky.*—Louisville Underwriters v. Pence, 93 Ky. 96, 40 Am. St. Rep. 176, 19 S. W. 10, 21 Ins. L. J. 493, 14 Ky. L. Rep. 21; Firemen's Ins. Co. v. Powell, 13 B. Mon. (52 Ky.) 311.

*Louisiana.*—Henderson v. Western Marine & Fire Ins. Co. 10 Rob. (La.) 164, 43 Am. Dec. 176.

*Maryland.*—Georgia Insurance & Trust Co. v. Dawson, 2 Gill (Md.) 365.

*Massachusetts.*—Copeland v. New England Ins. Co. 2 Met. (43 Mass.) 432.

*Missouri.*—Missouri Ins. Co. v. Glasgow, 8 Mo. 725; St. Louis Ins. Co. v. Glasgow, 8 Mo. 713, 41 Am. Dec. 661.

*Pennsylvania.*—Phœnix Fire Ins. Co. v. Cochran, 51 Pa. St. 143; American Ins. Co. v. Insley, 7 Pa. St. 223, 47 Am. Dec. 509.

*England.*—Redman v. Wilson, 14 Mees. & W. 476, 14 L. J. Ex. 333, 9 Jur. 714; Dixon v. Sadler, 5 Mees. & W. 415, 9 L. J. Ex. 48, 14 Eng. Rul. Cas. 58, per Parke, B., 8 Mees. & W. 895, 14 Eng. Rul. Cas. 63, *cited* Wilton v. Atlantic Royal Mail Steam Navigation Co. 10 Com. B. (N. S.) 453, 100 Eng. C. L. 465, 30 L. J. C. P. 369, 8 Jur. (N. S.) 232, *citing* Busk v. Royal Exch. Co. 2 Barn. & Ald. 73, 20 R. R. 350, 14 Eng. Rul. Cas. 332; Walker v. Maitland, 5 Barn. & Ald. 171, 24 R. R. 230; Holdsworth v. Wise, 7 Barn. & C. 791; Bishop v. Pentland, 7 Barn. & C. 214, 219; Shore v. Bentall, 7 Barn. & C. 798n, 1 M. & Ry. 111.

See: *United States.* — Orient Ins. Co. v. Adams, 123 U. S. 67, 31 L. ed. 63, 8 Sup. Ct. 68; Phœnix Ins. Co. v. Erie & W. Transportation Co. 117 U. S. 312, 20 L. ed. 873; Waters v. Merchants' Louisville Ins. Co. 11 Pet. (36 U. S.) 222, 9 L. ed. 691, per Story, J.

*Massachusetts.*—Parkhurst v. Gloucester Mutual Fire Ins. Co. 100 Mass. 301, 1 Am. Rep. 105.

*New York.*—Mathews v. Howard Ins. Co. 11 N. Y. 9.

*Ohio.*—Germania Ins. Co. v. Sherlock, 25 Ohio St. 33, 1 Wkly. Law Bul. 226, 7 Ohio Dec. 17.

*England.*—Davidson v. Burnand, 4 L. R. C. P. 117, 38 L. J. C. P. 73; Laurie v. Douglass, 15 Mees. & W. 746; Phillips v. Nairne, 4 Com. B. 343, 350, 16 L. J. C. P. 194, 11 Jur. 455; Carruthers v. Lydebotham, 4 Maule & S. 77, 16 R. R. 392; Corcoran v. Gurney, 1 El. & B. 456, 22 L. J. Q. B. 113, 17 Jur. 1152. There are decisions in conflict with so much of the above rule as relates to unseaworthiness and neglect to repair, as noted hereafter under this section. See §§ 2741–44 herein, "Barratry."

[8] Patapsco Ins. Co. v. Coulter, 3 Pet. (28 U. S.) 222, 7 L. ed. 659.

[9] Perrin v. Protection Ins. Co. 11 Ohio, 147, 38 Am. Dec. 728, overruling Lodwicks v. Ohio Ins. Co. 5 Ohio, 433, and other decisions in that state.

the insurers.[10] Nor does it avail the underwriter that the negligence and carelessness of the officers and crew was the remote cause of an explosion of a powder magazine and consequent loss of the ship.[11] And where the vessel puts into a port in distress, it is held that the insured is not liable for the improper exercise of judgment in putting out to sea in an unseaworthy condition, for the master and mariners are not the servants of the assured.[12] In a Massachusetts case, however, a distinction is made between the acts of the master, officers, and crew in their own proper sphere in navigating the vessel, and the master's acts as agent or representative of the owner of the vessel, holding that the rule is limited to acts of negligence or misconduct in the first case, and not to those acts in the latter.[13] But if such a distinction exists, exactly where the line should be drawn would be a difficult matter to determine, although an exception to the rule might arise, so far as the doctrine of the cases in this country would require the master to make repairs where the ship becomes unseaworthy during the voyage to which the insurance relates. There are also decisions in conflict with the principal rule first above stated.[14] Notwithstanding the general rule above noted, the provisions of the California code that under an insurance for a specified length of time the ship must be seaworthy at the commencement of every voyage she may undertake during that time, and also that either party may rescind for the violation of a material warranty or other material provision of the policy by either party thereto, are material factors bearing upon the question, which would probably change the rule there so far as policies for a specified time are concerned.[15]

§ 2168. **Employment of pilot.**—The employment of a pilot goes to the question of seaworthiness,[16] and it is held that the insurer

[10] Van Syckel v. The Ewing, Crabbe, Adm. 405, Fed. Cas. No. 16,877.

[11] Waters v. Merchants' Ins. Co. 11 Pet. (36 U. S.) 213, 9 L. ed. 69, 1 McLean (U. S. C. C.) 275, Fed. Cas. No. 17,266; Mathews v. Howard Ins. Co. 11 N. Y. 9, overruling Grim v. Phœnix Ins. Co. 13 Johns. (N. Y.) 451.

[12] Brioso v. Pacific Mutual Ins. Co. 4 Daly (N. Y.) 246, *citing* the cases in the last note, and Redman v. Wilson, 14 Mees. & W. 476, 14 L. J. Ex. 333, 9 Jur. 714.

[13] Copeland v. New England Marine Ins. Co. 2 Met. (43 Mass.) 432; 1 Phillips on Ins. (3d ed.) 402, sec. 732.

[14] See Riggin v. Patapsco Ins. Co. 7 Har. & J. (Md.) 279, 16 Am. Dec. 302; Cleveland v. Union Ins. Co. 8 Mass. 308; American Ins. Co. v. Bryan, 26 Wend. (N. Y.) 563, 36 Am. Dec. 278, 1 Hill (N. Y.) 25. See Law v. Hollingsworth, 7 Term Rep. 160, overruled in Sadler v. Dixon, 5 Mees. & W. 415, 9 L. J. Ex. 48, 14 Eng. Rul. Cas. 58; Alcock v. Royal Exch. Assur. Corp. 13 Q. B. 292, 18 L. J. Q. B. 121, 13 Jur. 445.

[15] Deering's Annot. Civ. Code Cal. secs. 2610, 2683.

[16] Lapene v. Sun Ins. Co. 8 La. Ann. 1, 58 Am. Dec. 668.

may defend on the ground that the vessel did not have a pilot.[17] But in determining to what extent it enters into such question, reference must be had to the law and usage, as a factor entering into the safe navigation of the vessel, and also to the circumstance whether the port is one of departure or entry, or an intermediate port. In accordance with the rule stated under the preceding section herein, if the vessel have a competent master and crew at the commencement of the voyage, a doubt would be raised whether the master's negligence in subsequently failing to employ a pilot at an intermediate port or ports of entry would excuse the underwriters, provided a peril insured against was the proximate cause of loss, although it is declared that if the nonemployment of a pilot at an intermediate port is only the remote cause of the loss, where the vessel was originally seaworthy, the master being of competent skill, the insurers are nevertheless liable.[18] But it is also declared that this doctrine is subject to the qualification that if an act of parliament requires the employment of a pilot, it is necessary.[19] And, under the merchant shipping acts of England of 1854 and 1862, if the assured, says Mr. Maclachlan, were to sail without a licensed pilot, the policy would be vitiated, whether on goods or on the ship, when the assured is a party to the illegality.[20] So it is held in this country that the presumption of unseaworthiness, arising under a statute, from a foreign vessel leaving the port of New York without a licensed pilot is not rebutted by the fact that she was taken out of port in safety by the master.[1] But in another case it is held that a statutory unseaworthiness is not established by a statute requiring an outward bound vessel to employ a licensed pilot under penalty for noncompliance, and that the underwriter is not excused by the mere refusal of the master to receive on board a pilot, even though the loss occurs in pilot ground, but that the question of seaworthiness depends upon the circumstances, such as usage of the port and the master's ability to pilot his own vessel.[2] So it is held that a schooner is not rendered unseaworthy by sailing up the Potomac without a licensed pilot, where her mate is acting as pilot, and is a skillful man, it being customary for mates to pilot vessels of her size in such cases, and this even though the statute prohibited other than properly

[17] Treadwell v. Union Ins. Co. 6 Cow. (N. Y.) 270.

[18] Phillips v. Headlam, 2 Barn. & Adol. 380, 9 L. J. (O. S.) K. B. 238.

[19] Hollingsworth v. Broderick, 7 Ad. & El. 40, 44, 2 N. & P. 608, 8 L. J. Q. B. 80, per Patterson, J.

[20] 2 Arnould on Marine Ins. (Maclachlan's ed. 1887) 696; 2 Id. (8th ed. Hart & Simey) secs. 702, 703, pp. 862 et seq.

[1] Borland v. Mercantile Mutual Ins. Co. 46 N. Y. Sup. Ct. 433, under Laws N. Y. 1857, c. 242.

[2] Flanigan v. Washington Ins. Co. 7 Pa. St. 306, under Pa. Stats. 1803.

licensed pilots from acting.[3] So in the case of a government vessel, she is not prima facie unseaworthy from the fact that the officers navigating her are not licensed pilots.[4] And recovery was had where a pilot was on board, although not licensed.[5] So a recovery was had where a pilot was not employed by a vessel entering a harbor, the loss occurring at a point where the pilot was usually dismissed and beyond that place at which the aid of a pilot was desirable.[6] But if a vessel is about to enter a harbor where the approaches are difficult of access, and where not only nautical skill but local knowledge and experience thereof is required, and pilots are to be had, and the usage is to take pilots on board, it is held that the law is not satisfied as to seaworthiness unless a pilot is employed.[7] So the question as to a custom exempting an assured from providing a branch pilot in coasting trade from North Carolina is declared to be one of fact, both as to its existence and reasonableness.[8] It is also decided that the master is bound to secure the services of a pilot when entering a foreign port where pilots are employed, and must approach pilot ground with caution, and that the underwriter's liability ceases upon failure to employ a pilot on the part of the owner or his agents, where a pilot's services are necessary to avoid danger.[9] And that as the captain has, upon coming out of a harbor, the power to procure a pilot, he is obligated to do so, especially where usage requires a pilot. But it is held in another case that the neglect to employ a pilot discharged the insurers when the loss was a direct and immediate consequence of the neglect, but not otherwise.[10] If a competent pilot is received on board, and the navigation of the vessel given into his charge, the warranty would undoubtedly be complied with as to seaworthiness.[11] But the nature of the risk, as where a non-seagoing vessel is, with full knowledge of said fact, insured for a voyage necessitating, at least in part, an ocean voyage, may make the question of whether it was usual and customary, the master being a competent navigator, to employ a pilot during certain parts of the voyage.[12] It will be seen from the

[3] Keeler v. Fireman's Ins. Co. 3 Hill (N. Y.) 250.

[4] Hathaway v. St. Paul Fire & Marine Ins. Co. 1 McCrary (C. C.) 25, 1 Fed. 197.

[5] Domingo v. Merchants' Mutual Ins. Co. 19 La. Ann. 479.

[6] McMillan v. Union Ins. Co. Rice (S. C.) 248, 33 Am. Dec. 112.

[7] Whitney v. Ocean Ins. Co. 14 La. 485, 33 Am. Dec. 595n; Thomson v. Bisset, 4 Cas. Ct. Sess. (Shaw & D. R.) 670, 677. See Van Syckel v. The Ewing, Crabbe, Adm. 405, Fed. Cas. No. 16,877, and *examine* De Pau v. Jones, 1 Brev. (S. C.) 437.

[8] Cox v. Charleston Fire & Marine Ins. Co. 3 Rich. (S. C.) 331, 45 Am. Dec. 771.

[9] McDowell v. General Mutual Ins. Co. 7 La. Ann. 684, 56 Am. Dec. 619.

[10] McMillan v. Union Ins. Co. Rice (S. C.) 248, 33 Am. Dec. 112.

[11] Law v. Hollingsworth, 7 Term Rep. 160.

[12] Thebaud v. Great Western Ins.

above cases that there is much doubt whether the nonemployment of a pilot constitutes such unseaworthiness as to relieve the insurers, except perhaps when law and usage require one to be taken in going out of a port, or where the nonemployment is the proximate cause of the loss. We would suggest that a possible ground for a solution of the question may exist in the fact that the warranty of seaworthiness relates to the condition of the ship, and its equipment and fitness for port or for the voyage, and that the employment of a pilot is a mere temporary condition, relating merely to the ship's temporary navigation within certain limits.

**§ 2169. Warranty may be superseded by stipulation: waiver and estoppel: latent defects.**—The warranty of seaworthiness may be superseded by stipulation, or by acts or declarations of the assurer operating as a waiver or estoppel. Thus, the underwriters may agree that the ship is seaworthy for the voyage, which will dispense with the ordinary warranty and render the insurers liable for loss, even from latent defects not aggravated by ordinary perils.[13] And if at the time of issuing the policy the insurer knows that the vessel is unseaworthy, and elects to continue the risk and take the entire premium, whereby the assured is induced to rely upon the belief that the insurance is in force, this estops the underwriter from avoiding the contract after a loss on the ground of unseaworthiness. A case of this character differs, however, from one where the underwriter has reasonable means and opportunity of ascertaining the facts, but has no knowledge thereof,[14] and it is also to be distinguished from one where the assurer is as well acquainted with the state and condition of the ship, as the owner, and has equal opportunity for judging as to her unseaworthiness, but does not know the vessel is unseaworthy.[15] An advertisement that the company would insure goods on certain enumerated boats amounts to a waiver of the implied warranty of seaworthiness.[16] If it be stipulated that vessels used by assured shall be approved by the assurer, the certificate of the assurer's inspector approving a vessel constitutes an admission of seaworthiness, which supersedes the ordinary warranty.[17] So after the vessel has sailed, the assurers, having knowledge of the unseaworthiness, may waive the fact of breach of the warranty, and contract that the same may be remedied, and thereby render themselves liable to the same extent

Co. 155 N. Y. 516, 50 N. E. 284, 27 Ins. L. J. 756.

[13] Parfitt v. Thompson, 13 Mees. & W. 392, 14 L. J. Ex. 73. See § 2156 herein.

[14] Hoxie v. Home Ins. Co. 32 Conn. 21, 85 Am. Dec. 240.

[15] Oliver v. Cowley, reported in 1 Marshall on Ins. (ed. 1810) *161.

[16] Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 340, 41 Am. Dec. 592.

[17] Marine Fire Ins. Co. v. Burnett, 29 Tex. 433.

as if the vessel had been originally seaworthy.[18] But it cannot be held that the fact of seaworthiness, as a condition precedent, is waived or ceases to be a condition, if the unseaworthiness has been created by the intentional wrong of the master.[19]

**§ 2169a. Latent defects: Inchmaree clause.**—Where every effort is made to render a vessel seaworthy as where she was constructed, both with respect to hull and machinery by builders of the best reputation under competent supervision and notwithstanding all proper precautions are taken there is a latent defect in the casting of a bedplate which occasioned the injury, and the insurance was upon a new lake steamboat under a time policy containing the Inchmaree clause providing that "this insurance also to cover loss of, or damage to the hull or machinery through . . . any latent defect in the machinery or hull, provided such loss or damage has not resulted from the want of due diligence by the owners of the ship or any of them, or by the manager," etc., it was held that the vessel was seaworthy in the ordinary sense and that the policy attached and the insurer was liable.[20]

**§ 2169b. When warranty not superseded by stipulation.**—In order to exclude the implied warranty of seaworthiness the words used must be pertinent and apposite, and, therefore, such implied warranty or implied condition in a policy on cattle is not excluded or superseded by a policy stipulation that the "fittings and condition of cattle" be approved by Lloyd's agent's surveyor and there is a breach of both provisions where there is an insufficient ventilation and an insufficient supply of cattlemen to attend them.[1]

[18] Weir v. Aberdein, 2 Barn. & Ald. 320, 20 R. R. 450; Quebec Marine Ins. Co. v. Commercial Bank of Canada, L. R. 3 P. C. 234, 244, 39 L. J. P. C. 53, 22 L. T. 559, 18 W. R. 769, per Lord Penzance.

[19] Borland v. Mercantile Mutual Ins. Co. 14 Jones & S. (46 N. Y. Super. Ct.) 433.

[20] Cleveland & Buffalo Transit Co. v. Insurance Co. of North America, (U. S. D. C.) 115 Fed. 431. The court, per Adams, D. J., states the reason for and history of the Inchmaree clause Id. 435.

[1] Sleigh v. Tyser [1900] 2 Q. B. 333, 69 L. J. Q. B. 626, 82 L. T. 804, 5 Com. Cas. 271, 9 Asp. M. C. 97. The court, Bigham, J., said: "The question then arises whether insufficient ventilation and an insufficient supply of men constitute a breach of the implied warranty—or, more correctly, the implied condition—of seaworthiness. I think they do. What is the implied warranty in a policy on cargo? It is, in my opinion, exactly the same as the warranty in a policy on ship—that the ship shall be seaworthy for the adventure on which she starts. Stating the warranty with particular reference to a policy on cargo, it may be defined as a warranty—or rather as a condition—that the ship shall be fit for the proposed service—fit, that is, in respect of all those things that appertain to the safe carriage of the cargo in question to its destination. No doubt it is not usual for underwriters on cargo to rely on the defense of unseaworthiness; the un-

**§ 2169c. Same subject: effect of Harter act.**—The rule stated under a prior section,[2] as well as that given under the last preceding one, is affected by the Harter act[3] to the extent that said act precludes the insertion in bills of lading of any covenant or agreement whereby the obligation of the shipowner to use due diligence in making the vessel seaworthy, fit and capable for performing her intended voyage is lessened or avoided and this applies to vessels engaged in the dressed beef trade where a refrigerating apparatus is necessary, and is therefore included in the warranty of seaworthiness, so that said act is violated by inserting in bills of lading, of a vessel employed in said trade, the "dressed beef clause" releasing said vessel from damages notwithstanding defects in the refrigerating apparatus whether they existed prior to or at the commencement of the voyage; and it must be shown that the owner has used due diligence to make the vessel seaworthy at the

derwriter generally pays the cargo owner and avails himself of the latter's right against the ship owner, the benefit of which he obtains by subrogation: McArthur's Contract of Marine Ins. (2d ed.) p. 15, note (c). But this is because of the supposed hardship of the law which makes innocent shippers of cargo responsible for the oversight or neglect of the shipowner. The practice does not modify the law, and in the present case the hardship out of which the practice has sprung does not exist, for the plaintiffs had themselves undertaken with the shipowners to provide both the ventilation appliances and the cattle-men. . . . But it is said in this case that the implied warranty is gone by reason of the express words in the policy to which I have already referred—'the fittings and condition of the cattle to be approved by Lloyd's agent's surveyor.' . . . It is argued on the plaintiff's behalf that their compliance with that express provision of the contract discharges them from further obligation. I do not, however, think so. The certificate has nothing to do with the sufficiency of men shipped on board to attend to the cattle. With that matter Lloyd's surveyor did not concern himself. And though ventilation appliances may well come within the meaning of the word 'fittings,' the question remains whether the parties intended, by this stipulation that the fittings should be approved by Lloyd's agent, to supersede the implied warranty of seaworthiness in respect of ventilation. I am of opinion that they did not. . . . To exclude the implied warranty of seaworthiness the words used must be express, pertinent, and apposite, per Lord Penzance in Quebec Marine Ins. Co. v. Commercial Bank of Canada, L. R. 3 P. C. 234, at p. 242. If I could find in these words sufficient to satisfy me that the parties intended that Lloyd's surveyor should be put in the position of a sole judge to decide once for all whether the fittings were enough for the purpose required, I should probably come to a different conclusion as to intention of the parties in introducing the stipulation relied on. But I do not find anything of the kind. The stipulation is, in my opinion, merely superadded for the benefit of the underwriter, and therefore does not exclude the implied warranty. See Mody v. Gregson, L. R. 4 Ex. 49, at p. 53."

[2] See § 2156 herein.

[3] 27 U. S. Stat. 445.

commencement of the voyage and this includes making the refrigerating plant reasonably fit for the intended uses thereof.[4]

**§ 2170. Seaworthiness: estoppel against insurer: certificate of board of underwriters.**—If an inspector of a local board of underwriters, to which the insurer belongs, issues, shortly prior to the attachment of the risk, and delivers to the manager of the insured, a certificate that he has made a thorough examination of the barge in question, and has found her in good order, and well conditioned, privileged to carry certain goods and merchandise to a certain amount on certain waters, and that goods and merchandise shipped on her will be insured at the usual rates of premium by the insurers composing said local board of underwriters for a specified time, subject to reinspection at any time, said certificate estops said insurer to question the seaworthiness of the barge, as against a shipper of the goods specified, who has relied thereon in making said shipments and in effecting said insurance.[5]

**§ 2170a. Assurer's knowledge of condition of vessel and nature of risk.**—Where there is no fraud or misrepresentation to induce assurer to accept the risk and it has full knowledge of the history of the vessel, her condition and all the facts from a written record on file in its office, and by reason of the increased hazard it charges a higher premium it is precluded from defending that said vessel is unseaworthy because she is lost by reason of rough water occasioned by wind and tide being against each other.[6] And where assurer before assuming the risk is fully informed as to all the circumstances, the character of the vessel and nature of the hazard, and exacts an additional premium for the risk, it cannot defeat a recovery on the ground of unseaworthiness.[7]

**§ 2171. Successive voyages or stages of the voyage.**—If a voyage consists of different parts, and not one entire voyage, or if there be successive stages before the vessel sails on her main voyage, a different complement of men or a different degree of seaworthiness may be sufficient for the several voyages, or for each stage of the voyage, but the vessel must be seaworthy for each voyage, or for each successive stage of a voyage, in a degree commensurate with her then risk.[8] And in case a policy upon a steamship where

[4] The Southwark, 191 U. S. 1, 48 L. ed. 65, 24 Sup. Ct. 1, *explained* in The Wildcroft, 201 U. S. 378, 50 L. ed. 794, 26 Sup. Ct. 467.

[5] Western Assurance Co. v. Southern Cotton Oil Co. 16 U. S. C. C. A. 67, 68 Fed. 924.

[6] Farmers' Feed Co. v. Ins. Co. of North America, 166 Fed. 111, 92 C. C. A. 95, aff'g 162 Fed. 379.

[7] Thebaud v. Great Western Ins. Co. 155 N. Y. 516, 50 N. E. 284, 27 Ins. L. J. 756, *considered* under § 2159 herein.

[8] Cobb v. New England Mutual Ins. Co. 6 Gray (72 Mass.) 192;

the length of the voyage is such that it must of necessity be divided into stages for the purpose of coaling, said vessel must, however, as between the shipowner and the assurer, at the commencement of each stage of the voyage, be seaworthy for that stage by being sufficiently provided with coal for that stage. The shipowner must show that he had sufficient coal for the whole voyage, or sufficient at the commencement of each stage, that the ship was seaworthy for that particular stage, otherwise he fails to defeat the prima facie inference of unseaworthiness.[9] Where the first part of the voyage is river navigation and the subsequent part a sea voyage, the vessel must, upon sailing on the latter, be seaworthy therefor.[10] If the ship may at her election pursue any part of her voyage she may choose, it is sufficient if she has a competent crew for such part of the adventure; as where the voyage was both sealing and whaling, and she pursued only sealing, for which purpose she had a sufficient crew, she was held seaworthy.[11] If the risk is to commence from the loading of the cargo on board ship at and from different ports, whereby there are separate voyages and different shipments therefor, the vessel must be seaworthy for each voyage.[12] It may be a question whether the voyage is entire or consists of

Treadwell v. Union Ins. Co. 6 Cow. (N. Y.) 270; Bell v. Reed, 4 Binn. (Pa.) 127, 5 Am. Dec. 398; Dixon v. Sadler, 5 Mees. & W. 415, 9 L. J. Ex. 48, 14 Eng. Rul. Cas. 58, per Parke, B.; Bouillon v. Lupton, 33 L. J. C. P. 37, 15 Com. B. (N. S.) 113, 10 Jur. (N. S.) 422, 8 L. T. 575, 11 W. R. 966, 14 Eng. Rul. Cas. 72, 109 Eng. C. L. 113; Oliverson v. Loughman, 4 M. & S. 346, *cited* 2 Barn. & Ald. 322; Lane v. Nixon, L. R. 1 C. P. 412. As to seaworthiness where voyage consists of different stages, see article in 48 L. T. 84; 2 Chic. Leg. News, 107.

[9] Greenock Steamship Co. v. Maritime Ins. Co. [1903] 2 K. B. 657, 72 L. J. K. B. 868, 89 L. T. 200, 52 W. R. 186, 9 Com. Cas. 41, 9 Asp. M. C. 463, aff'g [1903] 1 K. B. 367, *relying* upon The Vortigern [1899] P. 140, 155, 68 L. J. P. 49, 80 L. T. 382, 47 W. R. 437, 8 Asp. M. C. 523. It was also declared in this case that: "I do not myself think that it very much matters what the policy is called—whether a time policy, or a voyage policy. One must look at the policy and see what was contemplated by the shipowner and the underwriters respectively, and whether having regard to what both parties contemplated, the ship was seaworthy," Vaughan Williams, L. J.

"Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of, or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage." Marine insurance act 1906 (6 Edw. VII. c. 41) sec. 39 (3); Butterworth's Twentieth Century Stat. (1900–1909) p. 408.

[10] Quebec Marine Ins. Co. v. Commercial Bank of Canada, L. R. 3 C. P. 234, 39 L. J. P. C. 53, 22 L. T. 559.

[11] Hucks v. Thornton, 1 Holt N. P. 30, 17 R. R. 594, per Gibbs, C. J.

[12] Biccard v. Shepherd, 14 Moore P. C. 471, 5 L. T. N. S. 504, 10 W. R. 136.

separate voyages. If it be the former, the rule does not apply, although the voyage may consist of different parts.[13] This rule is, however, subject to such qualifications as exist in this country under the rules relating to continuing seaworthiness and repairs. The California code provides that "where different portions of the voyage contemplated by a policy differ in respect to the things requisite to make the ship seaworthy therefor, a warranty of seaworthiness is complied with if, at the commencement of each portion, the ship is seaworthy with reference to that portion." [14]

**§ 2172. To what time the warranty of seaworthiness refers.**—To what time the warranty of seaworthiness refers depends upon the character of the risk, and it is a point which has been much discussed whether any implied warranty of seaworthiness exists in time policies. The fact has also been considered important as to whether the insurance is upon ship or goods and freight, whether the policy is "from" or "at and from," or whether the voyage is entire, or consists of different parts or stages, reference being had to seaworthiness for the voyage. These points are fully considered in the several sections under this chapter, but it may be generally stated that seaworthiness must exist, as a condition precedent, at the commencement of the voyage insured; that is, at the time the vessel sails, and if the ship is not then seaworthy, the policy is void and insurers discharged, even though the loss arises from another cause; for unseaworthiness at the time of sailing is a good defense, and neither party in such a case is bound, and the premium if paid, must be returned. So also in certain cases the vessel must be seaworthy in port.[15] So it is held, both in England and in this country, that if the vessel sails in an unseaworthy condition, the underwriter is not liable, even though the vessel arrives safely at her destination.[16] But if the vessel is seaworthy

[13] See Van Valkenberg v. Astor Mutual Ins. Co. 1 Bosw. (14 N. Y.) 61; Holdsworth v. Wise, 1 Moody & R. 673, 7 Barn. & C. 794, 31 R. R. 299.

[14] Deering's Annot. Civ. Code Cal. sec. 2685.

[15] Pacific Coast Steamship Co. v. Bancroft-Whitney Co. 94 Fed. 180, 36 C. C. A. 135, rev'd on other points in Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. ed. 419; Scriba v. Insurance Co. of North America, 2 Wash. (U. S. C. C.) 107, Fed. Cas. No. 12,560; Merchants' Ins. Co. of Chicago v. Morrison, 62 Ill. 242, 14 Am. Rep. 93; Porter v. Bussey, 1 Mass. 436; Dudgeon v. Pembroke, 46 L. J. Ex. 409, 2 App. Cas. 284, 36 L. T. 382, 14 Eng. Rul. Cas. 105, 1 Q. B. D. Ex. 96; Forshaw v. Chabert, 3 Brod. & B. 158, 6 Moore, 369, 23 R. R. 596; Wedderburn v. Bell, 1 Camp. 1, 10 R. R. 615, per Lord Ellenborough; Knill v. Hooper, 2 Hurl. & N. 277, 26 L. J. Ex. 377, 5 W. R. 791; Quebec Marine Ins. Co. v. Commercial Bank of Canada, L. R. 3 C. P. 234, 39 L. J. P. C. 53, 22 L. T. 559; Christie v. Secretan, 8 Term Rep. 192, 198, per Lawrence, J.

[16] Stewart v. Wilson, 12 Mees. & W. 11, 13 L. J. Ex. 27, 7 Jur. 1020;

when she sails, it is a sufficient compliance with the warranty, even though she is lost shortly afterwards.[17] There are exceptions, however, to the principal rule above noted, which will be hereafter considered.

**§ 2173. Continuing warranty as to seaworthiness: the English rule.**—It seems to be settled in England that no continuing warranty of seaworthiness for the voyage is implied, but that it is a sufficient compliance with the warranty if the ship be seaworthy for the voyage insured when she first sails thereon, and this rule applies, where the voyage is entire, to a sailing from an intermediate port, or from an outport during a subsequent stage of the voyage.[18]

**§ 2174. Continuing warranty as to seaworthiness: the rule in this country.**—In this country the rule as to a continuing warranty of seaworthiness differs from the English rule, and is apparently in conflict with the general rule stated elsewhere, that if the loss is proximately caused by a peril insured against, the remote cause of the loss will not be a defense even though ascribable to the mere negligence of the master and crew, and even though such negligence primarily caused the unseaworthiness. We may, however, state the following as the rule which obtains here: In the

Prescott v. Union Ins. Co. 1 Whart. (Pa.) 399, 30 Am. Dec. 207.

[17] Treat v. Union Ins. Co. 56 Me. 231, 96 Am. Dec. 447; Stephenson v. Piscataqua Fire & Marine Ins. Co. 54 Me. 55; Martin v. Fishing Ins. Co. 20 Pick. (37 Mass.) 389, 32 Am. Dec. 220; Treadwell v. Union Ins. Co. 6 Cow. (N. Y.) 270; Walsh v. Washington Marine Ins. Co. 32 N. Y. 427; Patrick v. Hallett, 1 Johns. (N. Y.) 241; Miller v. Russel, 1 Bay (S. C.) 309; Franco v. Natusch, 6 Tyrw. 401.

[18] Dixon v. Sadler, 5 Mees. & W. 415, 9 L. J. Ex. 48, 14 Eng. Rul. Cas. 58, 8 Mees. & W. 895, 900, 14 Eng. Rul. Cas. 63, per Parke, B.; Bermon v. Woodbridge, 2 Doug. *781, 14 Eng. Rul. Cas. 507, per Lord Mansfield; Holdsworth v. Wise, 7 Barn. & C. 794; Eden v. Parkinson, Doug. 732, per Lord Mansfield; Watson v. Clarke ("The Midsummer Blossom"), 1 Dow P. C. 344, 14 R. R. 73, 14 Eng. Rul. Cas. 50; Parfitt v. Thompson, 13 Mees. & W. 392, 14 L. J. Ex. 73; 1 Arnould on Marine Ins. (Perkins' ed. 1850) 657, *656, sec. 244; Id. (Maclachlan's ed. 1887) 652 et seq. 659; 2 Id. (8th ed. Hart & Simey) sec. 691, p. 848. But see Phillips v. Headlam, 2 Barn. & Adol. 380, 382, 9 L. J. (O. S.) K. B. 238; Thompson v. Hopper, 6 El. & B. 172, 27 L. J. Q. B. 441, 6 W. R. 857, per Lord Campbell. Mr. Parsons states the English rule as follows: "We suppose the law in England at this time to be that if a ship which is seaworthy at the commencement of the voyage subsequently becomes unseaworthy from any cause whatever, other than the willful and wrongful act of the insured himself, this subsequent unseaworthiness will not discharge the insurer from his liability for a loss subsequent to the unseaworthiness, if that loss be the direct and proximate cause of a peril insured against:" 1 Parsons on Marine Ins. (ed. 1868) 382, 383; *citing* Marshall on Ins. (Shee's ed.) 122; Gibson v. Small, 4 H. L. Cas. 353, 1 C. L. R. 363, 17 Jur. 1131, 14 Eng. Rul. Cas. 86.

absence of anything in the policy to the contrary, if a defect of seaworthiness subsequently arises, the assured or the master, or those who may, under the circumstances, be held to be his agents, must make the vessel seaworthy, or restore her to a seaworthy condition during the period of the risk, so far as the same may reasonably be done by the exercise, in good faith, of due diligence, proper care, and reasonable discretion, in view of all the circumstances, and if through a want of such prudence and diligence by assured or his agents a loss occurs, which distinctly appears to have been directly caused thereby, the assurer is not liable, although the contract is not affected as to any other risk or loss covered by the policy, nor increased or caused by, such particular defect, and if the loss is not connected with such unseaworthiness so caused, the insurer is nevertheless liable; as where the vessel is not repaired, or only temporarily repaired at an intermediate port, the master, in the exercise of good faith and reasonable discretion, under the circumstances, deeming no repairs or only temporary repairs necessary at that port, and the subsequent loss of the vessel is in no way connected with such failure to repair, the insurer is nevertheless liable. There is nothing in the above rule to prevent the assured from making out a prima facie case, by showing that the vessel was seaworthy at the commencement of the voyage.[19] In the following case, while the general rule is followed as to losses remotely caused by the negligence of the master and mariners, it is held that the insurer is discharged by proof that the efficient and direct cause of encountering the peril is the failure on the part of the assured to act in good faith toward the insurer, or to exercise ordinary prudence in the management, navigation, and care of the vessel, for the underwriter cannot be held for losses by the peril insured against directly caused by the fraud or gross misconduct of the assured; that the latter is obligated, under the warranty of seaworthiness, to exercise such a sufficient degree of care as to secure competent officers and a crew, but that the burden rests upon the underwriter to satisfy the jury, beyond a reasonable

[19] *United States.*—Union Ins. Co. v. Smith, 124 U. S. 405, 31 L. ed. 497, 8 Sup. Ct. 53, per Blatchford, J.; The Titania, 19 Fed. 101.

*Louisiana.*—Lapene v. Sun Mutual Ins. Co. 8 La. Ann. 1, 58 Am. Dec. 668; McDowell v. General Mutual Ins. Co. 7 La. Ann. 684, 56 Am. Dec. 619; Dupeyre v. Western Ins. Co. 2 Rob. (La.) 457, 38 Am. Dec. 218.

*Massachusetts.*—Starbuck v. New England Ins. Co. 19 Pick. (36 Mass.) 198; Paddock v. Franklin Ins. Co. 11 Pick. (28 Mass.) 227, per Shaw, C. J.

*Ohio.*—Franklin Ins. Co. v. Cobb, 2 Cin. Sup. Ct. 87.

*Pennsylvania.*—Peters v. Phœnix Ins. Co. 3 Serg. & R. (Pa.) 25.

*South Carolina.* — Cudworth v. South Carolina Ins. Co. 4 Rich. Law (S. C.) 416, 55 Am. Dec. 692. In this case the insured was owner and master.

doubt, that the master designedly cast away and destroyed his vessel in a case where the defense rests upon such facts, and that it was not the position of the party, but the character of the fact upon which the degree of proof rested.[20] So it is held that insurers are not liable for the neglect of the master in not causing the false keel to be repaired, whereby the vessel became exposed to the action of worms, which obtained entrance while in the Pacific Ocean, and destroyed the ship, and this was held to release the insurers.[1] It is held that seaworthiness is limited to the commencement of the risk, and that the insurer is not released by the fact that the vessel afterward becomes unseaworthy.[2] If the contract assumes risks only "on all cotton seed in bulk or in bags owned by the assured, or consigned to them and shipped to their address in New Orleans on board good and seaworthy steamboats and barges," there is no contract, express or implied, that after shipment the steamboat or barge shall continue in a seaworthy condition.[3] Where the owner of a river steamer contracted for her employment in respondent's service for a specified time, guaranteeing that the vessel should have the underwriter's certificate as to her seaworthiness, and it was given at the commencement of the service, but withdrawn during her service, it was held that the guaranty was a continuing one, extending over the entire period of employment, not limited to the beginning thereof.[4]

**§ 2175. Continuing warranty as to seaworthiness: time policies.** —We have already considered the question whether there is any implied warranty of seaworthiness in time policies,[5] and the un-

[20] Shultz v. Pacific Ins. Co. 14 Fla. 73 (but quære, as to the "reasonable doubt"); Marshall v. Thames Fire Ins. Co. 43 Mo. 586; Kane v. Hibernia Ins. Co. 39 N. J. L. 697, 23 Am. Rep. 239.

[1] Hazard v. New England Marine Ins. Co. 1 Sum. (U. S. C. C.) 218, rev'd 8 Pet. (33 U. S.) 557, 8 L. ed. 1043, Fed. Cas. No. 6,282. See § 2797, and chapter LXXIII. herein.

[2] American Ins. Co. v. Ogden, 15 Wend. (N. Y.) 532, 533; Peters v. Phœnix Ins. Co. 3 Serg. & R. (Pa.) 25.

Under the California code an implied warranty of seaworthiness is complied with if the ship be seaworthy at the time of the commencement of the risk, except, where the policy is on time, the vessel must be seaworthy at the commencement of every voyage, and except also where goods are transshipped at an intermediate port under the terms of the policy or the description of the voyage or the established custom of trade, in which latter case the vessel on which the cargo is shipped or transshipped must be seaworthy at the commencement of its particular voyage: Deering's Annot. Civ. Code Cal. sec. 2683.

[3] So declared in Western Assurance Co. v. Southern Cotton Oil Co. 16 U. S. C. C. A. 67, per Pardee, J., 68 Fed. 924. See 16 U. S. C. C. A. 65, 68 Fed. 923.

[4] Whipple v. Mississippi & Yazoo Packet Co. 34 Fed. 54.

[5] See §§ 2152–54 herein.

settled state of the law in that respect necessitates an inquiry whether there is a continuing warranty of seaworthiness in time policies, and if so, its extent.[6] It is held that there is an implied obligation under a time policy to keep the vessel tight, strong, and staunch as far as practicable during the voyage, although it is declared in the same case that there is no continuing warranty of seaworthiness.[7] In another case in the United States Supreme Court it is held that although the warranty is complied with in time policies if the vessel is seaworthy at the commencement of the risk, yet if a subsequently arising defect as to seaworthiness is, through the bad faith or want of ordinary prudence or diligence on the part of assured or his agents, permitted to continue, the insurer is discharged as to any loss directly arising therefrom, but as to the other risks or losses covered by the policy, and not increased or occasioned by unseaworthiness, the underwriter is not discharged and that if the want of ordinary care is alleged by insurer, it must be proved by him.[8] It is held, however, that where a vessel sustains a loss by a peril insured against, receives partial repairs, and makes several trips in an unseaworthy condition, that the insurer is not discharged, for the liability was fixed while she was seaworthy.[9] In New York, it is declared that there is an implied warranty to keep the vessel seaworthy while the risk continues, so far as "reasonably possible," and necessitates "active diligence" in this respect, but this rule, taken in connection with the other language of the court immediately preceding such declaration, must be intended to be limited to those cases where the vessel leaves the port where the vessel is insurd.[10] So in another case in that state the vessel lost her small bower anchor in entering an intermediate port, and the master endeavored to replace it, but was unable to procure one of sufficient size, and set sail therefrom,

[6] "Where an insurance is made for a specified length of time, the implied warranty is not complied with unless the ship be seaworthy at the commencement of every voyage she may undertake during that time:" Deering's Annot. Civ. Code Cal. sec. 2683.

[7] Capen v. Washington Ins. Co. 66 Mass. 517.

[8] Union Ins. Co. v. Smith, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. ed. 497, per Blatchford, J. In this case there was an exception of liability for loss consequent upon incompetency of the master and want of care and skill in navigating the vessel, rottenness, inherent defects and all other unseaworthiness. The vessel, a tug, which had sprung a leak, was made seaworthy to be towed and was attempted to be towed to a port of repairs and passed two other ports where she might have been repaired, and recovery for a loss occurring before she reached the intended port of repairs was had.

[9] Gazzam v. Cincinnati Ins. Co. 6 Ohio, 71.

[10] Berwind v. Greenwich Ins. Co. 114 N. Y. 231, 234, 21 N. E. 151.

unseaworthy in this respect. It was held that, having been originally seaworthy, sailing from an intermediate port in such unseaworthy condition did not discharge the underwriter.[11] In Wisconsin, it is declared that assured is obligated from time to time to keep the vessel in a condition suitable for the service required, and the underwriter is not liable if a loss is occasioned by the failure so to do; but in this case the vessel left port with insufficient ballast, which ordinary care and prudence justified procuring, and capsized, and the case was submitted to the jury.[12] It certainly is not unreasonable to require that where the vessel leaves port at the inception of the risk she should be seaworthy under a time policy,[13] and that she should be kept in that condition within the limits of the rule stated under the last section; there being nothing in the policy to warrant a different construction.[14]

§ 2176. **Continuing warranty as to seaworthiness: repairs.**—If a vessel which is originally seaworthy becomes unseaworthy during the voyage, and the master, who is owner of the vessel, neglects to repair her at a port of refuge or trade, or other port which he has entered, and, in consequence thereof, the vessel leaves port in an unseaworthy condition, and the loss is caused directly by such neglect, and not otherwise, the insurers are released.[15] This rule has also been extended to repairs by the master[16] where he has reasonable cause for suspecting the existence of defects, or where he has knowledge of the same, and has reasonable grounds for the belief that such repairs are necessary to enable her to proceed on her voyage,[17] or if the defect be of such a character that a pru-

[11] In this case the insured vessel sustained damage from perils of the sea, but reached port and discharged her cargo: American Ins. Co. v. Ogden, 20 Wend. (N. Y.) 287.

[12] Merchants' Mutual Ins. Co. v. Sweet, 6 Wis. 670.

[13] See § 2154 herein.

[14] See §§ 2151–53 herein, and next section.

[15] Cudworth v. South Carolina Ins. Co. 4 Rich. (S. C.) 416, 55 Am. Dec. 692; McDowell v. General Mutual Ins. Co. 7 La. Ann. 684, 56 Am. Dec. 619. See Putnam v. Wood, 3 Mass. 481. "When a ship becomes unseaworthy during the voyage to which an insurance relates, an unreasonable delay in repairing exonerates the insurer from any loss arising therefrom:" Deering's Annot. Civ. Code Cal. sec. 2686.

[16] *United States.*—Jones v. Insurance Co. 2 Wall. Jr. (U. S. C. C.) 278, Fed. Cas. No. 7,470.

*Massachusetts.*—Copeland v. New England Mutual Ins. Co. 2 Met. (43 Mass.) 432, 439, per Shaw, C. J.; Deblois v. Ocean Ins. Co. 16 Pick. (33 Mass.) 303, 308, 28 Am. Dec. 245; Paddock v. Franklin Ins. Co. 11 Pick. (28 Mass.) 227.

*New York.* — Berwind v. Greenwich Ins. Co. 114 N. Y. 231, 234, 21 N. E. 151.

*Wisconsin.* — Merchants' Mutual Ins. Co. v. Sweet, 6 Wis. 670.

[17] Starbuck v. New England Mutual Ins. Co. 19 Pick. (36 Mass.) 198.

dent and discreet master of competent skill and judgment would consider it necessary to examine and repair before leaving port to continue the voyage.[18] But if a competent master, in the exercise of a reasonable discretion as a prudent man, and in good faith, omits to examine and repair the vessel, or if he partially repairs her under such conditions, deeming her seaworthy for the rest of the voyage, and runs her in an unseaworthy state, the neglect to repair does not release the insurers.[19] These decisions may probably rest upon the ground that the master is the agent or representative of the owner for the purpose of making repairs,[20] although it is directly held that the master and mariners are not the servants of the assured, so as to bind him by their negligent acts or improper exercise of judgment in leaving port with a vessel in an unseaworthy condition, when she was originally seaworthy.[1] The rule requiring repairs by the master has also been applied to time policies.[2] But in all the above cases the loss must have been directly attributable to the insufficiency, or master's neglect or omission to repair, and not otherwise.[3] The fact of original seaworthiness of a vessel does not constitute prima facie evidence that a necessity for subsequent repairs has arisen from some extraordinary peril.[4] If there is a condition that repairs be made to a vessel, the insured is obligated to make the necessary repairs before exposing the vessel again to the perils of navigation.[5] And it is held that although there is an implied warranty that a vessel will be kept in repair and maintained in a seaworthy condition,

[18] Adderly v. American Mutual Ins. Co. Taney (U. S. C. C.) 126, Fed. Cas. No. 75.

[19] Gazzam v. Cincinnati Ins. Co. 6 Ohio, 71; Hathaway v. Sun Mutual Ins. Co. 8 Bosw. (21 N. Y.) 33.

[20] Union Ins. Co. v. Smith, 124 U. S. 405, 31 L. ed. 497, 8 Sup. Ct. 534, per Blatchford, J.; Jones v. Insurance Co. 2 Wall. Jr. (U. S. C. C.) 278, Fed. Cas. No. 7,470; Hazard v. New England Mutual Ins. Co. 8 Pet. (33 U. S.) 557, 8 L. ed. 1043, 1 Sum. (U. S. C. C.) 218, 230, Fed. Cas. No. 6,282; Copeland v. New England Mutual Ins. Co. 2 Met. (43 Mass.) 432, per Shaw, C. J.; Paddock v. Franklin Ins. Co. 11 Pick. (28 Mass.) 227, 236; American Ins. Co. v. Ogden, 20 Wend. (N. Y.) 287, 301, per Walworth, Ch.; 1 Phillips on Ins. (3d ed.) 402, sec. 732.

[1] Brioso v. Pacific Mutual Ins. Co. 4 Daly (N. Y.) 246, *citing* Redman v. Wilson, 14 Mees. & W. 476; Waters v. Merchants' Ins. Co. 11 Pet. (36 U. S.) 213, 9 L. ed. 69; Matthews v. Howard Ins. Co. 11 N. Y. 9.

[2] Jones v. Insurance Co. 2 Wall. Jr. (U. S. C. C.) 278, Fed. Cas. No. 7,470; Union Ins. Co. v. Smith, 124 U. S. 405, 31 L. ed. 497, 8 Sup. Ct. 534, per Blatchford, J.; Hathaway v. Sun Mutual Ins. Co. 8 Bosw. (21 N. Y. 33.

[3] Copeland v. New England Marine Ins. Co. 2 Met. (43 Mass.) 432, 439, per Shaw, C. J.

[4] Donnell v. Columbian Ins. Co. 2 Sum. (U. S. C. C.) 366, Fed. Cas. No. 3,987.

[5] Hyde v. Mississippi Mutual Fire Ins. Co. 10 La. Ann. 543, 29 Am. Dec. 465.

so far as the same can be done by active diligence and prudent conduct, it does not excuse a breach of warranty that the vessel shall be securely moored in safety during the winter where, although the boat is in a leaky condition, still there is no immediate danger of sinking, and there is no unusual damage and the breach could have been avoided by notice to assurer.[6] Underwriters on cargo are not relieved on account of the neglect of the master to make repairs at an intermediate port at which she is unseaworthy except where the cargo or outfits are owned by the owner of the vessel.[7]

**§ 2177. Whether cases as to necessity for repairs can be reconciled with other doctrines and cases apparently in conflict therewith.**—It will be seen by an examination of the cases relating to seaworthiness in time policies in this country,[8] and of those relating to the negligence of the master and crew,[9] that there is an apparent want of harmony between them and the cases noted under this and the preceding section. The principal difficulty exists in the attempt to cover by the term "seaworthiness" one standard as to the fitness, equipment, and manning at the time of sailing, and another standard as to her fitness and equipment during the voyage, while, in the latter case the term "seaworthiness," strictly construed, does not properly apply, for it is not an absolute seaworthiness within the meaning of that warranty, as interpreted by the courts. If we say that, independently of the warranty of seaworthiness as to the vessel, its equipment, its officers and crew, there is an implied condition or warranty that due diligence and discretion, such as a prudent man would exercise in his own affairs, shall be used to ascertain defects which unfit the vessel for continuing her voyage with reasonable safety, and also to repair her as may be necessary in the exercise of a reasonable discretion for continuing her voyage, a ground for reconciling the cases appears. The proviso, however, is that if the want of repairs arising from the failure or neglect to exercise proper diligence and discretion is the direct or proximate cause of loss, then the assurer shall be released, but if the loss arises from a peril insured against, the assured may recover, since the assurer is liable where a peril insured against is the proximate cause of loss; but if the failure or neglect to repair under the conditions

[6] Ryan v. Providence-Washington Ins. Co. 79 N. Y. Supp. 460, 79 App. Div. 316.

[7] Morse v. St. Paul Fire & Marine Ins. Co. (U. S. C. C.) 122 Fed. 748 (*criticising* Union Ins. Co. v. Smith, 124 U. S. 405, 427, 8 Sup. Ct. 534, 31 L. ed. 497) s. c. (U. S. C. C.) 124 Fed. 451, s. c. (U. S. C. C.) 129 Fed. 233.

[8] See § 2153 herein.

[9] See § 2167 herein.

above stated can reasonably be said to have been the cause of loss, it is the proximate cause, even though that cause is a peril insured against. The maxim, non remota causa sed proxima spectatur, applies.[10]

§ 2177a. **Moored in safety: breach of warranty: repairs.**—Where a steam canal boat, insured against fire and maritime perils, is warranted to be securely moored in a safe place during the winter, the insurer to be duly notified as to time and place when so laid up, there is a breach of warranty if said boat, without giving the required notice, is, because of her leaky condition, removed during the winter from her moorings for the purpose of unloading, repairing and making her seaworthy, and in such case neither the sue and labor clause, nor the implied duty to keep the vessel in a seaworthy condition, aids assured.[11]

§ 2178. **Assurer's approval of ship at port of departure: subsequent repairs.**—If, under a stipulation therefor, the assurer approves of a vessel at a port of departure, and inspection is only made there, no obligation is thereby imposed upon assured to put the vessel in as good a condition at intermediate ports as she was when inspected.[12]

§ 2179. **Subsequent noncompliance as to seaworthiness no retrospective effect.**—If a vessel has sailed in a seaworthy condition for the voyage, a subsequent noncompliance with the warranty cannot have a retrospective effect, so as to excuse the insurer for a loss occurring prior to such noncompliance; for the subsequent seaworthiness contemplated by the rule above noted[13] does not go to the extent of holding the warranty so far a continuing one as to be a condition precedent in this respect.[14]

§ 2180. **Vessel seaworthy for port.**—The vessel may be seaworthy for port, the degree being commensurate with her then safety, whether for temporary purposes, or moving about in the harbor, or undergoing repairs, or lying in the offing, and even though her state of repair and equipment be such as to constitute unseaworthiness for the voyage.[15] And while every ship must, at

[10] See Copeland v. New England Mutual Ins. Co. 2 Met. (43 Mass.) 432, 439, per Shaw, C. J., where a suggestion is made which could reasonably form the basis of the distinction in the text.

[11] Ryan v. Providence Washington Ins. Co. 79 N. Y. Supp. 460, 79 App. Div. 316. See § 2073 herein.

[12] Marine Fire Ins. Co. v. Burnett, 29 Tex. 433.

[13] See § 2174 herein.

[14] See §§ 1952–55 herein; 1 Phillips on Ins. (3d ed.) 401, sec. 730.

[15] M'Lanahan v. Universal Ins. Co. 1 Pet. (26 U. S.) 170, 184, 7 L. ed. 98, per Story, J.; Paddock v. Franklin Ins. Co. 11 Pick. (28 Mass.) 227; Taylor v. Lowell, 3 Mass. 331, 3 Am. Dec. 141; Smith v. Surridge, 4 Esp. 25, 6 R. R. 837; Forbes v. Wilson, reported in 1 Marshall on Ins. (ed. 1810) *155; Parmeter v. Cousins, 2 Camp. 235, 257, 11 R. R. 702, 13

the commencement of the voyage, possess the qualities of seaworthiness, still, a policy on the ship "at and from a port" will attach, though the vessel be undergoing extensive repairs at a port.[16] If a time policy is effected on a vessel in port, and she is seaworthy for port on the day the risk commences, the policy attaches.[17] It is held in Massachusetts that the assured on cargo or freight does not warrant that the vessel is seaworthy for the voyage at the time of taking the cargo on board, but only that she is seaworthy at the time of sailing, and that under a policy "at and from," if the goods are loaded, and the vessel having sailed is subsequently compelled to return to port, unload her cargo for repairs, and reload, that the policy attaches from the first loading, and that the underwriters are liable on the return to port and during the subsequent homeward voyage, and this extends to freight insured.[18] Notwithstanding the strong character of this authority, a different rule is asserted by Mr. Phillips, who says that the seaworthiness of the ship depends upon the uses and purposes to which it is applied, and that if an insurance is upon cargo and freight, and the goods are loaded for the voyage when the ship is in so defective a state that the cargo must be relanded to make repairs, the risk does not attach on the cargo if it is to commence at the time of loading; but he adds, referring to the Massachusetts case,[19] that the noncompliance was at an intermediate stage of the risk, and there was nothing to prevent the attachment of the risk at the time of reloading upon repairs.[20] In a case where cargo was

Eng. Rul. Cas. 608; Anner v. Woodman, 3 Taunt. 299, 12 R. R. 263; Dixon v. Sadler, 5 Mees. & W. 415, 9 L. J. Ex. 48, 14 Eng. Rul. Cas. 58, per Parke, B. See chapters on attachment and duration of risk, ship, goods, and freight, §§ 1483 et seq., 1523 et seq., 1562 et seq., 1606 et seq. herein.

"Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port." Marine insurance act 1906 (6 Edw. VII. c. 41) sec. 39 (2); Butterworth's Twentieth Century Stat. (1900–1909) p. 408.

[16] M'Lanahan v. Universal Ins. Co. 1 Pet. (26 U. S.) 170, 7 L. ed. 98.

*Cited* in The Gentlemen, Olcott (U. S. C. C.) 115, Fed. Cas. No. 5,324; Higgle v. National Lloyds, 11 Biss. (U. S. C. C.) 401, 14 Fed. 148; Lapene v. New York Sun Mutual Ins. Co. 8 La. Ann. 3, 58 Am. Dec. 668; St. Victor Barrett v. New York General Mutual Ins. Co. 8 La. Ann. 103; Mead v. Northwestern Ins. Co. 7 N. Y. 536.

[17] Hoxie v. Pacific Mutual Ins. Co. 7 Allen (89 Mass.) 211. See Dallam v. Insurance Co. 6 Phila. (Pa.) 15.

[18] Taylor v. Lowell, 3 Mass. 331, 3 Am. Dec. 141; Merchants' Ins. Co. v. Clapp, 11 Pick. (28 Mass.) 56; Paddock v. Franklin Ins. Co. 11 Pick. (28 Mass.) 227. See Motteux v. London Assur. Co. 1 Atk. 545, 13 Eng. Rul. Cas. 467, per Lord Hardwicke.

[19] Taylor v. Lowell, 3 Mass. 331, 3 Am. Dec. 141.

[20] 1 Phillips on Ins. (3d ed.) 394, 395, secs. 721–23.

insured "at and from" North Carolina to New York, the assurers were precluded from showing that the vessel was unseaworthy prior to crossing the boundary line of North Carolina, it being held sufficient if she was then seaworthy.[1] It is also held that under an insurance "at and from," a warranty of seaworthiness must be referred to the commencement of the risk, and if between that time and the time of sailing the vessel becomes unfit for sea without the fault of the insured, and is afterward lost by the perils of the sea, the insured can recover.[2] It would undoubtedly be true, upon analogy with principles established in other cases, that if the risk commences on the cargo and freight at the first loading of the goods, that the vessel must be and continue, while in port, seaworthy in a degree commensurate with her then risk. Whether the Massachusetts rule or Mr. Phillips' rule be held the true one as to the attachment of risk upon a cargo which has been loaded, unloaded for repairs, and reshipped, it would probably not be doubted that a ship must be in such a seaworthy condition as to receive the cargo without injury thereto.[3] But such a case may be distinguished from those on which the Massachusetts doctrine is based, for a ship may be fitted to receive the cargo without injury while lying in port, and the cargo may be unloaded, the ship reported to be seaworthy for the voyage, and the cargo reshipped without injury or damage thereto; if the ship is in a suitable condition to carry the cargo put on board, or intended to be put on board, she is seaworthy.[4]

**§ 2181. Whether original unseaworthiness may be cured before loss.**—A question has arisen whether original unseaworthiness may be cured before loss, so that the underwriter will be liable for the loss. Mr. Phillips, referring to seaworthiness, says: "This warranty is not violated so as to defeat the insurance by merely incidental, temporary deficiency at the commencement of the risk, in fitness for the voyage, that may be easily remedied, and soon is so in fact."[5] This writer, however, declares in another section

[1] Treadwell v. Union Ins. Co. 6 Cow. (N. Y.) 270.

[2] Garrigues v. Coxe, 1 Binn. (Pa.) 592, 2 Am. Dec. 493.

[3] Stanton v. Richardson, 45 L. J. C. P. 78, 33 L. T. 193, 3 Asp. M. C. 23, L. R. C. P. 421, 9 C. P. 390, 5 Eng. Rul. Cas. 632. "A ship which is seaworthy for the purpose of an insurance upon the ship may nevertheless, by reason of being unfitted to receive the cargo, be unseaworthy for the purpose of insurance upon the cargo:" Deering's Annot. Civ. Code Cal. sec. 2687.

[4] Schultz v. Pacific Ins. Co. 14 Fla. 73.

[5] 1 Phillips on Ins. (3d ed.) 397, sec. 726; *citing* United States v. Hunt, 2 Story (U. S. C. C.) 120, 121, Fed. Cas. No. 15,423; Taylor v. Lowell, 3 Mass. 331, 3 Am. Dec. 141; Merchants' Ins. Co. v. Clapp, 11 Pick. (28 Mass.) 56; Stanwood v. Rich, Sup. Ct. Mass. Suff. Nov. 1817; Deblois v. Ocean Ins. Co. 16 Pick. (33

that if the vessel is unseaworthy, "owing to some material deficiency," at the time referred to by the warranty, tho underwriter is discharged.[6] We doubt the legality or practicability of a rule which attempts in policies "from" to distinguish between a "material deficiency" and an "incidental temporary deficiency," in connection with the warranty of seaworthiness at the commencement of the risk, in view of all that term implies. The vessel is or is not seaworthy for the voyage at the time to which the warranty relates. If the "incidental deficiency" is such a sufficient factor of seaworthiness that, if it were not remedied before loss, the warranty would be broken, it is just as much material as any other factor of seaworthiness, and to admit an exception in such a case would open the door to numerous encroachments upon the rule, and leave much ground for fraud as well. If the exception be admitted that an "incidental, temporary deficiency at the commencement of the risk" can be cured before loss, then the same reason exists for holding the insurers liable in case want of seaworthiness originally existing is cured before loss, thereby leaving the question merely one whether the vessel was unseaworthy at the time of loss, instead of at the time of sailing. The rule stated by Mr. Phillips differs from the case of a risk attaching in part under a policy at and from, and also differs from the case where a vessel originally seaworthy becomes unseaworthy after the commencement of the risk, and rests upon different principles. To hold that the vessel may remedy before loss an unseaworthy condition existing at the commencement of the risk overthrows the rule that seaworthiness when the vessel sails is a condition precedent, and it is held in a case in point that where the vessel's boiler was defective at the time she sailed, so as to make her unseaworthy, that the fact that the defect was remedied before loss could not aid assured.[7] In a Louisiana case, however, the vessel sailed from port short of water, and stopped to obtain it, and was subsequently lost by a peril wholly disconnected with the original unseaworthiness, and the insurers were held liable.[8]

Mass.) 303, 28 Am. Dec. 245; Chase v. Eagle Ins. Co. 5 Pick. (22 Mass.) 51; McMillan v. Union Ins. Co. Rice (S. C.) 248, 249, 33 Am. Dec. 112; Weir v. Aberdeen, 2 Barn. & Ald. 320, 20 R. R. 450. He says Mr. Justice Story intimates a doubt of this last case in M'Lanahan v. Universal Ins. Co. 1 Pet. (26 U. S.) 170, 184, 7 L. ed. 98. Mr. Parsons reviews these cases, and concludes that they do not support Mr. Phillips' rule (1 Parsons on Marine Ins. [ed. 1868] 378, 379), and a careful examination of the same cases warrants that conclusion.

[6] 1 Phillips on Ins. (3d ed.) 381, sec. 696.

[7] Quebec Marine Ins. Co. v. Commercial Bank of Canada, L. R. 3 P. C. 234.

[8] Lapene v. Sun Mutual Ins. Co. 8 La. Ann. 1, 58 Am. Dec. 668. Regarding risks immaterial to peril

**§ 2182. Policy at and from vessel sailing unseaworthy: may defect be remedied before loss?**—It is an important question whether, under a policy at and from, the risk having attached in port, the sailing of a vessel in a state of unseaworthiness imputable to the assured discharges the insurers, or whether it may be remedied before loss. The main question is, Is the risk divisible to the extent that, although the vessel must be seaworthy for port to a degree commensurate with her then risk, must she also be absolutely seaworthy for her voyage when she sails? Or may the doctrine of temporary suspension and removal of the risk, the policy having already attached in port, be applied, holding the insurers liable for a loss occurring after the unseaworthiness existing at the time of sailing has been remedied? It is held in England that, under a policy at and from, the fact that the vessel sails in an unseaworthy condition for the voyage, she having been seaworthy for port, does not ab initio avoid the policy so as to entitle assured to a return of the premium.[9] In another English case under a policy at and from the actual decision was that the underwriter had clearly waived an unseaworthiness which existed when the vessel first sailed, since they had consented in writing that the defect might be remedied, and that she might proceed a second time on her voyage, and the insurers were, therefore, held liable, the loss happening through another and entirely different cause.[10] It appears that the claim was made in this last case that the vessel having once sailed in an unseaworthy condition for the voyage this fact wholly put an end to the underwriter's liability on the policy, and Lord Tenterden is reported to have declared in answer to this claim that if a vessel, at the commencement of her voyage, is, by mistake or accident, unseaworthy, by reason of some defect which is immediately discovered and remedied before loss, the underwriters are nevertheless liable, since there would be many

from which injury is received, see American Ins. Co. v. Ogden, 15 Wend. (N. Y.) 532. See 3 Kent's Commentaries (5th ed.) 289. Two cases are cited by the court: In the Louisiana case, in the first, it was held that the warranty is confined to the commencement of the risk, and if the vessel is then seaworthy the insurer is not bound, although he is liable for unseaworthiness subsequently arising. In the second case (American Ins. Co. v. Ogden, 20 Wend. (N. Y.) 287) the risk under a time policy had attached, and the vessel left an intermediate port without replacing a small anchor which had been lost, but which the master had exercised due diligence to provide.

[9] Annen v. Woodman, 3 Taunt. 299, 12 R. R. 663. See Christie v. Secretan, 8 Term Rep. 192, 198, per Lawrence, J.

[10] Weir v. Aberdein, 2 Barn. & Ald. 320, 20 R. R. 450; Quebec Marine Ins. Co. v. Commercial Bank of Canada, L. R. 3 P. C. 234, 244, 39 L. J. P. C. 53, 22 L. T. 559, 18 W. R. 769, per Lord Penzance.

cases "where it would turn out that the assured could have no claim upon the underwriters, because something was wanting or something excessive at the instant of the ship's departure, although the want had been supplied or the excess removed before the loss happened." [11] Although the actual decision was based upon a waiver, yet in view of the fact that the above statement was made in direct answer to a claim by the underwriters, it may not unreasonably be construed as intended to apply in those cases of the character mentioned where the policy is at and from, the risk having attached and the defect remedied before loss, the loss being wholly disconnected with the unseaworthiness. We do not say, however, that this is the law, but only that such conclusion may be fairly deduced from the case; nevertheless, outside of this decision, the rule in England seems to be that if a vessel under a policy at and from sails in an unseaworthy condition for the voyage, the underwriter is discharged, though the policy has attached in or "at" port.[12] In a Massachusetts case, in an action to recover the premium, the ship, under a policy "at and from," sailed in an unseaworthy condition, but returned to port, discharged her cargo, was repaired, and cargo reshipped, when she again sailed, and the policy was held to have attached "at" port, and the insurer's liability to have continued on return to port, and subsequently on her voyage homeward, and that no return of premium could be had; [13] and to substantially the same effect is another case in the same state, under a policy on cargo and freight at and from.[14] The principle underlying the English cases seems, with perhaps the exception of the case from which Lord Tenterden's remarks above noted are taken, that there are really two warranties as to seaworthiness one of which attaches while the ship is in port,

[11] Weir v. Aberdein, 2 Barn. & Ald. 320, 20 R. R. 450, per Lord Tenterden.

[12] Knill v. Hooper, 2 Hurl. & N. 277, 26 L. J. Ex. 377; Wedderburn v. Bell, 1 Camp. 1, 10 R. R. 615; 1 Arnould on Marine Ins. (Perkins' ed. 1850) 675, *672; Id. (Maclachlan's ed. 1887) 665, where it is said: "Of course, if she ultimately sails unseaworthy for the voyage, this, according to the rule already laid down, wholly discharges the underwriters from all liability for loss on the voyage, although the policy may have attached on her while 'at' the port, owing to her having been there seaworthy for her other risk:" *Citing* Parker v. Potts, 3 Dow, 23, 27, 15 R. R. 1, per Parke arguendo in Watson v. Clark, 1 Dow, 344, 14 R. R. 73, 14 Eng. Rul. Cas. 50, see also 2 Arnould on Marine Ins. (8th ed. Hart & Simey) sec. 698, p. 857; sec. 714, p. 875. *Examine* 1 Marshall on Ins. (ed. 1810) 208, reporting Gilbert v. Redshaw.

[13] Taylor v. Lowell, 3 Mass. 331, 3 Am. Dec. 141. See Christie v. Secretan, 8 Term Rep. 192, 198, per Lawrence, J.

[14] Merchants' Ins. Co. v. Clapp, 11 Pick. (28 Mass.) 56. But see Deshon v. Merchants' Ins. Co. 11 Met. (52 Mass.) 199, 208.

and is commensurate to her then risk, and the other a condition of seaworthiness for her voyage, which does not attach till she sails.[15] And it is held in this country that where the vessel is seaworthy for port, the assured also impliedly warrants that she shall be seaworthy when she sails.[16] But Lord Tenterden's opinion and the cases in this country above noted suggest the point whether, in policies at and from, curing defects of seaworthiness not latent is limited to the time between the attachment of the risk "at" port and the sailing of the vessel, or whether defects of the character suggested by Lord Tenterden may be cured before loss, so as to render the insurer liable for loss totally disconnected with the unseaworthiness, or must the vessel under a policy "at and from" be absolutely seaworthy when she sails. The two Massachusetts cases seem to indicate clearly that the risk, having once attached, is merely suspended, and revives on the vessel again becoming seaworthy; and this conclusion would be aided by the construction of the warranty given by the court in another case in that state, where it is said that it would be consistent to hold that after the policy has once attached, the underwriter should be responsible for losses which could not possibly be "occasioned by peril increased or affected by the breach of such implied warranty," but should be exempted from all loss or damage proceeding from the cause warranted against.[17] Mr. Phillips is of the opinion that a temporary unseaworthiness imputable to the assured may be remedied before loss where the policy has attached in port and the vessel sails in an unseaworthy condition, and asserts that the doctrine "is supported by considerations of equity and commercial expediency, and a predominant principle in jurisprudence that unnecessary forfeitures are to be avoided." [18] While the decisions afford no absolutely certain ground for the deduction of such a rule, yet we are inclined to the belief that there is much in the language of the courts, the decisions, and analogous cases to warrant such a conclusion.[19] And even in an English case it is held

[15] Forbes v. Wilson, per Lord Kenyon, reported in 1 Marshall on Ins. (ed. 1810) *155; Park on Ins. 299; Smith v. Surridge, 4 Esp. 25, 6 R. R. 837; Annen v. Woodman, 3 Taunt. 299, 12 R. R. 663, per Lawrence, J.

[16] Hoxie v. Pacific Mut. Ins. Co. 7 Allen (89 Mass.) 211.

[17] Paddock v. Franklin Ins. Co. 11 Pick. (28 Mass.) 227, 234, per Shaw, C. J.

[18] 1 Phillips on Ins. (3d ed.) 406, 407, sec. 734.

[19] See Cruder v. Philadelphia Ins. Co. 2 Wash. (U. S. C. C.) 339, Fed. Cas. No. 3,452, per Washington, J.; McLanahan v. Universal Ins. Co. 1 Pet. (26 U. S.) 170, 184, 7 L. ed. 98, per Story, J.; Treadwell v. Union Ins. Co. 6 Cow. (N. Y.) 270; Garrigues v. Cox, 1 Binn. (Pa.) 592, 2 Am. Dec. 493; Prescott v. Union Ins. Co. 1 Whart. (Pa.) 399, 30 Am. Dec.

that under a policy "at and from" a defect in the vessel's seaworthiness for the voyage, she being seaworthy for port, may be remedied before the vessel sails.[20]

§ 2183. **Vessel becoming unseaworthy after commencement of risk and defect cured before loss.**—If the risk has commenced, the vessel having sailed, being originally seaworthy, but she becomes unseaworthy during the voyage, and the defect is cured before loss, the warranty having been originally complied with, and the insurer's liability having once attached, it will exist at the time of loss, for the risk is in effect merely suspended, and revives when the seaworthiness again exists.[1]

207. See 3 Kent's Commentaries (5th ed.) 289.

[20] Oliverson v. Loughman, 4 M. & S. 346, *cited* in 2 Barn. & Ald. 322.

[1] Deblois v. Ocean Ins. Co. 16 Pick. (33 Mass.) 303, 305, 28 Am. Dec. 245. See §§ 2176, 2177 herein, as to "Repairs and Continuing Warranty."

# TITLE IX.

## CONDITIONS VOIDING THE POLICY.

### CHAPTER LXIII.

### CONDITIONS VOIDING THE POLICY—GENERAL CONDITIONS.


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§ 2240. Same subject: authorities.

**§ 2190. Conditions in policy: generally.**—The parties may insert in the policy such conditions as they choose, and will be bound thereby, provided the conditions are not contrary to law or public policy.[2] An insurer also has a right to designate or prescribe in its contracts the terms and conditions upon which it will accept a proposed risk, and upon which it will be responsible for losses, provided, however, that said terms and conditions are not illegal or contrary to public policy, and the acceptance by assured of such conditions imposes upon the latter the duty of substantial compliance therewith and failure to comply in any material respect in the absence of waiver or estoppel, relieves assurer from liability except to the expressed or implied extent of said contract terms.[3] So it is declared those conditions or clauses inserted in the contract and which induce caution as to the conduct of either party in respect to the subject matter thereof, are not repugnant to public

[2] Wood v. Hartford Fire Ins. Co. 13 Conn. 533, 35 Am. Dec. 92; Beadle v. Chenango Mutual Ins. Co. 3 Hill (N. Y.) 161.

[3] Dover Glass Works Co. v. American Fire Ins. Co. 1 Marv. (Del.) 52, 65 Am. St. Rep. 264, 29 Atl. 1039; Johnson v. Maryland Casualty Co. 73 N. H. 259, 111 Am. St. Rep. 609, 60 Atl. 1009.

policy, because anything that stimulates diligence and good faith between the contracting parties, is highly promotive of the general as well as the individual good.[4] The law of legal relation between insurers and assured is the policy of insurance with its clauses, conditions, and stipulations, by which the mutual rights and liabilities of the parties are to be understood and measured,[5] and the assured cannot urge, in an action to recover for a loss, the fact that the conditions which are embodied in the policy, and upon which the insurers assumed the risk, were not specially pointed out to him.[6] But conditions in the policy should be set forth in clear and unambiguous language.[7] Concerning the effect of a condition, it may be stated that although a policy is conditioned to be void in case of a breach of any of the conditions, it is not absolutely void as a result of such a breach, but only voidable at the option of the insurers.[8]

We shall only treat in this chapter of those conditions which pertain to the contract of insurance during the existence of the risk, and not of those which relate to the attachment of the risk, or to matters subsequent to the loss. Those conditions which go to the life of the policy after the risk has commenced and prior to the loss need, as a general rule, be only substantially performed. A strict and literal compliance by the insured is not necessary.[9] So conditions usually contained in policies of insurance, providing that they shall be suspended, or the insurer relieved wholly or partially from liability, upon the happening of some event, or the doing or omitting to do some act, are not conditions precedent, but matters of defense, which, together with their breach, must be pleaded and proved by the insurer.[10] And when an insurance

[4] Dover Glass Works Co. v. American Fire Ins. Co. 1 Marv. (Del.) 32, 65 Am. St. Rep. 264, 29 Atl. 1039.

[5] West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573.

[6] Reeve v. Phœnix Ins. Co. 23 La. Ann. 219.

[7] Anderson v. Fitzgerald, 4 H. L. Cas. 484, 17 Jur. 995.

[8] Turner v. Meridian Ins. Co. 16 Fed. 454, Fed. Cas. No. 530n, Shearman v. Niagara Fire Ins. Co. 46 N. Y. 526, 7 Am. Rep. 380.

[9] *United States.*—Cady v. Imperial Fire Ins. Co. 4 Cliff. (U. S. C. C.) 203, Fed. Cas. No. 2,283.

*Illinois.*—Insurance Co. of North America v. McDowell, 50 Ill. 120, 99 Am. Dec. 497.

*Indiana.*—Kentucky Mutual Ins. Co. v. Jenks, 5 Ind. 96; Indiana Mutual Fire Ins. Co. v. Conner, 5 Ind. 170.

*Iowa.*—Bankhead v. Des Moines Ins. Co. 70 Iowa, 387, 30 N. W. 740.

*Massachusetts.*—Houghton v. Manufacturing M. F. Co. 8 Met. (49 Mass.) 114, 41 Am. Dec. 489.

*Virginia.*—Home Ins. Co. v. Cohen, 20 Gratt. (Va.) 312.

*England.*—Shaw v. Roberts, 6 Ad. & E. 75, 1 Nev. & P. 279, 6 L. J. K. B. 106. See c. XLVI. herein, as to warranties.

[10] Moody v. Amazon Ins. Co. 52

company attempts to defeat a recovery upon a policy upon a condition for its own benefit, and which deprives the assured, no matter how honest his claim, of the indemnity for which he paid, the company must be held to entire good faith, and the breach of condition must be promptly taken advantage of. Nothing else must be alleged as a reason for nonpayment, and the insured must not be led astray by proposing settlement on grounds other than the alleged breach of condition.[11]

**§ 2191. Alterations and repairs: employing mechanics, etc.: generally.**—If a policy contains no prohibition against any alteration in the insured premises, an alteration which does not increase the risk will not avoid the policy.[12] In the absence of any stipulation or restriction as to alterations or repairs in the insured premises, the insured may make any alteration, change, or repairs which do not increase the risk. The insurer cannot in such cases set up, in defense to an action on the policy, the fact that there has been some trivial or immaterial alteration in the premises. Nor will the fact that the premises insured have undergone a general repairing be any defense on the part of the insurers where such repairs were necessary to render the premises tenantable. The insured in such cases is entitled to the ordinary and customary use of the insured property, and to the exercise of the ordinary acts of ownership over it, the only obligation upon him being that the risk shall not be substantially increased. If the risk has been increased, then the insurer may avoid the policy, though there is no condition to that effect, since the insured, when the policy is issued, impliedly guarantees that the risk shall not be increased.[13] The question applicable in all these cases is whether there has been an increase of risk which could not have been in the contemplation of the insurers when the insurance was effected. If there has been, then the policy is void, but if not, it will continue of full force and effect. This is a question for the jury.[14] If a condition voiding the policy for increase of hazard is immediately followed

Ohio St. 12, 26 L.R.A. 313, 49 Am. St. Rep. 699, 38 N. E. 1011.

[11] Bonnert v. Pennsylvania Ins. Co. 129 Pa. St. 558, 15 Am. St. Rep. 739, 18 Atl. 552.

[12] Stetson v. Massachusetts Fire Ins. Co. 4 Mass. 330, 3 Am. Dec. 217.

[13] See §§ 2207, 2239.

[14] *United States.*—Dorn v. Germania Ins. Co. 5 Ins. L. J. 183, 8 Chic. Leg. News, 156, Fed. Cas. No. 4005.

*Connecticut.*—Wood v. Hartford Fire Ins. Co. 13 Conn. 533, 35 Am. Dec. 92.

*Delaware.*—Lattomus v. Farmers' Mutual Fire Ins. Co. 3 Houst. (Del.) 404.

*Louisiana.*—Meyer v. Queen City Ins. Co. 41 La. Ann. 1,000, 6 So. 899.

*Maryland.*—Washington Fire Ins. Co. v. Davison, 30 Md. 91, 92, 108; Jolly v. Baltimore Ins. Co. 1 Har. & J. (Md.) 295, 18 Am. Dec. 288.

*Massachusetts.*—Curry v. Common-

by a clause prohibiting employment of mechanics in building, altering, or repairing the premises for more than fifteen days at any one time, the latter clause is the material governing one in determining whether alterations operate as a forfeiture, for while the question of increase of hazard may be material, nevertheless if the work is extended without assurer's consent, beyond the time limit permitted, it would have the right to terminate the policy, even though the premises had not been injured or destroyed by fire, for the increase of hazard would not necessarily be a point involved, at least, it is so decided, although in the case so holding and in which a forfeiture was declared because of alterations prolonged beyond said time limitation for repairs, nevertheless, much stress was placed by the court in the opinion upon facts, showing clearly an increase of hazard in that among other things there were in the new building considerable quantities of linseed oil, turpentine dryer and other necessary materials for painters and that they were at work shortly preceding the fire. The repairs consisted of tearing down certain additions, used for storage and a stone basement wall, and erecting new buildings and connecting them with the main one, and the work was done without assurer's required consent in such cases.[15]

And under conditions of the above character the question of forfeiture may, upon the evidence, be a matter of law.[16]

wealth Ins. Co. 10 Pick. (27 Mass.) 535, 20 Am. Dec. 547.

*New Jersey.*—Robinson v. Mercer County Mutual Fire Ins. Co. 3 Dutch. (27 N. J. Law) 134.

*New York.*—Rann v. Home Ins. Co. 59 N. Y. 387.

*Pennsylvania.*—Lebanon County v. Franklin Fire Ins. Co. 237 Pa. 360, 44 L.R.A.(N.S.) 148, 85 Atl. 419, 42 Ins. L. J. 397, 399.

See James v. Lycoming Fire Ins. Co. 4 Cliff. (U. S. C. C.) 272, Fed. Cas. No. 7,182. In an exhaustive opinion in this case Clifford, J., said: "Whether regarded as a condition subsequent or a mere promissory warranty, the condition in question, it is clear, is not one where a literal compliance with its terms is required. Such a construction would be absurd, as it would render the policy void if the insured employed a mechanic to take out a broken slate or replace a broken pane of glass or stop a leak in a gas fixture or in a cistern. . . . Such conditions prohibiting repairs which increase the risk it is held by some courts are operative only when the increased risk is in existence, and that the policy becomes effectual as soon as the increased risk terminates:" Thompson v. Hopper, 6 El. B. & E. 1033, 1038, 27 L. J. Q. B. 441; Stokes v. Cox, 1 Hurl. & N. 533, 543, 26 L. J. Ex. 113; Baxendale v. Harvey, 4 Hurl. & N. *445. As to temporary increase of risk, see §§ 2239, 2240 herein.

[15] Newport Improvement Co. v. Home Ins. Co. 163 N. Y. 237, 57 N. E. 475, 29 Ins. L. J. 899, aff'g 47 N. Y. Supp. 1143, 21 App. Div. 633.

[16] Newport Improvement Co. v. Home Ins. Co. 163 N. Y. 237, 57 N. E. 475, 29 Ins. L. J. 499, aff'g 47 N. Y. Supp. 1143, 21 App. Div. 633; Robb v. Millers' Mutual Fire Ins. Co. 230 Pa. 44, 79 Atl. 150.

So in most policies there are conditions in regard to alterations, and these stipulations may greatly restrict and limit the rights, which the insured would otherwise have, to make alterations or repairs. The exact language of such conditions is important, for it is from them that the rights of the insured are ascertained.[17]

Though the policy provides that the company will not be liable "if the risk be increased by any means within the control of the insured," yet, under a permission to make alterations in the insured property, the insured may make such alterations as he desires, provided the risk is not increased for a longer period of time or to a greater degree than is necessary to make such alterations.[18]

A condition in a policy against any change in the situation and circumstances of property affecting the risk is not intended to prevent the making of necessary repairs, and the use of such means for the purpose as are reasonably necessary. Both parties to a contract for insurance must be presumed to expect that the property will be preserved and kept in better condition by making repairs upon it.[19] And where the policy provided that it should be void if without assurer's assent the situation or circumstances of the risk should, by or with the knowledge, advice, agency or consent of insured be so altered as to cause an increase of such risk, and the mortgagee continued the employment of mechanics in making alterations, etc., in and upon the premises beyond the time limit allowed therefor under a mechanic's permit, the policy was held not forfeited thereby unless the risk was increased and it was also held that whether situation or circumstances were such as to increase the risk was a question for the jury. The court in this case made a distinction between it and a Federal Supreme Court decision wherein the policy was to be avoided if mechanics were employed in the building in making alterations and repairs.[20] A violation of a condition that if mechanics are employed in building, altering, or repairing the premises, without notice to or permission of the insurance company, terminates the contract where it is so stipu-

[17] See Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. 379.

[18] Firemen's Ins. Co. v. Appleton Paper & Pulp Co. 161 Ill. 9, 43 N. E. 713.

[19] First Congregational Church v. Holyoke Mutual Fire Ins. Co. 158 Mass. 475, 35 Am. St. Rep. 508, 19 L.R.A. 587, 33 N. E. 572; Lebanon County v. Franklin Fire Ins. Co. of Phila. 237 Pa. 360, 85 Atl. 419, 43 Ins. L. J. 397, 44 L.R.A.(N.S.) 148n.

[20] Gilman v. Commonwealth Ins. Co. 112 Me. 528, L.R.A.1915C, 758, 92 Atl. 721, 45 Ins. L. J. 340, *distinguishing* Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. 379.

On scope and effect of provision that the working of mechanics shall avoid policy, see note in 44 L.R.A. (N.S.) 148.

lated, unless there is a waiver or estoppel and this is true although in the opinion of the court and the jury the alterations and repairs of the building do not in fact increase the risk.[1] But the making of repairs necessary for the proper care and preservation of the property is not within the operation of a provision in an insurance policy making the working of mechanics in altering or repairing the premises avoid the policy.[2] A distinction also exists between an unqualified provision as to the employment of mechanics making alterations and repairs and a clause voiding the policy if mechanics are employed in building, altering, or repairing the premises for more than fifteen days at any one time unless so agreed, and the latter clause is reasonable and valid and operates as a limitation of time within which repairs may be made without any agreement, but beyond which the risk of forfeiture is assumed, even though the repairs made are only those ordinarily and reasonably necessary to preserve the property.[3] And where different contractors are employed, and so far as time for the particular work of each was taken, no one extended the time limit for repairs fixed in the policy, but the mechanics were engaged to work, although not consecutively, for a number of days beyond said time limit, yet as the work was done in accordance with a certain plan as a whole, and as a continuous piece of work from its commencement to its completion, it was held that the policy was forfeited by being carried on without assurer's consent, over the permitted time as above stated.[4] So rubbing and polish-

[1] Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. 379.

*Cited* in: *United States.*—Gross v. New York T. & Steamship Co. 107 Fed. 516, 521; Union Central Life Ins. Co. v. Berlin, 101 Fed. 673, 677, 41 C. C. A. 592, 597; Petit v. German Ins. Co. 98 Fed. 800, 803; Georgia Home Ins. Co. v. Rosenfield, 95 Fed. 358, 360, 37 C. C. A. 96, 99; Fischer v. London & Lancashire Fire Ins. Co. 83 Fed. 807, 809; Lozano v. Palatine Ins. Co. 78 Fed. 278, 280, 24 C. C. A. 85, 87, 41 U. S. App. 694; Jackson v. Fidelity & Casualty Co. 75 Fed. 359, 366, 21 C. C. A. 394, 400, 41 U. S. App. 552; Western Assurance Co. v. Redding, 68 Fed. 708, 714, 15 C. C. A. 619, 625, 30 U. S. App. 442.

*District of Columbia.*—Hamburg-Bremen Fire Ins. Co. v. Lewis, 4 App. D. C. 66, 86.

*Massachusetts.*—Hill v. Middlesex Mutual Assurance Co. 174 Mass. 542, 545, 55 N. E. 319.

*Ohio.*—Ohio Farmers' Ins. Co. v. Burget, 65 Ohio St. 119, 126, 55 L.R.A. 825, 827, 87 Am. St. Rep. 596, 61 N. E. 712.

*Virginia.*—Virginia Fire & Marine Ins. Co. v. Morgan, 90 Va. 290, 293, 18 S. E. 191.

[2] Lebanon County v. Franklin Fire Ins. Co. 237 Pa. 360, 44 L.R.A. (N.S.) 148n, 85 Atl. 419, 43 Ins. L. J. 397.

[3] German Ins. Co. v. Hearne, 117 Fed. 289, 54 C. C. A. 527, 59 L.R.A. 492, 32 Ins. L. J. 462, certiorari denied, 188 U. S. 742, 47 L. ed. 678, 23 Sup. Ct. 849.

[4] Robb v. Millers' Mutual Fire Ins.

ing woodwork, repairing walls and ceilings, repairing and reburnishing plumbing and gas fittings, and repairing the gutters and spouts, are within the provisions of a fire policy, making it void in case mechanics are engaged in repairing the building for more than fifteen days at any one time.[5] But it is decided that painters are not mechanics within the intent of such clauses.[6] If the policy is not intended to become of force and effect before alterations and repairs are completed, their prolongation beyond the time limit therefor does not avoid the policy.[7]

Where a policy was issued upon a "mill building and additions, including flumes . . . and automatic sprinkler equipment complete," and permission was given to "make alterations, additions, and repairs to building and machinery," it was held that the insured might remove the sprinkler equipment for the purpose of putting in a more complete one, and that such removal would not avoid the policy.[8] So where due diligence is by the policy required to be used to maintain the sprinkler system, then in use, in complete working order at all times, and by accident, notwithstanding more than ordinary care amounting substantially to due diligence is taken, repairs became necessary and while making the same and before their completion, a loss occurs, there is no such increase of risk or change made in the system as avoids the policy, even though it requires consent of assurer in writing if a change in said system be made.[9] Placing and operating an engine fifty feet away from an insured building is not an alteration of the insured premises, nor is it a use for carrying on trade or business which increases the risk unless expressly so declared by the contract.[10] It is decided that even though assurer's agent had knowledge, obtained during negotiations for the policy, that alterations were to be made in the building and said agent told assured that it would be all right, still there was no waiver of a condition limiting the time for making repairs, where written indorsement of a change of the terms of the policy was required to be made thereon

Co. 230 Pa. 44, 79 Atl. 150, 40 Ins. L. J. 951.

[5] German Ins. Co. v. Hearne, 117 Fed. 289, 54 C. C. A. 527, 59 L.R.A. 492.

[6] Smith v. German Ins. Co. 107 Mich. 270, 2 Det. Leg. News, 667, 30 L.R.A. 368, 65 N. W. 236.

[7] Massell v. Protective Mutual Fire Ins. Co. 19 R. I. 565, 35 Atl. 209.

[8] Firemen's Ins. Co. v. Appleton Paper & Pulp Co. 161 Ill. 9, 43 N. E. 713.

On change in use or condition of mill or factory as avoiding policy, see note in 45 L.R.A.(N.S.) 123.

[9] Cummer Lumber Co. v. Associated Manufacturers' Mutual Fire Ins. Corp. 73 N. Y. Supp. 668, 67 App. Div. 151, 31 Ins. L. J. 87, aff'd (mem.) 173 N. Y. 633, 66 N. E. 1106.

[10] Schaeffer v. Farmers' Mutual Fire Ins. Co. 80 Md. 563, 45 Am. St. Rep. 361, 31 Atl. 317.

by certain officers, and the same condition was in assurer's by-laws.[11]

§ 2192. **Permission to make alterations or repairs.**—Permission in an insurance policy to make necessary alterations or repairs will not be considered as giving permission to make such changes as will materially increase the risk. So where the policy authorized the insured to make "necessary alteration and repairs," it was held that this did not authorize him to construct an addition to the building twelve feet in width, and two hundred feet in length.[12] If "the insured has permission to make alterations and repairs incidental to the business," he cannot make such repairs or alterations as will materially increase the liability of the property to destruction by fire.[13] And where a policy of insurance gave permission to the insured "to make additions, alterations, and repairs," it was held that a new warehouse erected forty feet away from the main building was neither an addition, an alteration, or repairs, although connected with the main building by a bridge and an underground passage used for pipes.[14] But continuing work after the expiration of a building permit does not avoid an insurance policy which provides that it shall become invalid if, without the consent of the company, the situation or circumstances affecting the risk shall by, or with, the knowledge, advice, agency, or consent of the insured be so altered as to cause an increase of such risk, unless such continuance increases the risk.[15] But the fact that alterations were completed before the loss occurs, will not preclude insurer, when it has not consented thereto, from avoiding the policy where the alterations are not ordinary repairs, but are of such a nature as may of themselves materially increase the risk, such as changing tenements into flats.[16]

§ 2193. **Whether loss was occasioned by the alterations cannot be inquired into: materiality of alteration.**—If, in the absence of any stipulation as to alteration or increase of risk, it be shown that the risk has been materially increased by any alteration, the

[11] Robb v. Miller's Mutual Fire Ins. Co. 230 Pa. 44, 79 Atl. 150, 40 Ins. L. J. 95.

[12] Frost's Detroit Lumber Works v. Miller's Mutual Ins. Co. 37 Minn. 300, 5 Am. St. Rep. 846, 34 N. W. 35.

[13] Crane v. City Ins. Co. 3 Fed. 558.

[14] Peoria Sugar Refinery Co. v. People's Fire Ins. Co. 24 Fed. 773.

[15] Gilman v. Commonwealth Ins. Co. 112 Me. 528, 55 L.R.A.(N.S.) 758, 92 Atl. 721.

[16] Hill v. Middlesex Mutual Fire Assoc. Co. 174 Mass. 542, 55 N. E. 319, 29 Ins. L. J. 185. See §§ 2239, 2240 herein.

On effect of temporary condition which ceased before loss under general provision against increase of risk or specific provision against certain conditions, see notes in 10 L.R.A. (N.S.) 736; 28 L.R.A.(N.S.) 593; 32 L.R.A.(N.S.) 240; and 48 L.R.A. (N.S.) 1221.

fact as to whether the loss was caused thereby cannot be inquired into. The insured cannot show it in an action to recover for a loss, and the insurer is not obliged to show that the alteration caused the loss. And this same rule prevails under a condition forbidding any alterations or repairs which increase the risk. So where, in an action upon a policy of insurance issued by a company incorporated under an act which provides that if any alteration shall be made in any building by the proprietor thereof, after insurance has been made thereon by the company, whereby it may be exposed to greater risk from fire, the insurance shall be void, unless an additional premium and deposit after such alteration be settled and paid to the company, but no alterations or repairs not increasing the risk shall affect the insurance, it is held that an instruction was correct, that in case of a material alteration, it was not necessary, in order to avoid the policy, for the company to show that the loss had been occasioned by the alteration.[17]

**§ 2194. Materiality of alteration.**—If the policy specifies certain alterations as prohibited, any such alterations, if made by the insured, will avoid the policy, and the question will not then arise as to whether such alterations are material to the risk. If, however, such alterations as increase the risk are prohibited, then the question arises as to whether the alterations made do in fact increase the risk. In determining this question, the factor whether the rate of premium charged for the insurance is that which would have been charged in the altered condition of the building is important, and it has been held that if the building as altered would not have called for a higher rate of premium than before such alteration, then there has been no increase of the risk.[18] In a case involving this point it was held that an instruction to the jury that the alteration must have been such that a higher rate of premium would have been demanded to insure the building in its altered state than before, otherwise the alteration was not material, was correct.[19] The fact, however, that the insurers would have charged a higher premium is not of itself conclusive as to whether the risk has been increased. It is a question for the jury to decide, under all the facts of the case, whether the risk has actually been increased, and the fact that the insurer regarded it as a greater risk is not conclusive upon the jury.[20]

[17] Merriam v. Middlesex Mutual Fire Ins. Co. 21 Pick. (38 Mass.) 162, 32 Am. Dec. 252. See Newport Improvement Co. v. Home Ins. Co. 163 N. Y. 237, 57 N. E. 475, 29 Ins. L. J. 899, aff'g 47 N. Y. Supp. 1143, 21 App. Div. 633, *considered* under § 2191 herein.

[18] Schenck v. Mercer County Mutual Fire Ins. Co. 24 N. J. L. (4 Zab.) 447.

[19] Merriam v. Middlesex Mutual Fire Ins. Co. 21 Pick. (38 Mass.) 162, 32 Am. Dec. 252.

[20] Williams v. People's Fire Ins. Co. 57 N. Y. 274; Loyal Mutual Fire

**§ 2195. Alteration by act of proprietors.**—The alteration of insured premises by "act of proprietors" so as to avoid the insurance, within the terms of the charter of the insurance company, is an alteration by the owner himself, or authorized by him or adopted as his before a loss accrues, and not an alteration by the tenant without authority, and whether he has authorized and adopted the act is a question for the jury.[1]

**§ 2196. Alteration conditioned to be at risk of insured.**—Under an insurance policy providing that alterations or repairs made in and about the insured premises must be at the risk of the party insured, such repairs or alterations do not per se avoid the contract, but only place upon the insured party the hazard of their increasing the liability of the insured.[2]

**§ 2197. Repairs upon the insured premises: builder's risk.**—We have already stated that such ordinary repairs as are necessary to render the premises tenantable and to keep the property insured in such condition as is necessary for the proper enjoyment and use thereby will not avoid the policy. The insured is entitled to make ordinary and necessary repairs about the premises.[3] Thus, after a policy of insurance was taken out on a mill, the boiler being cracked and in a dangerous condition, it became necessary to put in another with some additions, and these repairs did not increase the risk, and extended no farther than was reasonably necessary, and were completed several months before the destruction of the mill. It was held in an action on the policy that the above facts did not render it void under the condition termed the "builders' risk."[4] In another case the application stated that there was a force pump, "designed expressly for protection against fire, at all times in good condition for use." The insured, for the purpose of putting in a new bulkhead, the old one being badly decayed, interrupted the supply of water for several days, thus disabling the pump, and it was held that these acts did not avoid the policy if

Ins. Co. v. J. S. Brown & Bro. Mercantile Co. 47 Colo. 467, 107 Pac. 1098, 39 Ins. L. J. 870, 875; Lebanon County v. Franklin Fire Ins. Co. of Phila. 237 Pa. 360, 44 L.R.A. (N.S.) 148, 44 Ins. L. J. 148n, 85 Atl. 419, 43 Ins. L. J. 397, 399.

[1] Padleford v. Providence Mutual Fire & Life Ins. Co. 3 R. I. 102, 67 Am. Dec. 496.

[2] Girard Fire & Marine Ins. Co. v. Stephenson, 37 Pa. St. 293, 73 Am. Dec. 423.

[3] Dorn v. Germania Ins. Co. 8 Chic. Leg. News, 156, Fed. Cas. No. 4,005; 5 Ins. L. J. 183; Lyman v. State Ins. Co. 14 Allen (96 Mass.) 329; Grant v. Howard Ins. Co. 5 Hill (N. Y.) 10. This is as stated in a prior section held not to excuse exceeding the time limit allowed in the policy condition for making repairs, see § 2191 herein.

[4] James v. Lycoming Ins. Co. 4 Cliff. (U. S. C. C.) 272; Fed. Cas. No. 7,182.

the repairs were made without unnecessary delay;[5] and though in making the repairs prohibited articles are taken upon the premises, this will not avoid the policy where such articles are necessary and incidental to making the repairs.[6] Although the insured may make necessary and ordinary repairs about the insured premises, yet if the repairs are of an extensive nature, and amount to a material alteration, and such as increase the risk, the insured cannot recover on the policy for a loss occurring subsequent to the alteration.[7] Again, a policy of insurance against fire on an icehouse contains a condition entitled "builder's risk," and that "the working of carpenters, roofers, etc., in building, altering, or repairing the premises named in the policy, without permission indorsed in writing on the policy, should vitiate it." The assured, in an action on the policy, testified that the "icehouse was nearly as good as new, for the reason that he always kept a crew of men and a carpenter or two about the building the year round, and was constantly making repairs and keeping the building in thorough condition." It was held that, under the facts, the policy was not vitiated.[8]

§ 2197a. **Unauthorized additions to building: proximity to other houses.**—An increase of risk, by the unauthorized addition to the building in which a business is conducted, is not shown by evidence that the addition brought the building a few feet nearer certain houses, if it is not shown how far distant these houses were, and that their proximity increased the danger of fire.[9]

§ 2198. **Specially prohibited articles under policy on stock of goods, etc.: generally.**—The policy generally prohibits the keeping or use of certain articles upon the insured premises. Stipulations of this character must be construed in reference to the subject matter of the policy, having in view the general rule that if the written and printed parts of a policy are inconsistent, that which is written will prevail over the printed. There are many instances in which a policy of insurance is issued upon a stock of goods, or upon materials used in a manufacturing establishment as a part of the stock usually and ordinarily required in such business, or it may happen that in the process of manufacture certain articles

[5] Townsend v. Northwestern Ins. Co. 18 N. Y. 168.

[6] Au Sable Lumber Co. v. Detroit Mfg. Mutual Fire Ins. Co. 89 Mich. 407, 50 N. W. 870, 21 Ins. L. J. 311.

[7] Howell v. Baltimore Equitable Soc. 16 Md. 377; Allen v. Massasoit Ins. Co. 99 Mass. 160; Kern v. South St. Louis Ins. Co. 40 Mo. 19; Mack v. Rochester German Ins. Co. 106 N. Y. 560, 13 N. E. 343.

[8] Franklin Fire Ins. Co. v. Chicago Ice Co. 36 Md. 102, 11 Am. Rep. 469.

[9] Mitchell v. Mississippi Home Ins. Co. 72 Miss. 53, 48 Am. St. Rep. 535, 18 So. 86.

are kept or used which are prohibited in the printed stipulations of the policy. In such cases, to hold otherwise than that the written should prevail over the printed matter, would be to defeat the purposes of the policy and the clear intent of the parties when making the contract; nor should the printed matter be extended by implication to defeat the written description;[10] and therefore the policy will not be avoided by keeping on the premises articles prohibited by the printed portion of the policy if they were part of the general stock of merchandise which the written part of the policy permitted to be kept thereon.[11] So an "agreement indorsed," permitting otherwise prohibited articles to be kept on insured premises, is made where the articles are included in the written description of the property insured.[12] And not only do the above stated rules of construction apply, but a use of prohibited articles which is a necessary incident to the business or to the carrying on of the occupation in which the insured is engaged, must be deemed to have been contemplated by the parties, and to have been impliedly permitted by the assurer, as where farm buildings are insured it will be assumed that they will continue to be used for purposes for which they were intended in the ordinary course of that occupation or business.[13]

[10] Phœnix Ins. Co. v. Flemming, 65 Ark. 54, 39 L.R.A. 789, 44 S. W. 464, 27 Ins. L. J. 584; O'Neill v. Caledonian Ins. Co. 166 Cal. 310, 135 Pac. 1121 (*considered* under § 2202 herein); McClure v. Mutual Fire Ins. Co. 242 Pa. 59, 48 L.R.A.(N.S.) 1221, 88 Atl. 921 (*considered* under § 2202 herein). But *compare* Norfolk Fire Ins. Co. v. Tulley, 112 Va. 413, 71 S. E. 534.

[11] McClure v. Mutual Fire Ins. Co. 242 Pa. 59, 48 L.R.A.(N.S.) 1221, 88 Atl. 921.

[12] Yoch v. Home Mutual Ins. Co. 111 Cal. 503, 34 L.R.A. 857, 44 Pac. 189.

[13] Bouchard v. Dirigo Mutual Fire Ins. Co. 113 Me. 17, L.R.A.1915D, 187, 92 Atl. 476, 92 Atl. 899, 45 Ins. L. J. 476. *Citing* and *considering:*

*Maryland.*—Carlin v. Western Assurance Co. 57 Md. 515, 40 Am. Rep. 440.

*Massachusetts.*—First Congregational Church v. Holyoke Mutual Fire Ins. Co. 158 Mass. 475, 9 L.R.A. 587, 35 Am. St. Rep. 508, 33 N. E. 572.

*Missouri.*—Archer v. Merchants & Manufacturers Ins. Co. 43 Mo. 434.

*New Jersey.*—Garrabrant v. Continental Ins. Co. 75 N. J. Law, 577, 12 L.R.A.(N.S.) 443, 67 Atl. 90.

*New York.*—Harper v. City Ins. Co. 22 N. Y. 441, aff'g 14 N. Y. Super. Ct. 520.

*Pennsylvania.*—Lebanon Co. v. Franklin Fire Ins. Co. 237 Pa. 360, 44 L.R.A.(N.S.) 148, 85 Atl. 419, Ann. Cas. 1914B, 130; Plate Co. (Silver Plate Co.) v. National Fire Ins. Co. 170 Pa. 151, 32 Atl. 613.

*Wisconsin.*—Davis v. Pioneer Furniture Co. 102 Wis. 394, 78 N. W. 956; Faust v. American Fire Ins. Co. 91 Wis. 158, 30 L.R.A. 783, 51 Am. St. Rep. 876, 64 N. W. 833.

*England.*—Dobson v. Sotheby, 1 Moody & M. 90, 30 Rev. Rep. 718. Also note 13 Ann. Cas. 540.

On effect of provision in fire insurance policy prohibiting presence of designated articles on premises, see note in 3 B. R. C. 7.

So the use of inflammable substances which constitute component parts of a stock of materials used in, and which is a necessary, usual, and customary incident to a business, must have been in the contemplation of the parties at the time of taking a policy of insurance upon said stock of materials and are covered by said policy, and it is not avoided, notwithstanding express language to that effect in printed clauses, by keeping such substances in such quantities only and using them in such manner only as must have been contemplated.[14] So the words "kept or used" in the clause as to especially prohibited articles, are not confined in their meaning to a temporary possession or possession for a temporary purpose, nor are they applicable to one occasion alone, nor to an exceptional use in some emergency, but they imply that which is, customary or habitual, a continuance or duration; there must be some degree of permanency.[15] But where it is stipulated that the

On construction and effect of provisions against keeping prohibited articles, see note in L.R.A.1917C 278.

On use of engine on farm premises as violation of general provisions against increase of risk or specific provisions relating to engines, see note in L.R.A.1915D, 187.

On the effect of temporary keeping of prohibited articles on premises which ceased before loss under provision against keeping such articles, see notes in 10 L.R.A.(N.S.) 741; 28 L.R.A.(N.S.) 593, 32 L.R.A.(N.S.) 240; and 48 L.R.A.(N.S.) 1221.

[14] Maril v. Connecticut Fire Ins. Co. 95 Ga. 604, 30 L.R.A. 835, 23 S. E. 463. See the following cases: Plinsky v. Germania Fire & Marine Ins. Co. 32 Fed. 47; Tubb v. Liverpool & London & Globe Ins. Co. 106 Ala. 651, 17 So. 615.

[15] Bouchard v. Dirigo Mutual Fire Ins. Co. 113 Me. 17, L.R.A.1915D 187, 92 Atl. 899, 45 Ins. L. J. 476. *Citing* and *considering:*

*Georgia.*—Adair v. Southern Mutual Ins. Co. 107 Ga. 297, 45 L.R.A. 204, 73 Am. St. Rep. 122, 33 S. E. 78.

*Illinois.*—Szymkus v. Eureka Fire & Marine Ins. Co. 114 Ill. App. 401.

*Massachusetts.*—First Congregational Church v. Holyoke Mutual Fire Ins. Co. 158 Mass. 475, 19 L.R.A. 587, 35 Am. St. Rep. 508, 33 N. E. 572.

*Michigan.*—Smith v. German Ins. Co. 107 Mich. 270, 30 L.R.A. 368, 65 N. W. 236.

*New York.*—Hynds v. Schenectady County Ins. Co. 16 Barb. 119, aff'd 11 N. Y. 554.

*Pennsylvania.*—Lebanon County v. Franklin Fire Ins. Co. 237 Pa. 360, 44 L.R.A.(N.S.) 148, 85 Atl. 419, Ann. Cas. 1914B, 130; Mears v. Humboldt Ins. Co. 92 Pa. 15, 37 Am. Rep. 647; Farmers' & Mechanics' Ins. Co. v. Simmons, 30 Pa. 299.

*Texas.*—Springfield Fire & Marine Ins. Co. v. Wade, 95 Tex. 598, 58 L.R.A. 714, 93 Am. St. Rep. 870, 68 S. W. 977.

*Wisconsin.*—Clute v. Clintonville Mutual Fire Ins. Co. 144 Wis. 638, 32 L.R.A.(N.S.) 240, 129 N. W. 661.

*England.*—Thompson v. Equity Fire Ins. Co. (1910) L. R. App. Cas. 592 ("keep or store," "stored or kept"); note 13 Ann. Cas. 542; Webster's New Int. Dict.; Standard Dict. See also Lebanon County v. Franklin Fire Ins. Co. of Phila. 237 Pa. 360, 44 L.R.A.(N.S.) 148n, 85

policy shall be avoided by use of an article expressly specified and there is nothing in the contract from which a permission to use such article in a partial, limited, or temporary way can be inferred full effect will be usually given to such prohibitive clause by declaring a forfeiture for its violation.[16] And it is decided that where the keeping of certain articles is prohibited the provision only applies where the specified articles are not the subject of insurance.[17] And if the policy prohibits keeping, storing, or using certain articles, specifying each by name, in excess of a named quantity, none of the articles mentioned are thereby entirely excluded but the restriction as to each article is only upon quantities greater than that so stated.[18]

If the insurer issues a policy upon a stock of goods such as is "usually kept," or a similar phrase is used, the insured should, as a general rule, subject to such qualifications as are hereafter noted, be allowed to recover where he can show that such articles were usually kept in that business. Substantially the same rule should also prevail, in the case of an insurance upon materials, or a building used for the purposes of manufacture, as to articles usual and necessary to carry on the business. To declare a forfeiture in such cases, based upon the printed description as opposed to the written description, would be to give the insurer the benefit of terms of his own choosing, which will perhaps operate to deceive the insured into the belief that his property is protected. And it is a cardinal rule that courts will construe conditions strictly against the insurer so as to prevent a forfeiture. The wording of the policy should, therefore, be carefully considered in all cases. These principles are clearly sustained by the cases noted under the following sections.[19]

Again, a stipulation voiding the policy if specified prohibited articles are kept or used, any custom or usage of manufacture or trade to the contrary notwithstanding, such clause limits the custom or usage to one appertaining to trade or manufacture and a domestic custom is excluded.[20]

Atl. 143, 43 Ins. L. J. 397. See § 2202 herein.

[16] Wheeler v. Traders' Ins. Co. 62 N. H. 450, 13 Am. St. Rep. 582.

[17] Mascott v. Granite State Fire Ins. Co. 68 Vt. 253, 35 Atl. 75.

[18] Phœnix Ins. Co. v. Slaughter, 12 Wall. (79 U. S.) 404, 20 L. ed. 444.

[19] *Minnesota.*—Russell v. Manufacturers & Builders Fire Ins. Co. 50 Minn. 409, 52 N. W. 906.

*Missouri.*—Renshaw v. Missouri State Mutual Fire & Marine Ins. Co. 103 Mo. 595, 23 Am. St. Rep. 904, 15 S. W. 945; Barnard v. National Fire Ins. Co. 27 Mo. App. 26.

*Pennsylvania.*—Fraim v. Manchester Fire Assur. Co. 170 Pa. 166, 32 Atl. 616; Fraim v. National Fire Ins. Co. 170 Pa. 151, 50 Am. St. Rep. 753, 32 Atl. 613.

[20] American Central Ins. Co. v. Green, 16 Tex. Civ. App. 531, 41 S.

**§ 2199. "Stock in trade:" "goods usually kept."**—The insurer is presumed to contract with reference to the business known to be conducted upon the premises, and if in the ordinary use of the premises, building, or goods upon which the insurance is effected certain articles are used which are prohibited in the printed portion of the policy, this will not avoid the policy.[1] So an insurance on a dry goods store which prohibits "the use of the premises for carrying on or exercising any business which is hazardous or extra hazardous, or for the purpose of keeping or storing goods of that character," is not void because bales of cotton are kept in such store as a part of the dry goods stock in trade, although such articles are designated in the policy as hazardous.[2] And where the policy describes the stock to be "such as is usually kept in a country store," but in the printed condition many of the articles which are usually kept in such a store are prohibited as hazardous, the written description of the property will overcome the printed conditions therein.[3] If the clause "usually kept in a country store," or one of similar import, is followed by the words "except as hereinafter provided," and in the subsequent printed part of the policy certain articles are prohibited, the policy will be avoided by the keeping of any such articles.[4] If the clause "usually kept," etc., is followed by a clause permitting the keeping of a specified quantity or amount of the prohibited articles, the insured will not be permitted to show that a greater amount is usually kept in such stores.[5] So an insurance on a stock of merchandise consisting of drugs and chemicals and such other goods, not more hazardous,

W. 74. See also Heron v. Phœnix Mutual Fire Ins. Co. 180 Pa. 257, 36 L.R.A. 517, 57 Am. St. Rep. 638, 36 Atl. 740. But *compare* Norfolk Fire Ins. Co. v. Talley, 112 Va. 413, 71 S. E. 534.

[1] Grant v. Lexington Fire Ins. Co. 5 Ind. 23, 61 Am. Dec. 74.

[2] Moore v. Protection Ins. Co. 29 Me. 97, 48 Am. Dec. 514.

[3] *Arkansas.*—Phœnix Ins. Co. v. Fleming, 65 Ark. 54, 39 L.R.A. 789, 44 S. W. 464, 27 Ins. L. J. 584.

*Massachusetts.* — Whitmarsh v. Conway Fire Ins. Co. 16 Gray (82 Mass.) 359, 77 Am. Dec. 414.

*Minnesota.*—Phœnix Ins. Co. v. Taylor, 5 Minn. 492.

*New York.*—Pindar v. Kings County Mutual Ins. Co. 36 N. Y. 648, 93 Am. Dec. 544.

*Pennsylvania.*—Franklin Fire Ins. Co. v. Updegraff, 43 Pa. St. 350.

*Vermont.*—Carrigan v. Lycoming Fire Ins. Co. 53 Vt. 418, 38 Am. Rep. 687.

See contra, Western Assur. Co. v. Rector, 85 Ky. 294, 3 S. W. 415; Beers v. Forest City Mutual Fire Ins. Co. 39 Ohio St. 109. *Examine* Birmingham Fire Ins. Co. v. Kroeger, 83 Pa. St. 64, 24 Am. Rep. 147.

[4] Lancaster Fire Ins. Co. v. Lenheim, 89 Pa. St. 497, 33 Am. Rep. 778. Pleadings when demurrable, when not; gasolene; merchandise usually kept in similar stocks, see Cassimus v. Scottish Union & National Ins. Co. 135 Ala. 256, 33 So. 163.

[5] Pittsburgh Ins. Co. v. Frazier, 107 Pa. St. 521.

such as is usually kept for sale in a drug store covers benzine.[6] And if a policy provides that it shall be void if dynamite is kept, used, or allowed on the premises, unless otherwise provided by agreement indorsed on the policy or added thereto, and a slip is attached to the policy providing that the insurance shall cover certain articles and such other merchandise as is usually kept for sale in a retail hardware store, the policy is not avoided by reason of keeping dynamite on the premises, if it can be proved to be an article of merchandise usually kept for sale in a retail hardware store.[7] So where the insurance is upon the "stock in trade" of a furniture dealer, paints, varnishes, and oils used in the course of the business are covered.[8] Where, however, the policy is upon "stock in trade, consisting of not hazardous merchandise," and the policy classifies the hazards as not hazardous, hazardous, extra hazardous, and specially hazardous, if goods are kept which are within the classes specified as being of greater risk, the policy is avoided.[9] A policy of insurance upon the materials used in a business, or the process of manufacture, will permit the use of all such materials as are ordinarily used in that business, though the printed part of the policy may prohibit keeping some of those materials.[10] If, however, the policy covers finished articles which are not in the process of manufacture, articles used in the manufacture of the finished product cannot be kept. So where a policy was issued upon a stock of "cabinet wares," it was held that the keeping of paint and varnish, which was used in the manufacture of the cabinet wares, being prohibited in the printed conditions, the policy was avoided.[11]

**§ 2200. Storing of prohibited articles.**—Another of the ordinary conditions of an insurance policy is that prohibiting the storing of certain hazardous articles; this provision has been construed as covering only those cases where the storing and safe-keeping of the prohibited articles is the sole object of the deposit, or to the storing in a mercantile sense; that is, a keeping for safe custody. It does not refer to a keeping as incidental to the

[6] Phœnix Ins. Co. v. Fleming, 65 Ark. 54, 39 L.R.A. 789, 44 S. W. 464, 27 Ins. L. J. 584.

[7] Phœnix Ins. Co. v. Walters, 24 Ind. App. 87, 79 Am. St. Rep. 257, 26 N. E. 257. *Examine* Sperry v. Springfield Fire & Marine Ins. Co. 26 Fed. 234 (policy avoided).

[8] Haley v. Dorchester Fire Ins. Co. 12 Gray (78 Mass.) 545, 546.

[9] Richards v. Protection Ins. Co. 36 Me. 273.

[10] Hall v. Insurance Co. of North America, 58 N. Y. 292, 17 Am. Rep. 255; Citizens' Ins. Co. v. McLaughlin, 53 Pa. St. 485, 6 Am. L. Reg. N. S. 374. See Bryant v. Poughkeepsie Mutual Ins. Co. 21 Barb. (N. Y.) 154, s. c. 17 N. Y. 200.

[11] Appleby v. Astor Ins. Co. 54 N. Y. 253.

use.[12] But whatever may be the exact meaning of the words "stored or kept" under a statutory provision relieving insured from liability for loss or damage occurring while gasolene is stored or kept in the insured building such provision does not preclude recovery where the only gasolene used in the building was that used in a small quantity in a cooking stove although it appeared that it caused the fire.[13] Although it is held that said words "stored or kept" as used in the statute, must be separately interpreted and that the policy might be avoided by a keeping which was not continuous nor habitual but only one which was temporary for a special purpose.[14] The keeping of hazardous articles for the purpose of retail is not a storing within the meaning of the condition.[15] In such cases, though the goods are kept, the purpose of the keeping is not the storing of them, but that of sale; the keeping being in all such instances incidental to the use.[16] Thus, the keeping by a grocer of oils and liquors for this purpose will not avoid the policy under such a condition.[17] Nor will the keeping of spirituous liquors in a house for the purpose of retailing them to the boarders avoid the insurance.[18] If an insurance is upon a building in the process of erection, articles necessary to be used in the construction thereof may be kept, though the policy prohibits storing of such articles. Such keeping for use is not a storing within the meaning of the condition.[19] Nor is the temporary keeping of tar for the purpose of repairing the building a storing.[20] But a policy on a three-story building described therein, covers a one-story addition to such building adjoining to, connected therewith, and for a long time previously thereto used and occupied in connection therewith, so as to avoid the policy for the unauthorized storing of explosives in such addition.[1] So a violation of a provision, prohibiting the

[12] Williams v. Fireman's Fund Ins. Co. 54 N. Y. 569, 13 Am. Rep. 620; New York Equitable Ins. Co. v. Langdon, 6 Wend. (N. Y.) 623. See § 2198 herein.

[13] Thompson v. Equity Fire Ins. Co. [1910] App. Cas. L. R. 592. See § 2198 herein.

[14] Equity Fire Ins. Co. v. Thompson (Ont.) 29 Canadian L. T. 617, rev'g 17 Ont. L. R. 214. See § 2198 herein.

[15] Renshaw v. Missouri State Mutual Fire & Marine Ins. Co. (103 Mo. 595, 23 Am. St. Rep. 904, 43 Alb. L. J. 400, 20 Ins. L. J. 385, 15 S. W. 945. But see contra, Whitmarsh v. Charter Oak Fire Ins. Co. 2 Allen (84 Mass.) 581; Macomber v. Howard Fire Ins. Co. 7 Gray (73 Mass.) 257.

[16] Moore v. Protection Ins. Co. 29 Me. 97, 48 Am. Dec. 514; Phœnix Ins. Co. v. Taylor, 5 Minn. 492.

[17] New York Equitable Ins. Co. v. Langdon, 6 Wend. (N. Y.) 623; Buchanan v. Exchange Ins. Co. 61 N. Y. 26.

[18] Rafferty v. New Brunswick Ins. Co. 18 N. J. L. 480, 38 Am. Dec. 525.

[19] O'Neil v. Buffalo Fire Ins. Co. 3 Comst. (N. Y.) 122.

[20] Dobson v. Sotheby, Moody & M. 90, 31 R. R. 718.

[1] Boyer v. Grand Rapids Fire Ins.

storing of seed cotton or loose lint cotton in the insured building renders the policy void, although the cotton was stored in the building, without the knowledge of the insured, by one to whom he had leased the premises, and who was in control of them.[2]

**§ 2201. Keeping of prohibited articles: hazardous and extra hazardous.**—The insurer may prohibit the keeping of certain articles by express terms in the policy. Such articles are generally specified in the printed portion of the policy. When there is nothing in the written portion inconsistent with the printed part, as a general rule no recovery can be had for a loss occurring while such articles are kept. These articles, and also the prohibited uses of the premises, may be classified with reference to their bearing upon the risk, for some articles kept or trades pursued upon the premises may be of a more hazardous nature than others. The terms "not hazardous," "hazardous," "extrahazardous," and "specially hazardous" are used by the different insurers to classify the different risks. Each of these terms has a separate and distinct technical meaning which is well understood among insurers.[3] The condition prohibiting hazardous articles has been held to refer to those articles which create a greater risk of fire, and not to those which are more liable to injury in case of fire.[4] A policy upon goods "hazardous" and "not hazardous," will not cover merchandise included in the terms "extra hazardous" and "specially hazardous." [5] The conditions of keeping and the enumeration of articles mentioned as hazardous in a policy of insurance form part of it, and, if prohibited by it, it is not necessary for the insurer to show that the keeping thereof caused the loss or increased the risk.[6] A clause prohibiting the keeping of certain articles cannot be extended to include buildings not covered by the policy.[7] If the policy prohibits the keeping of certain articles which are denomi-

Co. 124 Mich. 455, 83 Am. St. Rep. 338, 83 N. W. 124.

[2] Edwards v. Farmers' Mutual Ins. Assoc. 128 Ga. 353, 12 L.R.A. (N.S.) 484, 57 S. E. 707.

[3] Pindar v. Continental Ins. Co. 38 N. Y. 364, 97 Am. Dec. 795. In this case Woodruff, J., said: "With these specifications of risks, 'not hazardous,' 'hazardous,' 'extra hazardous,' and 'specially hazardous,' the parties agree to an insurance. The policy declares what was insured in explicit terms as 'goods hazardous' and 'not hazardous' and excludes all others. It follows that the condition by which the policy was declared void if any goods 'extra hazardous' are kept, the contract is specific—the defendant had a right to make it, and the keeping of turpentine, it being 'extrahazardous,' was fatal and forbade any recovery."

[4] Rathbone v. City Fire Ins. Co. 31 Conn. 193.

[5] Pindar v. Continental Ins. Co. 38 N. Y. 364, 97 Am. Dec. 795; Richards v. Protection Ins. Co. 30 Me. 273.

[6] Phœnix Ins. Co. v. Lawrence, 4 Met. (61 Ky.) 9, 81 Am. Dec. 521.

[7] Sperry v. North American Ins. Co. 22 Fed. 516.

nated as hazardous, it is held that the casual deposit of any of these articles in the building covered will not be a violation of the condition;[8] nor will the keeping of articles incidental to the use of the insured premises.[9] If the policy specifies articles which it prohibits as being of a hazardous nature, articles which are not enumerated in such specification will not avoid the policy, except the keeping of such articles materially increases the risk.[10]

§ 2202. **Specially prohibited articles: benzine: burning fluid: camphene: dynamite: fireworks: gasolene.**—(a) *Benzine.* The temporary taking of benzine upon the premises for the purpose of cleaning the machinery is not a violation of a condition forbidding the insured to "keep or have . . . benzine" upon the premises,[11] nor is the risk increased by the temporary use of benzine in cleaning furniture and carpets,[12] and if the keeping of a particular article, such as benzine, is necessary in the insurer's business, the fact that the printed portion of the policy excludes the keeping thereof will not avoid the contract, where the written portion of the contract covers the property to be used in conducting that particular business.[13] And this applies where the insured property is a paint shop, where the use of benzine is necessary to carry on the business.[14] Again, where a policy by a typewritten rider annexed thereto, insures "paints, oils, varnishes," and "such other articles as are usually kept in a sign painter's and carriage painter's and tinner's shop," the insured may show that benzine is one of the articles usually kept in such a business, and therefore that the policy is not avoided by its keeping, and this though the policy provides in its printed stipulations that it shall be void "if (any usage or custom of trade or manufacture to the contrary, notwithstanding) there be kept benzine."[15] So benzine kept bottled in small quantities as part of a stock in trade is included in a policy containing a written description of the property insured as a stock of drugs and chemicals such as are usually kept for sale in a drug store, although the printed portion of the policy stipulates that it shall be void if benzine is kept without an agreement indorsed on the policy. The latter stipulation refers to keeping benzine in large quantities.[16] And

[8] Hynds v. Schenectady County Mutual Ins. Co. 11 N. Y. 554. See Phœnix Ins. Co. v. Lawrence, 4 Met. (61 Ky.) 9, 81 Am. Dec. 521.

[9] New York Equitable Ins. Co. v. Langdon, 6 Wend. (N. Y.) 623.

[10] New York Equitable Ins. Co. v. Langdon, 6 Wend. (N. Y.) 623.

[11] Mears v. Humboldt Ins. Co. 92 Pa. St. 15, 37 Am. Rep. 647, 9 Ins. L. J. 139.

[12] Bentley v. Lumberman's Ins. Co. 191 Pa. 276, 43 Atl. 209, 28 Ins. L. J. 552.

[13] Faust v. American Fire Ins. Co. 91 Wis. 158, 30 L.R.A. 783, 64 N. W. 883, 51 Am. St. Rep. 876.

[14] Mascott v. First National Fire Ins. Co. 69 Vt. 116, 37 Atl. 255.

[15] Mascott v. Granite State Fire Ins. Co. 68 Vt. 253, 35 Atl. 75.

[16] Phœnix Ins. Co. v. Flemming, 65

clauses which forbid the keeping by the insured upon his premises of "hazardous" articles, but which has indorsed upon it by the company permission "to keep one barrel of benzine or turpentine in tin cans," are not violated by the introduction of a barrel of benzine in a wooden barrel upon the premises for the purpose of immediately emptying the same into a tin can.[17] But keeping or using benzine on the premises contrary to the provisions of the policy will avoid it unless such use is incidental to the business, adopted from necessity or custom, and recognized by insurer, or is in small quantities for a special and not dangerous purpose.[18] Where a policy provides that it shall be void in case benzine is used upon the premises, a statement by the insured in his proofs of loss that he had been informed that the fire was caused by the use of benzine by others upon the premises will not estop him from showing upon the trial that no benzine was in fact used, in the absence of any claim of surprise by defendant.[19] Whether benzine is a "burning fluid or chemical oil" is a question of fact for the jury.[20]

(b) *Burning fluid.* If the memorandum of special hazards prohibits the use of burning fluid for lighting, such use will avoid the policy.[1] But burning fluid, as prohibited in a policy of insurance, does not necessarily mean any fluid which will burn.[2]

(c) *Camphene.* Though a policy prohibits in its printed conditions the keeping of camphene, yet where a building is insured "privileged for a printing office," the insured may use camphene so far as is necessary in the business of printing.[3] And a provision in a policy forbidding the use of camphene is not violated by the use of a fluid for the purpose of illumination which is not in its nature like camphene.[4]

Ark. 54, 39 L.R.A. 789, 67 Am. St. Rep. 900, 44 S. W. 464, 27 Ins. L. J. 584.

[17] Maryland Fire Ins. Co. v. Whiteford, 31 Md. 219, 1 Am. Rep. 45.

[18] Wheeler v. Traders Ins. Co. 62 N. H. 450, 13 Am. St. Rep. 582.

[19] White v. Royal Ins. Co. 149 N. Y. 485, 44 N. E. 77, aff'g 29 N. Y. Supp. 323, 8 Misc. Rep. 613, 60 N. Y. S. R. 830.

[20] Mears v. Humboldt Ins. Co. 92 Pa. St. 15, 37 Am. Rep. 647, 9 Ins. L. J. 139.

[1] Campbell v. Charter Oak Fire & Marine Ins. Co. 10 Allen (92 Mass.) 213.

[2] Putnam v. Commonwealth Ins. Co. 4 Fed. 753.

[3] Harper v. Albany Ins. Co. 17 N. Y. 194. In this case the court said: "By insuring the plaintiff's stock, with the privilege of a printing office and book bindery, the use of such materials, including camphene, as were necessary in that business were allowed; otherwise, the contract was a mere delusion. But the restraining clause might nevertheless have its full effect upon the use of camphene for the purposes of light and for all purposes beyond its necessary connection with the stock and business insured."

[4] Wheeler v. American Central Ins. Co. 6 Mo. App. 235.

(d) *Dynamite.* The keeping of dynamite in a building without the written consent of the insurance company will avoid a policy prohibiting the keeping of nitro-glycerine in the building.[5] And if dynamite has been kept upon property insured by a policy providing that it shall be void if dynamite is kept, used, or allowed thereon, no recovery can be had on the policy, although the dynamite had nothing to do with the loss.[6] But the keeping of dynamite will not avoid the policy if it can be proved to be an article of merchandise usually kept for sale in a retail hardware store.[7]

(e) *Fireworks.* Fireworks may be shown to be an ordinary part of a stock of a "fancy goods and Yankee notion store," upon which a policy of insurance has been issued, and where it is so proven, the keeping of them is not a violation of a printed condition of the policy forbidding such keeping.[8] And if squibs containing a less amount of gunpowder than the quantity permitted are kept in a stock of general merchandise as is usual in such cases the policy is not avoided even though assured has no permit therefor other than as above stated and the prohibition is that fireworks shall not be kept, used, or allowed, any usage or custom of trade to the contrary notwithstanding.[9] So where a policy upon a building prohibited the keeping of fireworks upon the premises, it was held that the keeping of fireworks in a building twenty-five or fifty feet distant did not avoid the policy.[10] But it has been held that an insurance upon "family groceries, wines, liquors, tobacco, and cigars" does not include fireworks.[11] So fireworks temporarily kept for a celebration the next day avoids the policy under a condition that they shall not be kept, used, or allowed, notwithstanding any custom, usage or trade to the contrary.[12] And fireworks are not included under the name of firecrackers which are permitted to be kept, nor are they within the description "other articles in the line of business," where the policy requires that fireworks be specially written

[5] Sperry v. Springfield Fire & Marine Ins. Co. 26 Fed. 234.

[6] Bastian v. British American Assur. Co. 143 Cal. 287, 66 L.R.A. 255, 77 Pac. 63.

[7] Phœnix Ins. Co. v. Walters, 24 Ind. App. 87, 79 Am. St. Rep. 257, 26 N. E. 257.

[8] Barnum v. Merchants' Fire Ins. Co. 97 N. Y. 188. See Steinbach v. Lafayette Ins. Co. 54 N. Y. 90; Steinbach v. Relief Ins. Co. 13 Wall. (80 U. S.) 183, 20 L. ed. 615; Plinsky v. Germania Fire Ins. Co. 32 Fed. 47.

[9] Merchants & Traders Ins. Co. v. Floyd, 20 Ky. L. Rep. 1538, 49 S. W. 543.

[10] Allemania Fire Ins. Co. v. Pittsburgh Exposition Soc. 10 Cent. Rep. 592, 11 Atl. 572, 8 Sadler, 424.

[11] Georgia Home Ins. Co. v. Jacobs, 56 Tex. 366.

[12] Heron v. Phœnix Mutual Fire Ins. Co. 180 Pa. 257, 36 L.R.A. 517, 57 Am. St. Rep. 638, 36 Atl. 740.

in it.[13] Nor are fireworks included under "general merchandise" although they had been generally kept in such store but were not necessary to the business.[14] When forfeiture of a fire insurance policy is claimed for breach of conditions concerning the keeping of fireworks, the fact that fireworks were on exhibition, or that one of the insurance agents, after the policy was issued, purchased fireworks in his individual capacity at the insured store, does not necessarily show that another agent issuing the policy knew of the presence of such fireworks, so as to constitute a waiver by him of such forfeiture. The burden of proof is on the insured to show that the agent issuing the policy knew at the time of the keeping of such fireworks, or that the other agent, with knowledge, did some act in the course of his duties as such, recognizing the continuing validity of the policy.[15] Although the keeping of fireworks may be waived by giving a permit therefor, still such waiver is not of itself impliedly extended so as to authorize their continued keeping so that if they are not removed after the expiration of said permit the policy becomes ipso facto void.[16]

(f) *Gasolene.* A condition against the use or keeping of gasolene on the insured premises, is not broken by its use to an extent necessary to carry on the business, for which the insurer knew that the property insured was used and where both parties must have known either that the business insured must be discontinued or gasolene used therein. But in order to justify the use of gasolene on insured premises, on the ground that such use was necessary to continue the business which the insurer knew to be the one carried on by the assured, the necessity need not be absolute, nor need it be proved that the gasolene was of such vital importance to the business that it could not be ignored. It is sufficient that the gasolene was in ordinary use by the trade for the attainment of the results for which it was employed by the assured.[17] If a policy specifies as

[13] Steinbach v. Relief Fire Ins. Co. 13 Wall. (80 U. S.) 183, 20 L. ed. 615. *Cited* in:

*United States.*—James v. Lycoming Ins. Co. 4 Cliff. 272, 287, Fed. Cas. No. 7,182.

*District of Columbia.*—Mitchell v. Potomac Ins. Co. 16 App. D. C. 241, 265.

*Kansas.*—Cobb v. Insurance Co. of North America, 17 Kan. 492, 503.

*Kentucky.*—Western Assur. Co. v. Rector, 85 Ky. 294, 305, 3 S. W. 415.

*New York.*—Steinbach v. Lafayette Fire Ins. Co. 54 N. Y. 90, 97.

*Distinguished* in Plinsky v. Germania Fire & Marine Ins. Co. 32 Fed. 47, 49; Stout v. Commercial Union Assur. Co. 11 Biss. 309, 312, 12 Fed. 554, 566; Tubb v. Liverpool & London & Globe Ins. Co. 106 Ala. 651, 662, 17 So. 615.

[14] Norfolk Fire Ins. Co. v. Talley, 112 Va. 413, 71 S. E. 534.

[15] Phœnix Ins. Co. v. Fleming, 65 Ark. 54, 39 L.R.A. 784, 67 Am. St. Rep. 900, 44 S. W. 464.

[16] Betcher v. Capital Fire Ins. Co. 78 Minn. 240, 80 N. W. 971, 29 Ins. L. J. 135.

[17] Fraim v. National Fire Ins. Co.

insured a stock of goods in a first-class retail stove and tin store, and upon "such other goods kept for sale" therein, and this is followed by a privilege to keep not more than a certain quantity of gasolene or other oil or vapor, the "other goods" must be such as are ordinarily, usually, and customarily kept for sale in a store of that kind, and not such other classes of property as assured may then or at any time keep for sale in said store, and unless gasolene is such a commodity thus usually kept for sale, it is not covered and the privilege granted to keep gasolene implies that it was not considered by the parties as being otherwise covered, and where an additional premium is paid for said permission it will be deemed that it was thereby intended to offset any forfeiture which might otherwise have been incurred by said keeping, and that assured understood the terms of his policy and paid for keeping the permitted quantity and knew that if more was kept the policy would be forfeited.[18] And the use of gasolene such as is usual and necessary in the business of an auto repair shop, is permitted where the written part of a rider states that premises are to be used for such purpose, for the written controls the printed part of a policy in case of repugnancy.[19] And where keeping a small quantity of gasolene in no way contributed to the loss and it was usual and customary to keep such an article as a part of the goods insured, as one ordinarily used in the business, the policy is not thereby avoided and in such case the written will prevail over the printed clause in regard thereto.[20] And gasolene, kept as part of the usual stock of merchandise, will not avoid a policy in which a written description of the property insured names such stock "as is usually kept in country stores," although a printed condition declares that the policy shall be void if certain articles, including gasolene, are kept, used, or allowed on the premises.[1] So, although gasolene and coal oil may be articles of the class known as "extra hazardous," the keeping of them in reasonable quantities in a grocery store for the purpose of selling at retail, unless specially prohibited in the policy, will not avoid a contract of fire insurance.[2] So the keeping upon insured premises

170 Pa. St. 151, 37 Wkly. Notes Cas. 39, 50 Am. St. Rep. 753, 32 Atl. 613.

[18] Mitchell v. Potomac Ins. Co. 183 U. S. 42, 46 L. ed. 74, 22 Sup. Ct. 22, 31 Ins. L. J. 570, aff'g 16 App. D. C. 241.

[19] O'Neill v. Caledonian Ins. Co. of Edinburgh, Scotland, 166 Cal. 310, 135 Pac. 1121.

[20] McClure v. Mutual Fire Ins. Co. of Chester County, 242 Pa. 59, 48 L.R.A.(N.S.) 1221, 88 Atl. 921.

[1] Yock v. Home Mutual Ins. Co. 111 Cal. 503, 34 L.R.A. 857, 44 Pac. 189. *Compare* Cassimur v. Scottish Union & National Ins. Co. 135 Ala. 256, 33 So. 163 ("merchandise usually kept in similar stocks:" When allegation demurrable, when not).

[2] Renshaw v. Missouri State Mutual Fire & Marine Ins. Co. (103

of a very small quantity of gasolene for use in an engine used to operate the machinery necessary for the business, does not nullify insurance upon the property, although the keeping of gasolene is prohibited by the policy, if premiums were paid.[3] So the taking of a pint of gasolene in a bottle securely corked, into an insured dwelling, for cleansing purposes, is not within a clause in the policy avoiding it if there is kept, used, or allowed on the premises "any gasolene." [4]

A provision in a fire insurance policy rendering it void if gasolene is "kept, used, or allowed" on the premises, is not violated by the bringing of a gallon of it, on a single occasion, onto the property for temporary use, although such act results in the destruction of the property. Such a condition is not violated unless it is brought there for the purpose of being stored or kept. The purpose of the word "used" is to provide against the danger which would arise from the habitual, constant, or continued exposure of the property through the presence or use of the articles. The one word forbids the permanent or habitual keeping of the dangerous thing, and the other a like use of it without the actual depositing or storing of it on the premises.[5] So where gasolene is temporarily left at insured's factory instead of at his home where it was intended that delivery should have been made, and assured at once, upon learning of such fact, takes precautions for safety by placing it outside until its removal shortly thereafter, said gasolene is not so "kept or allowed" as to forfeit the policy, for the words "kept or allowed" do not refer to the temporary presence of gasolene on the premises, said prohibition means something more than a mere casual taking of gasolene on the premises and removing it soon after, and the burden of proof is on the insurer to show by a fair preponderance of evidence that assured exposed the property insured to the additional hazard of habitually keeping gasolene upon the premises for a considerable time before the jury would be warranted in finding for assurer.[6] Nor is the use, temporarily, of gasolene in an engine used for threshing grain in an insured barn, such a keeping or use of gasolene as to avoid the policy.[7]

Mo.) 595, 23 Am. St. Rep. 904, 15 S. W. 945.

[3] McClure v. Mutual Fire Ins. Co. 242 Pa. 59, 48 L.R.A.(N.S.) 1221, 88 Atl. 921.

[4] Arnold v. American Ins. Co. 148 Cal. 660, 25 L.R.A.(N.S.) 6, 84 Pac. 182.

[5] Springfield Fire & Marine Ins. Co. v. Wade, 95 Tex. 598, 58 L.R.A. 714, 93 Am. St. Rep. 870, 68 S. W. 977.

[6] Clute v. Clintonville Mutual Fire Ins. Co. 144 Wis. 638, 32 L.R.A. (N.S.) 240n, 129 N. W. 661, 40 Ins. L. J. 494.

[7] Bouchard v. Dirigo Mutual Fire Ins. Co. 113 Me. 17, L.R.A.1915D, 187, 92 Atl. 899, 45 Ins. L. J. 476.

But it is held that if a policy provides that it shall become void if gasolene is kept, used, or allowed on the insured premises, the policy is avoided by temporarily storing a small quantity of gasolene to be used in a gasolene stove for cooking purposes.[8]

The prohibition as to the use or keeping of gasolene is not to be strictly construed, as what is intended to be prohibited is the habitual and not the exceptional use, as in case of an emergency so that it does not preclude the use of a torch in order to burn off old paint or soften it up and prepare a building for repainting, and such use for such purpose, does not prevent a verdict for insured where a fire occurs therefrom, nor is such use within said clause as a matter of law,[9] although the increase of hazard in such case is held a question for the jury where there is some evidence to show that it was the custom of painters.[10] So a policy in the standard form is not made void by the use of a gasolene torch by a painter for the purpose of burning off paint from the building insured, where the work has continued for less than the fifteen days allowed by the policy for repairs.[11] Nor is gasolene "kept, used, or allowed" on the premises insured, by leaving a five gallon can containing said article in the building for a number of days for use in burning off old paint preparatory to repainting the building.[12] So a prohibition against using the premises for a more hazardous business does not include the use of gasolene for lighting.[13] So the presence on the insured premises of a small quantity of gasolene in a gasolene stove used for cooking, from which the fire originated, is not a storing or keeping within a condition of the policy that the insurer shall not be liable "for loss or damage occurring while gasolene is stored or kept in the building insured." [14] And the necessary use of gasolene in a gasolene stove for cooking, will be deemed to have been contemplated by the policy, where such use is customary in the neighborhood.[15] But it is also held that where the deposit or use of gasolene is prohibited, the use thereof in a stove in the house containing the

[8] Boyer v. Grand Rapids Fire Ins. Co. 124 Mich. 455, 83 Am. St. Rep. 338, 83 N. W. 124.

[9] Lebanon County v. Franklin Fire Ins. Co. of Phila. 237 Pa. 360, 44 L.R.A.(N.S.) 148n, 85 Atl. 419, 43 Ins. L. J. 397.

[10] Smith v. German Ins. Co. 107 Mich. 270, 65 N. W. 236, 30 L.R.A. 368.

[11] Garrebrant v. Continental Ins. Co. 75 N. J. Law, 577, 12 L.R.A. (N.S.) 443, 67 Atl. 90.

[12] Smith v. German Ins. Co. 107 Mich. 270, 30 L.R.A. 368, 65 N. W. 236.

[13] Mutual Fire Ins. Co. v. Coatesville Shoe Factory, 80 Pa. St. 407, 412.

[14] Thompson v. Equity Fire Ins. Co. 3 B. R. C. 1 (1910) A. C. 592. Also reported in 80 L. J. P. C. N. S. 13, 103 L. T. N. S. 153, 26 Times L. R. 616n.

[15] American Central Ins. Co. v. Green, 16 Tex. Civ. App. 531, 41 S. W. 74.

insured property, avoids the contract, even though it is kept in a receptacle in another building.[16] Again, a clause prohibiting the generating or evaporating within the building, or contiguous thereto, of any substance for burning gas, or the use of gasolene for lighting, is not infringed by the manufacture of gas from gasolene fifty feet from the building, and the use of it for lighting the building, it not appearing that gas and gasolene are substantially the same.[17] Nor is gasolene kept upon the "premises" within the policy intent where it is stored in quantities in excess of that permitted in an open shed only a few feet away from the buildings described as containing the insured property and which must be deemed, in conformity with the wording of the policy, to be the "premises" intended to be covered.[18] And where the amount of gasolene permitted is limited to that in the reservoirs of machines admitted into the building, where the insured machine is permanently or temporarily "stabled" such provision will be construed to intend that more than one auto may be kept there, each with gasolene in its tank.[19] If without assured's knowledge or complicity, directly or indirectly, an employee of assured's carried a can of gasolene upon the premises for the purpose of burning the house or building containing the insured goods, and it was so used, such act does not constitute keeping, using, or allowing gasolene on the premises.[20]

But a condition against the keeping of gasolene upon the insured premises will be broken where kept by one who temporarily occupies the premises with the implied consent of the insured, such violation being deemed a violation by the assured.[1] And if permission is given by assured to another to use a rear platform to the building and the latter without assured's knowledge attaches thereto a gasolene lamp which explodes and causes the loss, there can be no recovery.[2] So where the condition of the policy was that it should be void if, among other things, gasolene was kept, used, or allowed on the insured premises, and the question was whether there had been any violation of this condition on the part of the insured, and the cause of the fire was not in any way involved, testimony showing that the fire was not caused by gasolene was held

[16] Pennsylvania Fire Ins. Co. v. Faires, 13 Tex. Civ. App. 111, 35 S. W. 55.

[17] Arkell v. Commerce Ins. Co. 69 N. Y. 191, 25 Am. Rep. 168. See Liverpool & London & Globe Ins. Co. v. Gunther, 116 U. S. 113, 29 L. ed. 575, 6 Sup. Ct. 306.

[18] Rau v. Westchester Fire Ins. Co. 55 N. Y. Supp. 459, 36 App. Div. 179, 28 Ins. L. J. 182.

[19] O'Neill v. Caledonian Ins. Co. of Edinburgh, Scotland, 166 Cal. 310, 135 Pac. 1121.

[20] Queen Ins. Co. v. Van Giesen, 136 Ga. 741, 72 S. E. 41.

[1] German Fire Ins. Co. v. Board of Commrs. 54 Kan. 732, 45 Am. St. Rep. 306, 39 Pac. 697.

[2] Kohlmann v. Selvage, 54 N. Y. Supp. 230, 34 App. Div. 380.

inadmissible, and properly rejected as it was calculated to mislead the jury.[3]

§ 2203. **Specially prohibited articles: gunpowder: hay: kerosene: lights: naphtha.**—(a) *Gunpowder.*—A condition against keeping gunpowder for sale or on storage upon the premises does not cover the case where gunpowder is merely kept upon the premises, but neither on storage nor for sale;[4] nor does it cover the merely placing of it upon the premises.[5] A condition in a policy of insurance upon "dry goods and groceries" that it shall be void in case gunpowder is kept "upon or in the premises insured," has been held not to apply in such a case, as "premises" means real estate, and not "dry goods and groceries." So where a policy of insurance provides that the building insured is privileged to contain goods "not hazardous, hazardous, and extra hazardous," and the proposals annexed thereto enumerate three classes of goods under the several heads, "not hazardous," "hazardous," and "extra hazardous," adding at the close of the last class, "gunpowder is not insurable unless by special agreement," the meaning is that gunpowder belongs to the "extra-hazardous" class, and may be stored in the building without forfeiting the policy, but that it will not be covered by the insurance unless there is a special agreement to that effect.[6] Where the insurance was upon "a stock of goods and merchandise" in plaintiff's store, it was held that though the policy forbids the keeping of gunpowder, the keeping of it in small quantities for the purpose of retail did not avoid the policy.[7] Placing gunpowder in a building is not a "storing" of gunpowder therein within the meaning of an exception in the policy, where the powder is placed there with a lighted match by municipal authority, for the purpose of an explosion.[8]

(b) *Hay.*—Where the policy does not cover "extra hazardous" articles, the keeping of hay, which is one of the articles designated in that class, will avoid the policy.[9] If the policy forbids the keeping of "hay pressed in bales," it being claimed as hazardous, it is held that the keeping of loose, unbaled hay in large quantities is also forbidden, since it is of a more hazardous nature.[10]

[3] Turnbull v. Home Fire Ins. Co. 83 Md. 312, 34 Atl. 875.

[4] State Ins. Co. v. Hughes, 10 Lea (78 Tenn.) 461.

[5] Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684.

[6] Duncan v. Sun Fire Ins. Co. 6 Wend. (N. Y.) 488, 22 Am. Dec. 539.

[7] Leggett v. Ætna Ins. Co. 10 Rich. (S. C.) 202. But see Western Assur. Co. v. Rector, 85 Ky. 294, 3 S. W. 415. See Pittsburgh Ins. Co. v. Frazee, 107 Pa. St. 521.

[8] City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258.

[9] Francis v. Somerville Mutual Ins. Co. 25 N. J. L. 78.

[10] Dittmer v. Germania Ins. Co. 23 La. Ann. 458, 8 Am. Rep. 600.

(c) *Kerosene: Lights.*—In the absence of proof, kerosene oil will not be held to be a "burning fluid or chemical oil," as these terms are used in an insurance policy.[11] A policy of insurance which allows the keeping of kerosene on the premises to be used for lights, provided the lights are filled and trimmed by daylight, is avoided where the insured draws kerosene by lamplight for the purpose of loaning it to a neighbor, in consequence of which an explosion occurs.[12] And the words "for lights" are restricted in meaning to lighting the insured premises only, and the words "by daylight" are intended to prevent the use of artificial light from which the oil might catch fire.[13] So like restrictions are merely a regulation of the use of the oil for lighting purposes, and will not be construed to prohibit its use for any other purposes than for lights.[14] Where a policy of fire insurance upon goods in a store contained a clause prohibiting the use of any burning fluid or chemical oils, and a subsequent clause expressly permitting the use of kerosene oil for use of lights in dwellings, it was held that the use of kerosene oil as a light in the store rendered the policy null and void.[15] And an instruction is proper that if the fire causing the loss was occasioned by assured's failure to comply with the policy restrictions as to the use of kerosene oil on the premises, the jury should find for assurer. But the keeping and storing of oil about the premises will not avoid the policy where the restrictions as to the quantity kept for sale and the use of the oil kept for lighting purposes are complied with.[16] A policy of insurance issued upon a photographer's stock, "including . . . materials used in their business," has been held to permit the use of a portable kerosene oil lamp or stove, such as is ordinarily used in that business, though there may be a clause prohibiting the use of kerosene.[17] Where a policy provided that the insurers should not be liable for loss occasioned by the use of kerosene oil as a light in any barn or outbuilding, and the insured took a kerosene lamp to his barn to catch fowls, and while there the lamp was upset and the barn destroyed, it was held that if the fire was occasioned by the use of the kerosene rather than of any other burning fluid, the policy was avoided, the condition not

[11] Mark v. National Fire Ins. Co. 24 Hun (N. Y.) 565.

[12] Gunther v. Liverpool & London & Globe Ins. Co. 34 Fed. 501.

[13] Gunther v. Liverpool & London & Globe Ins. Co. 134 U. S. 110, 10 Sup. Ct. 448, 33 L. ed. 857.

[14] Snyder v. Dwelling-House Ins. Co. 59 N. J. L. 544, 59 Am. St. Rep. 625, 37 Atl. 1022.

[15] Cerf v. Home Ins. Co. 44 Cal. 320, 13 Am. Rep. 165.

[16] Phœnix Ins. Co. v. Fleener, 104 Ark. 119, 148 S. W. 650, 41 Ins. L. J. 1488.

[17] Hall v. Insurance Co. of North America, 58 N. Y. 292, 17 Am. Rep. 255.

being restricted to an habitual use of the oil in the barn.[18] A provision that the insurer will not be liable "for the use of kerosene" means where the loss is occasioned by such use.[19] Where a steamboat was insured against fire by a policy conditioned to be void "if gunpowder, camphene, spirit gas, naphtha, benzine or benzole, chemical, crude, or refined coal oils are kept or used on the premises without consent," it was held that the use of kerosene oil to light the boat did not forfeit the policy.[20] So, where a fire insurance policy prohibited the use of camphene, spirit gas, burning fluid, or chemical oils, but permitted the use of refined coal oil, kerosene, or other carbon oil for lights, if drawn and the lamps filled by daylight, and the insured used for lights lard oil and candles, filling the lamps at night, it was held no breach of condition.[1]

(d) *Naphtha.*—The use of a naphtha torch to burn old paint from a wooden building for the purpose of repainting it, when such use continues every working day for nearly a month, violates a condition in a policy of insurance providing that it shall become void if the situation and circumstances of the risk shall be so altered as to cause an increase thereof, and this is so even though the naphtha is not on or in the premises, but is used in a liquid form a few inches outside the wall;[2] and in such case the question to be submitted to the jury is whether the use of naphtha at the time and in the manner in which it was used was reasonable and proper in the repair of the building, having reference to the danger from fire, as well as other considerations. If the use of the naphtha torch was, under the circumstances and at the time and in the manner in which it was used, an unreasonable use, the policy is avoided thereby.[3]

**§ 2204. Specially prohibited articles: petroleum: saltpeter: spirituous liquors: turpentine.**—(a) *Petroleum.*—The keeping by the insured of small quantities of petroleum for medicinal purposes will not avoid a policy which provides that if petroleum is stored upon the premises without written consent the policy shall be void.[4] Where a fire insurance policy on a specifically described steam flour-mill and machinery prohibited keeping of petroleum on "the

[18] Matson v. Farm Buildings Ins. Co. 73 N. Y. 310, 29 Am. Rep. 149.

[19] Jones v. Howard Ins. Co. 117 N. Y. 103, 22 N. E. 578, 26 N. Y. St. Rep. 844.

[20] Morse v. Buffalo Fire Ins. Co. 30 Wis. 534, 11 Am. Rep. 587.

[1] Carlin v. Western Assurance Co. 57 Md. 515, 40 Am. Rep. 440.

[2] First Congregational Church v. Holyoke Mutual Fire Ins. Co. 158 Mass. 475, 35 Am. St. Rep. 508, 19 L.R.A. 587, 33 N. E. 572. See § 2202 herein.

[3] First Congregational Church v. Holyoke Mutual Fire Ins. Co. 158 Mass. 475, 19 L.R.A. 587, 35 Am. St. Rep. 508, 33 N. E. 572.

[4] Williams v. Firemen's Fund Ins. Co., 54 N. Y. 569, 13 Am. Rep. 620.

premises," and the insured kept a barrel of petroleum in the engine-house adjoining, but not included in the specific description of the premises, and the fire originated in the main building, it was held that the petroleum was not on "the premises," and that the insured had a right to keep petroleum on the premises for the purpose of lubricating the insured machinery.[5]

(b) *Saltpeter.*—An insurance upon a wholesale grocery, with permission to keep "all articles kept for sale in such stock," is not avoided by the keeping of saltpeter, though the policy contains a printed stipulation prohibiting insured from keeping it, where it is shown to be part of stock usually kept in such business.[6] In Illinois, it has been held that an instruction in an action on an insurance policy that if the company knew the character of the business to be carried on when it issued the policy, it must be held to have taken the risks usual in that business, is erroneous, as tending to mislead, where the defense was that the insured kept saltpeter on the premises in violation of the condition of the policy, and the proof showed not only that it was of doubtful necessity for the insured to keep saltpeter on the premises to carry on his business, and unreasonable to keep a keg of it, but also that he kept it on sale.[7] In an action upon a policy of fire insurance which covered a stock of "drugs and medicines" and contained a stipulation that the policy should be avoided "if the insured shall keep gunpowder, fireworks, saltpeter," etc., it was held that the prohibition was not against keeping saltpeter as a drug, but only in such manner or quantity or for such purpose as would increase the risk, and where saltpeter was on hand as part of the stock of drugs at the time the policy issued, being an article usually kept in drug stores, it was kept as a part of the stock insured, and although specially prohibited by the terms of the policy, the contract was not thereby avoided.[8]

(c) *Spirituous liquors.*—Though a policy provides that spirituous liquors shall not be kept, yet where such keeping is incidental to the business of a grocer, it does not avoid the policy.[9] So also they may be kept for the use of the family, or for the purpose of selling to boarders.[10]

(d) *Turpentine.*—Spirits of turpentine may be shown to be part of the stock usually kept in the business upon the stock of

[5] Carlin v. Western Assurance Co. of Toronto, Canada, 57 Md. 515, 40 Am. Rep. 440.

[6] Stout v. Commercial Ins. Co. 11 Ins. L. J. 688, 11 Biss. (U. S. C. C.) 309, 12 Fed. 554.

[7] Commercial Ins. Co. v. Mehlman, 48 Ill. 313, 95 Am. Dec. 543.

[8] Collins v. Farmville Insurance & Banking Co. 79 N. C. 279, 28 Am. Rep. 322.

[9] New York Equitable Ins. Co. v. Langdon, 6 Wend. (N. Y.) 623.

[10] Rafferty v. New Brunswick Fire Ins. Co. 18 N. J. L. 480, 38 Am. Dec. 525.

which the policy is issued.[11] In Pennsylvania, however, where a fire policy insured a stock of "general merchandise of all kinds usually kept in a country retail store . . . except as hereinafter provided," and immediately following this was a printed exemption from liability for loss where "turpentine or benzine" were deposited, stored, kept, or used without written consent on the policy, and the insured kept for sale both turpentine and benzine without such consent, it was held that the policy was void, although those articles might be part of the merchandise usually kept in such stores.[12]

**§ 2205. Erection of buildings adjacent to insured premises.**—Unless the policy contains a stipulation against the erection of adjacent buildings, it has been held that it will not be avoided by the erection of such buildings unless some injury actually results therefrom.[13] It has also been held that though the erection of adjacent buildings by the insured may increase the risk, this will not avoid the policy, unless such loss is occasioned by such increase.[14] The fact that a policy is issued upon a building which is described as having no buildings adjacent thereto is no warranty upon the part of the insured that no adjacent buildings will be erected, where the policy contains no stipulation to that effect.[15] A policy which stipulates that if the risk is increased by the erection of adjacent buildings, the insurer may rescind the contract, is not made absolutely

[11] Pindar v. Kings Co. Ins. Co. 36 N. Y. 648, 93 Am. Dec. 544.

[12] Lancaster Fire Ins. Co. v. Lenheim, 89 Pa. St. 497, 33 Am. Rep. 778.

*Under the New York standard form of fire policies* the condition as to prohibited articles reads as follows: "If (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises benzine, benzole, dynamite, ether, fireworks, gasolene, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine, or other explosives, phosphorus, or petroleum, or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light"). 3 N. Y. Rev. Stats. (8th ed. 1663) Laws 1886, c. 488, am'd 1887, c. 429; 1901, c. 513; 1903, c. 106; 1909, c. 240; 1910, chaps. 168, 638, 668; 1913, c. 181; C. L. 1909, c. 33, sec. 121; Consol. L. c. 28.

[13] Gates v. Madison County Mutual Ins. Co. 5 N. Y. (1 Seld.) 469, 55 Am. Dec. 360. See Pottsville Iron Co. v. Horan, 89 Pa. 438, 9 Ins. L. J. 201. *Examine* Stetson v. Massachusetts Ins. Co. 4 Mass. 330, 3 Am. Dec. 217; Lattomus v. Farmers' Mutual Fire Ins. Co. 3 Houst. (Del.) 404.

[14] Howard v. Kentucky & Louisville Mutual Ins. Co. 13 B. Mon. (Ky.) 282; Stebbins v. Globe Ins. Co. 2 Hall (N. Y.) 632.

[15] Howard v. Kentucky & Louisville Mutual Ins. Co. 13 B. Mon. (Ky.) 282.

void by the erection of such buildings, and if the insurers fail to rescind the contract after having knowledge of the facts, the insured may recover for subsequent loss.[16] Where a policy provides that it shall be void if the risk is increased by the erection of any building contiguous thereto, the erection of a building twenty-five feet distant from the one insured is not contiguous, within the meaning of the policy.[17] If a policy is conditioned to be void in case the risk is increased by any alteration or change in circumstances by or with the advice, agency, or consent of the insured, the erection of a building by the insured on an adjoining lot which increases the risk will avoid the policy;[18] as it will also where the policy prohibits any increase of risk by any means within the control of the insured.[19] But if the erection of adjacent buildings has decreased the general risk, it will not avoid the policy, though the external risk has been increased. Thus, where a furnace was taken out of the insured building and placed in an addition, which had been built subsequent to the issuance of the policy, it was held that as the change decreased the risk generally, the policy was not avoided.[20] A breach of condition by the erection without notice of a barn on an adjacent lot is waived by acceptance and retention of the premium by insurer with knowledge of the breach.[1]

**§ 2206. Erection of adjacent buildings to which insured is not a party.**—If buildings are erected upon adjoining land over which the insured has no control, this will not avoid a policy conditioned to be void in case of any increase of risk, though the risk may be increased by the erection of the buildings.[2] The condition refers to acts over which the insured has control, and though the insured may own the adjoining land, yet the erection of buildings thereon which increases the risk by one holding under a lease executed prior to effecting the insurance will not avoid the policy.[3] But if with assured's knowledge a wooden building is erected, though

[16] Commercial Ins. Co. v. Mehlman, 48 Ill. 313, 95 Am. Dec. 543.

[17] Olson v. St. Paul Fire & Marine Ins. Co. 35 Minn. 432, 59 Am. Rep. 333, 29 N. W. 125.

[18] Allen v. Massasoit Ins. Co. 99 Mass. 160. See also Howard v. Kentucky & Louisville Mutual Ins. Co. 13 B. Mon. (Ky.) 282, 289; Boatwright v. Ætna Ins. Co. 1 Strob. (S. C.) 281, 287.

[19] Francis v. Somerville Mutual Ins. Co. 1 Dutch. (25 N. J. L.) 78; Murdock v. Chenango County Ins. Co. 2 N. Y. 210.

[20] Lomas v. British America Assurance Co. 22 U. C. Q. B. 310; Heneker v. British Am. Assur. Co. 13 U. C. C. P. 99.

[1] Schmurr v. State Ins. Co. 30 Oreg. 29, 46 Pac. 363, 26 Ins. L. J. 373.

[2] Howard v. Kentucky & Louisville Mutual Ins. Co. 13 B. Mon. (Ky.) 282.

[3] Franklin Fire Ins. Co. v. Gruver, 100 Pa. St. 266.

not by him nor under his control, within a few feet of the insured building, the hazard is increased and the policy forfeited.[4]

**§ 2206a. Erection or occupation of adjacent buildings: change in exposure.**—An insurance policy upon cornerib and the contents thereof, providing that it shall be void in case of any change in the exposure by the erection or occupation of adjacent buildings, or by any means whatever in the control or knowledge of the assurer, is avoided by the use by the assurer, or with his permission, of an engine and boiler near the cornerib, furnishing the power to a corn sheller. The word "exposure" as used in policies of insurance indicates danger of destruction or injury to the property insured from external sources not inherent in the property itself.[5]

**§ 2206b. Requirement to build chimneys.**—A condition voiding the policy if assured fails to build or have built brick or stone chimneys within a specified time from the date of the application, does not obligate compliance therewith nor bind assured where the policy was issued and delivered without an application although it was subsequently signed by assured.[6]

**§ 2207. Increase or change of risks.**—Most policies of fire insurance contain a clause to the effect that the policy shall be void in case of any increase in the risk. In construing this clause, the intent of the parties is to be considered, as in all other parts of the policy. A strict construction against the insured will not be given to such a condition. The use of the property upon which the policy is issued must be considered, and the insurer is presumed to have assumed the risk in reference thereto.[7] An increase of hazard is some alteration or change in the situation or condition of the property insured, which tends to increase the risk—something of duration, and not a casual change of a temporary character.[8] Increase in risk resulting from adjacent premises over which the assured has no control will not avoid a policy of insurance, though it declares that if the "hazard is increased without the consent of the company in writing the policy shall be void." This condition applies only to the insured premises, or to property under the control of the assured.[9] So a risk is not necessarily increased, in case of a

[4] Straker v. Phœnix Ins. Co. 101 Wis. 413, 77 N. W. 752, 28 Ins. L. J. 143.

[5] Davis v. Western Home Ins. Co. 81 Iowa, 496, 10 L.R.A. 359, 25 Am. St. Rep. 509, 46 N. W. 1073.

[6] Loyal Mutual Fire Ins. Co. v. J. S. Brown & Bro. Mercantile Co. 47 Colo. 467, 107 Pac. 1098, 39 Ins. L. J. 870.

[7] Holbrook v. St. Paul Fire & Marine Ins. Co. 25 Minn. 229. "Hazard," "moral hazard," "increased hazard." See Hartford Ins. Co. v. Dorrok, — Tex. Civ. App. —, 133 S. W. 465, 40 Ins. L. J. 499.

[8] Angier v. Western Assur. Co. 10 S. Dak. 82, 66 Am. St. Rep. 685, 71 N. W. 761. See §§ 2239, 2240 herein.

[9] State Ins. Co. v. Taylor, 14 Colo.

policy of insurance upon a distillery, by the fact that the assured kept on hand, and had at the time of the fire, thirty or forty barrels of whisky in the cellar, for a necessary and natural incident of the business would be to have some of the manufactured article on hand.[10] A subsequent sale under a pre-existing judgment or encumbrance does not increase the risk.[11] And a verdict that a change of business did not increase the hazard will not be disturbed.[12] A mere trifling increase will not avoid the policy. There must be a substantial and material increase, such as the insurer could not reasonably from the terms of the policy have contracted to assume,[13] and where there is such an increase, the policy is avoided.[14] Under a fire policy conditioned that if an engine be used upon the premises the president of the company shall appoint a committee to ascertain the amount of increase of risk, if any, by examination, and, if increased, the insured shall pay an additional premium, the use of the engine does not itself forfeit the policy, nor of necessity increase the risk; but if risk is increased and loss caused thereby, the insurer, in the event of no additional premium note being given, is released from liability, unless it has neglected to appoint the committee and make examination provided for.[15] The provision in a policy of insurance against an increase of risk by acts of the insured is an independent condition of itself, and is not to be controlled or limited by the previous provisions or specifi-

499, 20 Am. St. Rep. 281, 24 Pac. 333.

[10] People's Ins. Co. v. Spencer, 53 Pa. St. 353, 91 Am. Dec. 217.

[11] Collins v. London Assurance Co. 165 Pa. St. 298, 30 Atl. 924.

[12] McClure v. Mutual Fire Ins. Co. of Chester County, 242 Pa. 59, 48 L.R.A.(N.S.) 1221, 88 Atl. 921.

[13] *United States.*—Crane v. City Ins. Co. 3 Fed. 558.

*Connecticut.*—Wood v. Hartford Fire Ins. Co. 13 Conn. 533, 35 Am. Dec. 92.

*Maryland.*—Allen v. Mutual Ins. Co. 2 Md. 111.

*Massachusetts.*—Merriam v. Middlesex Ins. Co. 21 Pick. (38 Mass.) 162, 32 Am. Dec. 252; Jones Manufacturing Co. v. Mutual Ins. Co. 8 Cush. (62 Mass.) 82, 83, 54 Am. Dec. 742.

*New York.*—Parker v. Arctic Fire Ins. Co. 59 N. Y. 1; Appleby v. Astor Fire Ins. Co. 54 N. Y. 253.

*Pennsylvania.*—Girard Fire & Marine Ins. Co. v. Stephenson, 37 Pa. St. 293, 73 Am. Dec. 423.

[14] Lounsbury v. Protection Ins. Co. 8 Conn. 459, 21 Am. Dec. 686; Rice v. Tower, 7 Gray (67 Mass.) 426; Sanford v. Mechanics' Ins. Co. 12 Cush. (66 Mass.) 541; Bowman v. Pacific Ins. Co. 27 Mo. 152; Duncan v. Sun Ins. Co. 6 Wend. (N. Y.) 488, 22 Am. Dec. 539.

As to avoidance of policy by new and different use, see Progress Spinning & Knitting Mills Co. v. Southern National Ins. Co. 42 Utah, 263, 45 L.R.A.(N.S.) 132 and note, 130 Pac. 63.

[15] Schaeffer v. Farmers' Mutual Fire Ins. Co. 80 Md. 563, 45 Am. St. Rep. 361, 31 Atl. 317. But in German Ins. Co. v. Hart, 16 Ky. L. R. 344, it was held that a steam threshing machine placed near a barn did not avoid the policy, although it was the cause of the destruction of the property.

cations of the hazards. Therefore, an act done by the insured, although not included in the class of specified hazards, nevertheless avoids the policy if it increases the risk.[16] A condition forfeiting the policy if the property insured is so changed as to increase risk is not broken by a changed use of premises, as restaurant to that of paint and wagon shop, when evidence shows that such change diminished the risk.[17] If the policy simply contains a condition that "any increase of risk" will avoid it, any material increase will defeat the policy, and where such an increase is shown to have been made, there can be no inquiry into the fact as to whether the loss was caused by such increase of risk.[18] A provision of a policy requiring that if the circumstances affecting the risk shall be altered by the assured so as to increase the risk, without the consent of the underwriters, the policy shall be void, binds the assured not only not to make any alterations in the use of the property which shall increase the risk, but also obligates him not to discontinue the exercise of any precaution which it is represented in the application will be adopted with a view to diminish the risk, and a failure to substantially comply with such provision will release the underwriter.[19] The condition that a policy shall become void if the risk is increased by any means whatever within the control of the assured is not broken by his making a conveyance which is intended and accepted as a mortgage to secure the payment of a loan, unless it is found that the execution of such mortgage did increase such risk.[20] It has been decided that in case the policy is to be void if there is any change by which the degree of risk is increased without the consent of the company, a change which is the result of accident is not within the meaning of the provision.[1] There is such an increase of risk as avoids the policy where an insured

[16] Dittmer v. Germania Ins. Co. 23 La. Ann. 458, 8 Am. Rep. 600. In this case the assured allowed a lot of loose and unbaled hay to be stored in the upper part of the building insured without giving notice to the insurers. It was held that although unbaled hay was not specially excepted from the hazards, yet from its very nature the risk was increased, and therefore it avoided the policy on that ground. See also Boatwright v. Ætna Ins. Co. 1 Strob. (S. C.) 281. See Ampersand Hotel Co. v. Home Ins. Co. 198 N. Y. 495, 28 L.R.A. (N.S.) 218, 91 N. E. 1049, 39 Ins. L. J. 1031, 1033.

[17] Esch v. Home Ins. Co. 78 Iowa, 334, 16 Am. St. Rep. 443, 43 N. W. 229.

[18] Hoffecker v. Newcastle County Mutual Ins. Co. 5 Houst. (Del.) 101; Lyman v. State Ins. Co. 14 Allen (96 Mass.) 329; Mead v. North Western Ins. Co. 7 N. Y. 530.

[19] Houghton v. Manufacturers' Mutual Fire Ins. Co. 8 Met. (49 Mass.) 114, 41 Am. Dec. 489.

[20] Crittenden v. Springfield Fire & Marine Ins. Co. 85 Iowa, 652, 39 Am. St. Rep. 321, 52 N. W. 548.

[1] Breuner v. Liverpool & London & Globe Ins. Co. 51 Cal. 101, 21 Am. Rep. 703.

mill or manufactory then carrying on a certain business, subsequently changes the same exclusively to one wherein the chances of loss by fire are greatly increased, in that the material insured is more quickly ignited and combustible.[2]

**§ 2207a. Same subject: conspiracy to burn property: fraud.**—A conspiracy, unaccompanied by an overt act, to burn insured property, in which the owner joins, does not, although it is in process of accomplishment at the time the property is destroyed by fire, avoid the policy, under provisions that the policy shall be void in case of any fraud touching any matter relating to the subject of the insurance, or if the hazard is increased by any means within the control or knowledge of the insured.[3]

**§ 2207b. Same subject: attempt to burn property.**—A mere possibility that an unsuccessful attempt by an unknown person to burn an insured building may be repeated, coupled with failure to take any adequate measures to prevent it or to notify the insurer, is not an increase of hazard which will avoid the policy, under a provision that it shall be void if the hazard is increased by any means within the control or knowledge of the insured.[4]

**§ 2208. Notice of increase of risk: waiver.**—As a general rule, if the policy is conditioned to be void in case notice is not given to the insurers of any increase of risk, failure to give notice will defeat a recovery on the policy for any subsequent loss.[5] A similar rule also prevails where by-laws of a mutual company containing a provision such as the above are made a part of the policy.[6] The insured is bound only to give notice to the company of any change of which he has knowledge, and by which he knows the rate of insurance will be increased, when the conditions of the policy require him to give notice to the company of any change in the insured or neighboring premises, or in the use or occupation of the same, whereby the risk is increased so as to increase the rate

[2] Progress Spinning & Knitting Mills Co. v. Southern National Ins. Co. 42 Utah, 263, 45 L.R.A.(N.S.) 122, 130 Pac. 63, 42 Ins. L. J. 704.

On change in use or condition of mill or factory as avoiding policy, see note in 45 L.R.A.(N.S.) 123.

[3] Ampersand Hotel Co. v. Home Ins. Co. 198 N. Y. 495, 28 L.R.A. (N.S.) 218, 91 N. E. 1099, 39 Ins. L. J. 1031.

[4] Williamsburg City Fire Ins. Co. v. Weeks Drug Co. 103 Tex. 608, 31 L.R.A.(N.S.) 603, 132 S. W. 121.

On indications that building may be intentionally set on fire as an increase of risk, see note in 31 L.R.A. (N.S.) 603.

[5] Peoria Sugar Refining Co. v. People's Fire Ins. Co. 24 Fed. 773; Gardiner v. Piscataqua Marine & Fire Ins. Co. 38 Me. 439; Kern v. South St. Louis Mutual Ins. Co. 40 Mo. 19; Franklin Fire Ins. Co. v. Grawer, 100 Pa. St. 266.

[6] Calvert v. Hamilton Mutual Ins. Co. 1 Allen (83 Mass.) 308, 79 Am. Dec. 744.

of insurance.[7] If an insurance on a "builder's risk" on a factory and its machinery, the building being in the course of construction, stipulates for notice to the company as soon as manufacturing is ready to begin, and that the rate shall be adjusted, but that the use of the premises so as to increase the risk shall avoid the policy, there must be a notice or readjustment of the rate before the actual beginning of manufacturing, and there must be a notice of a use or occupancy beyond the ordinary hazard of a builder's risk, otherwise the policy will be void, but the fact of manufacturing without notice of readjustment, or of increase or risk without notice or consent, is for the jury.[8] But where by the terms of a policy the insured was bound to give notice to the company of an increase of risk, and the company was to have the option thereupon to terminate the insurance, and the insured did increase the risk, but failed to notify the company thereof, and the insured property was subsequently destroyed, but not by reason of such increased risk, it was held that the liability of the company on the policy still continued, as it could not be certainly assumed that the company, if notified, would have terminated the insurance.[9] If the policy is to be void in case notice of any increase of risk is not given, notice must be given within a reasonable time, in the absence of any limitation as to time in the policy.[10] And where it is optional with the insurer as to whether an increase avoids the policy, the decision must also be made within a reasonable time.[11] Notice of

[7] Rife v. Lebanon Mutual Ins. Co. 115 Pa. St. 530, 2 Am. St. Rep. 580, 6 Atl. 65.

[8] Phœnix Ins. Co. v. Franklin Brass Co. 7 U. S. C. C. A. 144, 8 U. S. App. 451, 58 Fed. 166. "We think the court should have instructed the jury in simple positive terms: 1. That unless the insurer was previously notified of the readiness of the insured to commence manufacturing operations, and unless the rate of insurance was adjusted and fixed, an actual commencement of the manufacturing of goods would release it; and 2. That during the period antecedent to readiness for commencing the work of manufacturing, if the insured so used or occupied the premises as to increase the risk of the insurer beyond the ordinary hazard of builders' risks, the latter would not be responsible for loss by fire if its consent had not been given upon previous notice; leaving it to the jury to decide upon the questions of fact whether there had, before the fire, been a commencement of manufacturing operations without notice of readiness to commence to the insurer and without a readjustment of the rate; or, if not, whether there had been an increase of the risk of fire without notice to or consent of the insurer. The court erred in failing to give such instructions:" Phœnix Ins. Co. v. Franklin Brass Co. 8 U. S. App. 460, per Hughes, D. J.

[9] Joyce v. Maine Ins. Co. 45 Me. 168, 71 Am. Dec. 536.

[10] Pim v. Reid, 6 Man. & G. 1, 6 Scott (N. R.) 982, 12 L. J. C. P. 299; Canada Landed Credit Co. v. Canada Agricultural Ins. Co. 17 Grant Ch. (U. C.) 418.

[11] Lattomus v. Farmers' Mutual Fire Ins. Co. 3 Houst. (Del.) 404.

an increase of risk given during the life of the original policy will run through subsequent renewals.[12] A condition of policy upon farm buildings, requiring notice of any change material to the risk, does not include the use of a steam engine upon one occasion in connection with a machine for crushing grain, but refers to a structural alteration in the premises, or habitual or permanent alteration in the nature of the work or business carried on.[13] Knowledge of the agent of a mortgagee for whose benefit a building is insured that the owner of the building is doing that which increases the hazard, is knowledge of the mortgagee, within a provision of the policy avoiding it in case of increase of hazard not communicated to the company.[14] A violation of a clause against increase of hazard, is not waived by the insurer canceling the policy by letter at about the date of a fire, on the ground of such violation.[15]

§ 2209. **Prohibited use of premises.**—The fact that the insured property is described in the policy as being used for a certain purpose does not constitute a warranty that there shall be no other use subsequent to effecting the insurance. Though there may, however, in the absence of any express stipulation, be a change in the use, yet if there is such a change as increases the risk, the policy will be void. No change which does not increase the risk will avoid the policy.[16] The policy may, and generally does, prohibit any change in the use or occupation of the insured premises. A frequent condition is that prohibiting any change which shall increase the risk. Where a policy contained a condition avoiding it in case the premises "shall be occupied or used so as to increase the risk," and at the time of the insurance there was a planer in the mill which was used occasionally to plane lumber cut in the mill, and this use was continued after the policy was issued, it was held that the condition only prohibited a new and different use from that to which the property was applied when the policy was issued and a use by which the risk was increased.[17] A condition of this nature is held to be a continuing warranty.[18] The fact that the

[12] People's Ins. Co. v. Spencer, 53 Pa. St. 353, 91 Am. Dec. 217.

[13] Johnston v. Dominion Grange Mutual Fire Ins. Co. 23 Ont. App. 729. See § 2598 herein.

[14] Cole v. Germania Fire Ins. Co. 99 N. Y. 36, 1 N. E. 38.

[15] Ruffner Bros. v. Dutchess Ins. Co. 59 W. Va. 432, 115 Am. St. Rep. 924, 53 S. E. 943.

[16] Wood v. Hartford Ins. Co. 13 Conn. 533, 35 Am. Dec. 92; Blood v. Howard Fire Ins. Co. 12 Cush. (66 Mass.) 472; Reynolds v. Commerce Ins. Co. 47 N. Y. 597; Crane v. City Ins. Co. 2 Flip. (U. S. C. C.) 576, 3 Fed. 558.

[17] Whitney v. Black River Ins. Co. 72 N. Y. 117, 28 Am. Rep. 116.

[18] Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868.

prohibited use was not with the knowledge or consent of the insured, but was the act of some third party in possession, has been held to avoid the policy the same as if done by the insured himself.[19] Where the owners of a flour mill, the insurance upon which provided that it should be void if appropriated to other purposes, devoted a part of the mill for several months to the coopering business, it was held that the policy was avoided.[20] In an action upon a policy of insurance which contained a stipulation that if the premises should be "appropriated or used" for carrying on the trade of a carpenter, etc., the policies should be of no force or effect so long as any portion of the premises was so appropriated or used, and while the policy was running a box manufactory was established on the premises, but work therein had been temporarily suspended for some months before the building was destroyed by fire, it was held that the mere setting up of the machinery, etc., for the manufacture of boxes was not such an "appropriation" of a part of the premises to carpenter's work as avoided the policy, and had no other effect than to suspend the policy while the factory was in actual operation.[1] Keeping a barroom for the purpose of retailing liquors to boarders and others does not constitute the keeper a tavern-keeper, within the meaning of a provision within a policy against carrying on that occupation.[2] A provision, permitting the use, for the purpose of threshing the crops on the premises, of a steamthresher, with an efficient spark arrester, does not by inference prohibit the use of a steam engine in connection with a machine for threshing grain.[3]

§ 2210. **Meaning of "premises" as used in condition.**—The words "premises," as used in the policy, has been held to mean "building."[4] So where a policy was issued upon a stock of goods, and was conditioned to be void in case gunpowder was stored "upon or in the premises insured," it was held that "premises" referred to buildings, and not to goods, and that the keeping of gunpowder in the stock insured was not a keeping "upon or in the premises insured."[5]

[19] Wetherell v. City Fire Ins. Co. 16 Gray (82 Mass.) 276; First National Bank of Ballston v. Insurance Co. of North America, 50 N. Y. 45.

[20] Harris v. Columbia Ins. Co. 4 Ohio St. 285.

[1] United States Fire & Marine Ins. Co. v. Kimberly, 34 Md. 224, 227, 6 Am. Rep. 325.

[2] Rafferty v. New Brunswick Ins. Co. 18 N. J. L. (3 Har.) 480, 38 Am. Dec. 525.

On who is engaged in the liquor business within the meaning of an insurance contract, see note in 45 L.R.A.(N.S.) 1144.

[3] Johnson v. Dominion Grange Mutual Fire Ins. Co. 23 Ont. App. 729.

[4] Robinson v. Mercer County Mutual Ins. Co. 3 Dutch. (27 N. J.) 134; Mosley v. Vermont Fire Ins. Co. 55 Vt. 142.

[5] Leggett v. Ætna Ins. Co. 10 Rich. (S. C.) 202.

**§ 2211. Prohibited uses: hazardous and extra hazardous.**—Another frequent condition of the policy is that which stipulates that if the premises shall be appropriated or used for any purposes which are denominated as hazardous or extra hazardous, the policy shall be void. Such a condition has been held to amount to a promissory warranty that there shall be no such use of the premises.[6] In cases where a certain use or uses of the premises are prohibited such use or uses will avoid the policy, whether the change has thereby increased the risk or not.[7] If an insurance is effected upon a building which is to be used for a purpose denominated as hazardous in the list of hazards which is stated in the policy, the rule seems to be that any change of use to a purpose which is included in the same list of hazards will not avoid the policy.[8] The occasional occupation of the premises insured for purposes called hazardous in the conditions annexed to a policy of fire insurance will not avoid the policy; if such an occupation is connected with the buildings insured, there must be direct appropriation of the property to such use or purpose before the covenant is broken.[9] The privileges for all the purposes of the business insured will include an occupation necessary for the carrying on of such business, although it may be excepted in the provision against occupations denominated extra hazardous.[10] Under the clause of a fire policy making it void if any unauthorized hazardous trade increasing the risk is carried on in the building, the fact that such trade is carried on avoids the policy, no matter what was the cause or origin of the fire, or that such trade was carried on by the tenant of the assured without his knowledge or consent, and the fact that the insured had no knowledge of the prohibited use will not preserve the policy.[11] If there has been a breach of this condition, and the premises have been used for a prohibited purpose, the fact that the loss has not occurred from such use will not avail the insured. The policy is conditioned to be void in case of a prohibited use, and where there is such a use, the policy is void though the loss is caused by

[6] Mead v. North Western Ins. Co. 7 N. Y. (3 Seld.) 530.

[7] Allen v. Mutual Fire Ins. Co. 2 Md. 111; Jones v. Manufacturers' Ins. Co. 8 Cush. (62 Mass.) 82, 54 Am. Dec. 742; Stetson v. Massachusetts Mutual Fire Ins. Co. 4 Mass. 330, 3 Am. Dec. 217; Grant v. Howard Ins. Co. 5 Hill (N. Y.) 10.

[8] Reynolds v. Commercial Ins. Co. 47 N. Y. 597; Smith v. Mechanics' & Traders' Fire Ins. Co. 32 N. Y. 399, 29 How. Pac. 384.

[9] Merchants' & Manufacturers' Mutual Ins. Co. v. Washington Mutual Ins. Co. 1 Handy (Ohio) 408, 12 Ohio Dec. 209.

[10] Lounsbury v. Protection Ins. Co. 8 Conn. 459, 21 Am. Dec. 686.

[11] Howell v. Baltimore Equitable Soc. 16 Md. 377; Mead v. North Western Ins. Co. 7 N. Y. 530; Hoxsie v. Providence Mutual Ins. Co. 6 R. I. 517.

some risk which the policy insures against, and not by the prohibited use.[12] Conditions in a policy of fire insurance exempting the insurers from liability in case of the carrying on of extra-hazardous occupations in the building are not conditions precedent but matters of defense, and therefore need not be negatived in the declaration.[13]

§ 2212. **Where policy is only suspended during a temporary prohibited use.**—If the policy, instead of being conditioned to be void in case of a prohibited use, provides that so long as the premises shall be so appropriated or used the policy shall cease to be of force and effect, this clause will simply cause a suspension of the policy during the time of such prohibited use. In case of a prohibited use under such a condition, the insured may recover in case of a loss, provided that at the time of a loss the prohibited use has ceased and the risk has not been increased by such temporary use.[14]

§ 2213. **Uses not violation of the conditions as to prohibited use.**—A clause in a policy of insurance that a "carpenter's shop" is prohibited is not violated by the employment of a carpenter to make necessary repairs about the premises.[15] Nor does the employing of a carpenter for an occasional day's work about the insured premises avoid a policy conditioned to be void if the premises are used for any trade, business, or vocation classed as hazardous.[16] The making of brooms by hand has been held not to be within the meaning of a condition that the policy shall be void if the building is used for "mills and manufactories of any kind." [17] The condition against a change of use is not violated by the use of a stove in the insured building, where such use is connected with the work of finishing the building.[18]

§ 2214. **Change in "situation or circumstances affecting the risk."**—The insured contracts with reference to the ordinary use

[12] Mead v. North Western Ins. Co. 7 N. Y. 530; Jones Manufacturers' Co. v. Manufacturers' Ins. Co. 8 Cush. (62 Mass.) 82, 54 Am. Dec. 742; Murdock v. Chenango Ins. Co. 2 Const. (N. Y.) 210; Clark v. Manufacturers' Ins. Co. 2 Wood. & M. (U. S. C. C.) 472, Fed. Cas. No. 2,829, 5 Fed. 692.

[13] Lounsbury v. Protection Ins. Co. 8 Conn. 459, 21 Am. Dec. 686.

[14] New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 22. *Compare* Smith v. Mechanics' Ins. Co. 32 N. Y. 399. See also Lounsbury v. Protection Ins. Co. 8 Conn. 459, 21 Am. Dec. 686; Keenan v. Missouri Ins. Co. 12 Iowa, 126; Phœnix Ins. Co. v. Lawrence, 4 Met. (61 Ky.) 9, 81 Am. Dec. 521.

[15] Lounsbury v. Protection Ins. Co. 8 Conn. 459, 21 Am. Dec. 686.

[16] Westchester Fire Ins. Co. v. Foster, 90 Ill. 121. See also Grant v. Howard Ins. Co. 5 Hill (N. Y.) 10.

[17] Franklin Fire Ins. Co. v. Block, 57 Pa. St. 74.

[18] Troy Fire Ins. Co. v. Carpenter, 4 Wis. 20.

of the insured premises, and any use which is necessary to the proper use and enjoyment of the property will not avoid the policy, unless expressly prohibited. Thus, where before the issuing of a policy of fire insurance a dummy-engine had been used near the insured building as often as its use was required, it was held that its subsequent use when required, although it increased the risk, did not make void the policy under a provision therein contained that "if the situation or circumstances affecting the risk shall be so altered or changed as to increase the risk," the policy should be void.[19]

§ 2215. **Condition as to smoking upon the premises.**—A condition in a policy of insurance that there shall be no smoking upon the insured premises is fulfilled if the insured complies with the condition on his part, and exercises reasonable diligence and care in preventing others from smoking on the premises. It is an undertaking on the part of the insured that there shall be no smoking with his consent.[20]

§ 2216. **Ceasing to operate factory, etc.: operating factory, etc., at night.**—A condition in a policy of insurance upon a building used for manufacturing purposes that it shall be void if the factory ceases to be operated, is not avoided by a merely temporary suspension of business, either for the purpose of repairs or for the want of materials.[1] So a condition against any cessation of operation

[19] Commonwealth v. Hide & Leather Ins. Co. 112 Mass. 136, 17 Am. Rep. 72.

[20] Insurance Co. of North America v. McDowell, 50 Ill. 120, 99 Am. Dec. 497. Here the court said: "In the application it was stated that smoking was not allowed. It appears that at one time smoking was done in the mill, but that it was prohibited by the insured as soon as they were informed that it was prohibited by the policy, and a notice was posted in the mill. This was some time before the loss. In such a case the insured only undertakes that he will not do the act or allow others to, if he can, by reasonable precaution, prevent it. Where the insured prohibited smoking and posted the notice, he did all that was required of him:" See Aurora Fire Ins. Co. v. Eddy, 55 Ill. 213.

[1] American Fire Ins. Co. v. Brighton Cotton Mfg. Co. 125 Ill. 131. In this case Scott, J., said: "After policy was written lease was made with the consent of the company. The lessees had operated the mill up to within a week of its destruction. Then most of the hands were discharged until their services should be again needed. There is evidence to show that the employees understood that the suspension of work was to be but for a short time. For the purpose of starting up, the lessees were getting in coal and doing other things indicating an intention to resume business. All the plant and much valuable material was in the building. One of the lessees was at the building when fire was discovered, and had come there with money to pay persons engaged as laborers about the mill. It is plain that the building was at no time 'vacant and unoccupied' in the sense those terms are used in the policy:" Brighton Mfg. Co. v. Redding Fire Ins. Co. 33

of an insured mill for ten consecutive days, has no reference to such temporary cessations as occur in the usual course of business, or arise from causes beyond the control of the insured.[2] And if insurer knows that continuous operation of an ice factory is impossible, the policy will not be avoided by a vacancy or cessation of operation for ten days, although the policy may be so conditioned.[3] So the operation of a mill at night under a permit by assurer's agent does not breach the condition, where said operation has ceased several months before the fire occasioning the loss.[4] Again, the temporary closing of an insured mill for forty-two days without notice to the insurers, when such closing is caused by want of logs to manufacture, such logs being daily expected, but detained by low water, is not such "ceasing to operate" as will avoid a policy of fire insurance providing that it shall become void if "the mill shall cease to be operated" without notice to or consent of the insurers.[5] And a condition as to insured mill that the non-operation for ten consecutive days will avoid the policy, is not violated by a cessation of operation for want of water-power in the winter, when the fact that the mill could not be operated in severe winter weather on account of a lack of water power was an existing fact known to the insurer at the time of issuing the policy.[6] So where the policy stipulated that it should be avoided if the manufactory insured should cease to be operated for more than ten consecutive days, and the agent of the insurer, knowing that operations were compelled to be suspended during certain seasons of the year, owing to the freezing of the water in the mill-race, had granted repeated renewals of said policy, a renewal term extending over the period of the loss operates as a waiver of the condition,

Fed. 232; Brighton Mfg. Co. v. Fire Ins. Co. of Philadelphia, 33 Fed. 234; Brighton Mfg. Co. v. Reliance Ins. Co. 33 Fed. 235; Brighton Mfg. Co. v. Fire Ins. Co. of Pennsylvania, 33 Fed. 236; Lebanon Mutual Ins. Co. v. Leathers, 5 Sadler (Pa.) 226, 20 Wkly. Not. Cas. 107, 8 Atl. R. 424; Poss v. Western Assur. Co. 7 Lea (75 Tenn.) 704, 40 Am. Rep. 68.

See §§ 2239, 2240 herein.

[2] Waukau Milling Co. v. Citizens' Mutual Fire Ins. Co. (Waukau Milling Co. v. Bower City Mutual Fire Ins. Co.: Waukau Milling Co. v. Central Manufacturers' Mutual Ins. Co.) 130 Wis. 47, 118 Am. St. Rep. 998, 109 N. W. 937.

[3] Morotock Ice Co. v. Pankey, 91 Va. 259, 21 S. E. 487.

[4] Strause v. Palatine Ins. Co. 128 N. Car. 64, 36 S. E. 256.

[5] City Planing & Shingle Mill Co. v. Merchants', Manufacturers' & Citizens' Mutual Fire Ins. Co. 72 Mich. 654, 16 Am. Rep. 552, 40 N. W. 777. See also Rosenerans v. Insurance Co. of North America, 66 Mo. App. 352, 2 Mo. App. Rep. 1362.

[6] Waukau Milling Co. v. Citizens' Mutual Fire Ins. Co. (Waukau Milling Co. v. Bower City Mutual Fire Ins. Co.: Waukau Milling Co. v. Central Manufacturers' Mutual Ins. Co.) 130 Wis. 47, 118 Am. St. Rep. 998, 109 N. W. 937.

even though during said renewal term the operations have ceased, owing to said cause, for more than the stipulated period.[7]

Where the property insured was described as a frame building, while occupied as a flour and roller mill, and covers also, by construction to prevent a forfeiture, machinery used in the manufacture of meal, bran and other feed products, and at the time the policy was issued the mill was not used for the manufacture of flour nor for a longer period than ten days thereafter, but was used and operated for the manufacture of meal, bran, and other feed products from the time the insurance was effected until the property was destroyed, it was decided that operations had not ceased within the policy intent.[8] So where the insured property consisted of a smelter, and a furnace as subsequently placed therein by permission of the insurer and was in full operation, requiring the working of five or six men, and in connection with it one of the boilers and also the tools and water-pipes on the premises, and the buildings were occupied for the storage of ores and other materials, the premises were not idle and unoccupied within the meaning of a condition in the policy against their being idle, and unoccupied, though four boilers therein were not in use, nor were other parts of the building used except as above stated.[9] A building used as a shoe factory may be considered of itself a manufacturing establishment, and so also may the machinery, furniture, etc., used in the business, where they are insured by separate policies, providing in statutory language that they shall be void if the premises insured are a manufacturing establishment and operations therein cease for more than thirty days, although in strictness the establishment must consist of the building, machinery, etc., combined.[10] But where machinery and merchandise are exclusively insured and the machinery is personalty, it is not a manufacturing establishment, so that ceasing to operate the same is not a ground of forfeiture. A distinction exists between such a case and one where the manufactory is itself insured and the machinery therein is used in connection with its operation, in which

[7] Bellevue Roller Mill Co. v. London & Liverpool Fire Ins. Co. 4 Idaho, 307, 39 Pac. 196.

[8] Capital Fire Ins. Co. v. Carroll, 26 Okla. 286, 109 Pac. 535, 39 Ins. L. J. 1258. See also Central Montana Mines Co. v. Fireman's Fund Ins. Co. 92 Minn. 223, 99 N. W. 1120, 100 N. W. 3, 33 Ins. L. J. 745. *Compare* Mecca Fire Ins. Co. v. Coughlan, — Tex. Civ. App. —, 134 S. W. 266, 40 Ins. L. J. 816; Progress Spinning & Knitting Mills Co. v. Southern National Ins. Co. 42 Utah, 263, 45 L.R.A.(N.S.) 122n, 130 Pac. 63.

[9] Mackintosh v. Agricultural Fire Ins. Co. 150 Cal. 440, 119 Am. St. Rep. 234, 89 Pac. 102.

[10] Stone v. Howard Ins. Co. 153 Mass. 475, 11 L.R.A. 771, 27 N. E. 6.

latter case the forfeiture clause for non-operation would apply.[11] Boots and shoes in a shoe factory do not constitute part of the manufacturing establishment, so that the suspension of operations in the factory will defeat insurance on them under a policy providing that it shall be void if the premises insured are a manufacturing establishment and operations therein cease for more than thirty days; but machines, tools and furniture are to be regarded as part of the establishment, under a similar policy.[12] Again, machinery and apparatus used in the business of manufacturing leather and morocco, including boiler, engine, etc., being the only property covered by a policy of insurance, do not constitute a mill, and the standing still thereof does not create a forfeiture, under a policy which provides that "if a building covered by this policy shall become vacant or unoccupied, or if a mill or manufactory shall stand idle, . . . all liability thereupon shall cease," where a further provision of the policy as to the falling of a building expressly declares that the policy shall cease as to property therein as well as to the building.[13] So a policy on an idle distillery described by written words as "occupied by the assured as a distillery," and in which the assured has an office which he occupies, is not void because the distillery is not in operation, notwithstanding a condition that the policy shall be void if it "ceases to be operated for more than ten consecutive days." [14] And insurance of a building which is not in operation as a manufactory at the time, as "occupied as an ice factory," does not require its operation as such, to make the policy valid, under a provision that the policy shall be void if on a manufacturing establishment which shall cease to be operated for ten consecutive days.[15]

If a policy insuring a mill provides that it shall be void if the mill is run extra hours, but fixes no hours within which the mill may run, it cannot be declared void merely because the mill is sometimes run nights.[16] So it is held that if a policy containing such a condition is issued and delivered by a general agent of the company, who has knowledge of the fact that the factory has always been operated at night, and also knows that such use is to be continued, and it is in fact continued with his knowledge, the

[11] Phenix Ins. Co. v. Holcomb, 57 Neb. 622, 73 Am. St. Rep. 300, 78 N. W. 300, 28 Ins. L. J. 238.

[12] Stone v. Howard Ins. Co. 153 Mass. 475, 11 L.R.A. 771, 27 N. E. 6.

[13] Halpin v. Insurance Co. of North America, 120 N. Y. 73, 8 L.R.A. 79, 23 N. E. 989.

[14] Louck v. Orient Ins. Co. 176 Pa. 638, 33 L.R.A. 712, 35 Atl. 247, 38 Wkly. N. C. 550.

[15] Home Ins. Co. v. North Little Rock Ice & Electric Co. 86 Ark. 538, 23 L.R.A.(N.S.) 1201, 111 S. W. 994.

[16] German-American Ins. Co. v. Steiger, 109 Ill. 254.

condition is waived.[17] But a breach of the condition as to operating a mill at night, is not waived by the adjuster's acts in delivering blanks for proofs of loss.[18]

A condition forbidding the cessation of the operation of the insured establishment without the consent of the insured, is valid, reasonable and proper.[19] So a condition that insured shall not run the factory at night without permission from the company indorsed upon the policy, is binding upon the insured.[20] And it is decided that neither the fact that a person insured usually ceases the operation of his shoe factory during the dull season, nor the general custom of other manufacturers to do the same thing, can render nugatory a provision in his policy that it shall be void if the factory ceases operations for more than thirty days.[1]

**§ 2216a. Same subject: when condition violated: instances.**—If a policy specifies a certain number of days as the limit of its ceasing to be operated, as where it is conditioned to be void if the mills insured should remain idle, from any cause whatever, for the period of twenty days without notice to the company, it is held that the fact that the premises are closed for the purpose only of making necessary repairs is immaterial, where done in violation of the condition.[2] And there is a forfeiture where a creamery is idle for a longer time than that permitted by the condition, except that it is occasionally operated and is used for storage of butter, and shipments were made therefrom from time to time.[3] A sawmill is also shut down within the provision of a policy rendering it void if the works insured shall remain shut down for more than thirty days without permission from the insurer; where it is not running and nothing is done in or about it except to take away and ship lumber previously cut, and to prepare the machinery for winter by removing belts, etc.[4] And a condition forbidding the cessation

[17] American Central Ins. Co. v. McCrea, 8 Lea (76 Tenn.) 513, 41 Am. Rep. 647. *Compare* Houghton v. Manufacturers' Mutual Ins. Co. 8 Met. (49 Mass.) 114, 41 Am. Dec. 489.

[18] Alspaugh v. British America Ins. Co. 121 N. Car. 280, 28 S. E. 415, 27 Ins. L. J. 441.

On furnishing blanks for proofs of loss or claim as a waiver of breaches of condition or forfeiture, see note in L.R.A.1917A, 1065.

[19] Dover Glass Works Co. v. American Fire Ins. Co. 1 Marv. (Del.) 32, 65 Am. St. Rep. 264, 29 Atl. 1039.

[20] Reardon v. Faneuil Hall Ins. Co. 135 Mass. 121.

[1] Stone v. Howard Ins. Co. 153 Mass. 475, 11 L.R.A. 771, 27 N. E. 6.

[2] Day v. Millowners Mutual Fire Ins. Co. 70 Iowa, 710, 29 N. W. 443.

[3] Cronin v. Fire Association of Philadelphia, 123 Mich. 277, 6 Det. L. N. 1048, 29 Ins. L. J. 564. See Downs v. German Alliance Ins. Co. (Del. Super. Ct. 1906) 36 Ins. L. J. 767.

[4] McKenzie v. Scottish Union &

of the operation of the insured establishment, without the consent of the insurer, and providing for the care and supervision of the workmen, and also providing that a breach of such condition shall avoid the policy, is broken, and the insurance terminated, when the business is discontinued and the operation of the establishment has ceased without the consent of the insurer, although watchmen are provided and kept in the establishment continually until the loss and fire occur.[5] Again, getting shingle bolts to the mill, selling and shipping shingles therefrom, and placing some shingles in the dry kiln without turning on the steam, are not an operation of the mill when the machinery is stopped, so as to prevent an operation of the clause in an insurance policy making it void if the property is shut down or idle for more than thirty days without permission.[6] So running a mill day and night violates the contract, especially so where it appears assured knew that a much higher premium would have been charged for night operation; and assured is not aided by the fact that he had never seen the policy and had no knowledge of its contents, it having been taken out in the mortgagors' name for the mortgagees' benefit on the application of the former.[7] An allegation that the hazard of the burning of a shingle mill was increased after the issuance of an insurance policy thereon, is supported by evidence that the mill was allowed to remain idle, where the facilities for extinguishing fires were largely dependent upon the mill being in operation.[8] If successive permits are given to cease operations and a loss occurs after expiration of the time limit under the last permit there can be no recovery and it constitutes no excuse that insured had not renewed the permit because of notice of cancelation but on the contrary the failure to renew evidences that insured regarded said notice of cancelation as effective and therefore took no further steps under the policy.[9]

**§ 2217. Use of stoves on premises: fires.**—In the absence of any provision prohibiting the use of additional stoves upon the insured premises, the mere putting up of additional stoves will not avoid the policy, unless it be shown that the risk has been thereby increased.[10] The fact that the insured has stated in his application

National Ins. Co. 112 Cal. 548, 44 Pac. 922, 25 Ins. L. J. 561.

[5] Dover Glass Works v. American Fire Ins. Co. 1 Marv. (Del.) 32, 65 Am. St. Rep. 264, 29 Atl. 1039.

[6] Brehm Lumber Co. v. Svea Ins. Co. 36 Wash. 520, 68 L.R.A. 109, 79 Pac. 34.

[7] Alspaugh v. British-American Ins. Co. 121 N. Car. 290, 28 S. E. 415, 27 Ins. L. J. 441.

[8] Brehm Lumber Co. v. Svea Ins. Co. 36 Wash. 520, 68 L.R.A. 109, 79 Pac. 34.

[9] El Paso Reduction Co. v. Hartford Fire Ins. Co. (U. S. C. C.) 121 Fed. 937, 32 Ins. L. J. 758.

[10] Newhall v. Union Mutual Ins. Co. 52 Me. 180.

As to pleadings as to placing stoves in barns; violation of mutual association's rules against insuring

"no stoves used" does not constitute a continuing warranty that none shall be used.[11] The policy may, however, prohibit the use of stoves entirely, or limit their use, and if the condition is violated, it will avoid the policy. Thus, where a policy prohibited the building of any fire upon the insured premises except in a small stove in the office, it was held that the placing of a stove in another part of the building and its subsequent use without the consent of the insurers would avoid the policy.[12] A covenant in the policy that insurer "will not be answerable for any loss arising from the use of fires in buildings unprovided with a good, substantial stove or brick chimney" does not require that a stove in which fires are used should be built into and form part of a brick chimney.[13]

§ 2218. **Use of premises for unlawful purposes.**—If it is provided by the policy or by the by-laws of a mutual company that, in case the insured buildings are appropriated to any illegal uses, the agent of the company must insist that such use shall cease, or else cancel the policy, the appropriation of the building to an illegal purpose will not of itself avoid the policy.[14] But if a policy is conditioned to be void in case the building is used for an unlawful purpose, it is avoided by the storage and sale of intoxicating liquors without a license;[15] and it is held that such unlawful use will avoid the policy, though insured had no knowledge thereof.[16] The carrying, however, of a large stock of liquors in a drug store with occasional unlawful sales, does not avoid the policy on the goods as a matter of law.[17] Where a house insured is occupied by a tenant at the time of the delivery of the policy and of the loss, the fact that the premises were used for an unlawful purpose without the knowledge of the insured will not avoid the policy when it does not prohibit such illegal use and the loss does not result therefrom.[18] The keeping of a bawdyhouse will, however, avoid a policy upon a dwelling-house which is conditioned to be void in case of a change of use.[19] And if the hazard is increased by conducting a gambling establish-

barns, see Farmers' Mutual Fire Ins. Co. v. Hill, 45 Ind. App. 605, 91 N. E. 361, 39 Ins. L. J. 721.

[11] Aurora Fire Ins. Co. v. Eddy, 55 Ill. 213.

[12] Daniels v. Equitable Fire Ins. Co. 50 Conn. 551.

[13] Madsden v. Phœnix Ins. Co. 1 S. C. 24.

[14] Behler v. German Mutual Fire Ins. Co. 68 Ind. 347.

[15] Kelly v. Worcester Ins. Co. 97 Mass. 284.

[16] Kelly v. Worcester Ins. Co. 97 Mass. 284; Jones v. Fireman's Ins. Co. 2 Daly (N. Y.) 307, s. c. 51 N. Y. 318. *Examine* Allen v. Home Ins. Co. 133 Cal. 29, 65 Pac. 138, 30 Ins. L. J. 711.

[17] Kellogg v. German American Ins. Co. 133 Mo. App. 391, 113 S. W. 663.

[18] Nebraska & Iowa Ins. Co. v. Christensen, 29 Neb. 572, 26 Am. St. Rep. 407, 45 N. W. 924. See § 2222 herein.

[19] Cedar Rapids Ins. Co. v. Shimp, 16 Bradw. (Ill. App.) 248.

ment upon the premises, the policy is avoided in the absence of a waiver.[20] In this connection, consideration should also be given to those cases where property is represented or warranted to be used for certain purposes, as where it is insured while occupied as a dwelling-house and it is used for an illegal or unlawful purpose, such as a bawdyhouse, thereby avoiding the policy even though such use is not expressly prohibited by the policy.[1] The commission, of a crime upon the premises will not avoid the policy. The condition refers to some actual and continued use of premises which is illegal.[2]

§ 2219. **Prohibited uses which will avoid the policy.**—If a policy prohibits certain trades as "specially hazardous" and "extra hazardous," the use of a part of the insured building for any of such trades will avoid the policy, and in such a case it is not necessary to show an increase of risk.[3] The keeping of confectionery in glass jars for the purpose of sale will avoid a policy which enumerates "confectionery" among hazardous risks which are prohibited.[4] So also will the carrying a sailmaker's stock of goods and tools into the loft of a building, though work has not actually been commenced, if the policy prohibits any hazardous business, and enumerates "sailmakers" in that clause.[5] And a policy on a woolen mill, which provides that it shall be void if the hazard is increased by any means within the control or knowledge of the insurer, becomes void when the mill is devoted to the manufacture of cotton bats.[6]

§ 2220. **Waiver of forfeiture on account of prohibited use.**—If the insurer after knowledge of uses which constitute a forfeiture, continues to treat the policy of insurance as an existing valid contract, the forfeiture is waived. Thus, where the insurer, after knowledge of the fact that the premises had been used for prohibited purposes, fixed no increased rate of premium, and continued to collect the regular assessments upon the policy, the forfeiture was held to be waived.[7]

[20] Moriarty v. United States Fire Ins. Co. 19 Tex. Civ. App. 669, 49 S. W. 132.

[1] Allen v. Home Ins. Co. 133 Cal. 29, 65 Pac. 138, 30 Ins. L. J. 711. See § 2105, and *examine* § 2537 herein.

[2] Boardman v. Merrimac Mutual Fire Ins. Co. 8 Cush. (62 Mass.) 583.

[3] Matthews v. Queen City Ins. Co. 2 Cin. (Ohio) 109, 13 Ohio Dec. 798; Lee v. Howard Ins. Co. 3 Gray (69 Mass.) 583; Dewees v. Manhattan Ins. Co. 35 N. J. 366.

[4] Wetherell v. City Fire Ins. Co. 16 Gray (82 Mass.) 276.

[5] Wetherell v. City Fire Ins. Co. 16 Gray (82 Mass.) 276.

[6] Progress Spinning & Knitting Mills Co. v. Southern National Ins. Co. 42 Utah, 263, 45 L.R.A.(N.S.) 122n, 130 Pac. 63. *Examine* Capital Fire Ins. Co. v. Carroll, 26 Okla. 286, 109 Pac. 535, 39 Ins. L. J. 1258 (*considered* under § 2216 herein).

[7] Witte v. Western Mutual Fire Ins. Co. 1 Mo. App. 188. Inasmuch, however, as the question of waiver or

**§ 2221. Notice in case of change of use: waiver.**—Where it is provided by the by-laws of a mutual insurance company that, in case the property is subjected to a more hazardous use, notice shall be given to the secretary, it has been held that a verbal notice to the general agent of the company, the treasurer, and one of the directors is sufficient, and will continue the policy in force.[8] But notice to insurer that the insured premises had been leased to a tenant, and its receipt of premiums or assessments from the owner thereafter, do not waive a provision of the policy forbidding the storing of seed cotton in the insured building.[9]

**§ 2222. Effects of acts of tenant upon insured property.**—If the risk has been increased, or if certain prohibitions of the policy have been violated by the tenant of the insured, this will be equivalent to a violation of the provisions by the insured himself, and will avoid the policy.[10] If the policy is conditioned to be void in case of any change of risk by assured "or others," [11] or in case of any increase of risk "by any means within his control," [12] the acts of tenants to whom he lets the premises will avoid the policy, though the insured has no knowledge of such acts. Where, however, the policy was conditioned to be void in case of any changes within the "control or knowledge" of the insured, it was held that acts of tenants in violation of the conditions of the policy, and of which the insured had no knowledge, would not defeat a recovery on the policy.[13] But where a policy provides that it shall be void if naphtha is used on the premises insured, the use of naphtha by a tenant of the in-

estoppel depends so largely upon the acts of insurer's agent and the extent to which insurer is chargeable therewith reference is hereby made to the chapters on agency herein.

[8] Planter's Mutual Ins. Co. v. Rowland, 66 Md. 236, 7 Atl. 257.

As to notice of increase of risk, see § 2208 herein.

[9] Edwards v. Farmers' Mutual Ins. Assoc. 128 Ga. 353, 12 L.R.A.(N.S.) 484, 57 S. E. 707.

[10] Liverpool & London & Globe Ins. Co. v. Gunther, 116 U. S. 113, 29 L. ed. 575, 6 Sup. Ct. 306 (*followed* in Gunther v. Liverpool & London & Globe Ins. Co. 134 U. S. 110, 33 L. ed. 857, 10 Sup. Ct. 448, *cited* in Norwaysz v. Thuringia Ins. Co. 204 Ill. 334, 344, 68 N. E. 551, 33 Ins. L. J. 83, 90; Thuringia Ins. Co. v. Norwaysz, 104 Ill. App. 390, 395; German Fire Ins. Co. v. Shawnee County, 54 Kan. 737, 45 Am. St. Rep. 306, 39 Pac. 697; Smith v. German Ins. Co. 107 Mich. 270, 298, 30 L.R.A. 368, 378, 65 N. W. 236); Appleby v. Firemen's Fund Ins. Co. 45 Barb. (N. Y.) 454; Diehl v. Adams County Mutual Ins. Co. 58 Pa. St. 443, 98 Am. Dec. 302.

On effect upon insurance policy of breach of condition by tenant, see note in 12 L.R.A.(N.S.) 489.

[11] Shepard v. Union Ins. Co. 38 N. H. 232.

[12] Appleby v. Firemen's Fund Ins. Co. 45 Barb. (N. Y.) 454; Wetherell v. City Fire Ins. Co. 16 Gray (82 Mass.) 276.

[13] Merrill v. North American Ins. Co. 23 Fed. 245; Nebraska & Iowa Ins. Co. v. Christiansen, 29 Neb. 572, 26 Am. St. Rep. 407, 45 N. W. 924.

sured invalidates the policy, so far as the insured is concerned, whether he knows of its use or not.[14] So an insured is chargeable with any acts of his lessee in keeping on the premises any prohibited articles, although they were not intended to be used there, but for lighting other places.[15] It is also declared that it is no excuse that insured had no knowledge as to the increase of risk, or the unlawful or illegal use of the insured property by his tenant, he cannot avoid responsibility on the ground of want of notice, by turning over the control of the premises to another for he is presumed to have notice, whether said premises are occupied by himself or his tenant.[16] And it is accordingly held that, under the ordinary condition of a policy, the fact that the owner of the premises has no knowledge that the risk has been increased or conditions as to the use of premises violated by the tenant will be no defense to a condition for forfeiture.[17] There are, however, cases which hold that the right of the insured to recover cannot be defeated by any acts of a tenant, unless done with the knowledge and consent of insured.[18]

§ 2223. **Change of occupancy: tenancy.**—If the policy contains no provision as to change of tenants, occupancy, or possession, it has been held that a mere change of tenants will not avoid the policy, though it may appear that the new tenant is more careless than the former.[19] This would certainly be true if there were no increase

[14] Badger v. Platts, 68 N. H. 222, 19 L.R.A. 587, 73 Am. St. Rep. 572, 33 N. E. 572.

[15] Gunther v. Liverpool & London & Globe Ins. Co. 134 U. S. 110, 33 L. ed. 857, 10 Sup. Ct. 448.

[16] Allen v. Home Ins. Co. 133 Cal. 29, 65 Pac. 138, 30 Ins. L. J. 711, 713.

[17] *United States.* — Liverpool & London & Globe Ins. Co. v. Gunther, 116 U. S. 113, 29 L. ed. 575, 6 Sup. Ct. 306, *followed* in Gunther v. Liverpool & London & Globe Ins. Co. 134 U. S. 110, 33 L. ed. 857, 10 Sup. Ct. 448.

*Maryland.*—Howell v. Baltimore Equitable Soc. 16 Md. 377.

*Massachusetts.*—Kelly v. Worcester Fire Ins. Co. 97 Mass. 284.

*New York.*—Duncan v. Sun Fire Ins. Co. 6 Wend. (N. Y.) 488, 489, 22 Am. Dec. 539.

*Pennsylvania.*—Long v. Beeber, 106 Pa. St. 466, 51 Am. Rep. 532; Diehl v. Adams County Mutual Ins. Co. 58 Pa. St. 443, 98 Am. Dec. 302; Fire Assoc. of Pennsylvania v. Williamson, 26 Pa. St. 196. In this case the court said: "It is not material that the landlord did not know that his tenant kept gunpowder. His contract with the insurance company was that it should not be kept without their permission, and it was his business to see that his tenants did not violate the contract."

[18] White v. Mutual Fire Assurance Co. 8 Gray (74 Mass.) 566; Hoxie v. Providence Ins. Co. 6 R. I. 517; Heneker v. British American Assurance Co. 14 U. C. C. P. 57.

[19] Lyon v. Commercial Ins. Co. 2 Rob. (La.) 266; Gates v. Madison County Mutual Ins. Co. 5 N. Y. 469, 55 Am. Dec. 360; Hobson v. Wellington District Mutual Fire Ins. Co. 6 U. C. Q. B. 356. See § 2103 herein.

Decisions as to vacancy and un-

of risk, as the insured by his statement, when obtaining the insurance, that the premises are occupied by a certain person does not warrant by such statement that the person then in possession shall continue in possession during the life of the policy. If, however, the risk is materially increased by the change of tenants, it would seem that the policy would be avoided.[20] A policy conditioned to be void in case "any change be made as to tenancy or occupancy" is not avoided by the fact that the tenant removes from the premises.[21] There is said to be no change such as is contemplated by the condition until the new tenant enters.[1] But a lease to tenants is a change in occupancy of property insured as a private dwelling where assured ceases to occupy the same.[2] The clause "change of occupants," as used in a policy of insurance, has been held to apply to personalty as well as real estate.[3] The vacancy of the premises has been held not to be "change in the nature of the occupancy," as the condition is intended to refer to an occupation for a different purpose.[4]

§ 2224. **Effect of nonoccupation of insured premises where policy only prohibits increase of risk.**—If a policy prohibits any increase of risk, and contains no prohibition or clause in regard to the premises becoming vacant or unoccupied, then the mere fact that the premises become vacant or unoccupied will not avoid the policy, unless the risk is materially increased. It has been held, however, that the fact that the premises become vacant and unoccupied will not avoid the policy, unless there is an express stipulation to that effect, even though the risk may be increased.[5] Where a policy simply provided that if the risk was increased by any means within the control of the insured the policy should be void, and if by any means not within his control notice should be given to the company which might avoid the policy it was held that a temporary vacancy between one tenancy and another was to be regarded as a part of the risk, and, in case of a longer vacancy, it was sufficient to notify the company thereof.[6] Where a building occupied as a dwelling-house

occupation in case of dwelling houses, tenements, and other property are further considered under the sections next following covering the particular clauses governing each case. See §§ 2224 et seq. herein.

[20] See §§ 2224, 2224a herein.

[21] Somerset County Mutual Fire Ins. Co. v. Usaw, 112 Pa. St. 80, 56 Am. Rep. 307, 4 Atl. 355.

[1] Alston v. Old North St. Ins. Co. 80 N. C. 326, 8 Ins. L. J. 428.

[2] Planters' Fire Ins. Co. v. Steele, 119 Ark. 597, 178 S. W. 910, 46 Ins. L. J. 617.

[3] Wadradt v. Phœnix Ins. Co. 64 Hun (N. Y.) 129, 19 N. Y. Supp. 293.

[4] Gould v. British American Assur. Co. 27 U. C. Q. B. 473.

[5] Gamwell v. Merchants' & Farmers' Mutual Fire Ins. Co. 12 Cush. (66 Mass.) 167.

[6] Lockwood v. Middlesex Mutual Ins. Co. 47 Conn. 553. See Luce v. Dorchester Ins. Co. 105 Mass. 297,

was insured as such, the policy providing that if the condition or circumstances of the property should be so changed by the act of the insured as to materially increase the risk, the policy should become void, unless the consent of the insurer to the change was obtained, it was held that the non-occupancy of the building for a year prior to its destruction by fire was not a change within the meaning of the condition in the policy.[7] But where buildings of a poor class on a cheap farm in a remote settlement without near neighbors were burned while vacant, it sufficiently appeared that the risk was increased by the vacancy so as to avoid the policy, under a condition to that effect in the policy, although the statute provided that vacancy should not be a forfeiture unless the risk was thereby increased.[8] In an action upon a policy which provided that, in case there was any change affecting the occupancy of the property whereby the risk was increased, notice should be given to the company, but which did not declare that the vacating of the premises was an increase of risk, it was held that the right of the insured to recover could not be defeated by the fact that he had moved out of the premises without notifying the insurer.[9]

**§ 2224a. Increase of risk: material to risk: clauses as to vacancy, etc.**—The words "vacant and unoccupied," when used in a policy of insurance in connection with the idea that the insurer is stipulating against an increase in the risk from the absence of persons from the premises insured, must be regarded as interchangeable, and equivalent in meaning. If no one lives in the house, it is both vacant and unoccupied, though it may contain articles of furniture which the last occupant failed to remove.[10] And where

7 Am. Rep. 522; Insurance Co. of North American v. Hannum, 11 Monaghan (Unreported Sup. Ct. Cas. Pa.) 369.

[7] Gilliat v. Pawtucket Mutual Fire Ins. Co. 8 R. I. 282, 91 Am. Dec. 229.

[8] Lancy v. Home Ins. Co. 82 Me. 492, 20 Atl. 79.

[9] Residence Fire Ins. Co. v. Hannawold, 37 Mich. 103.

[10] Moore v. Phoenix Fire Ins. Co. 64 N. H. 140, 10 Am. St. Rep. 384, 6 Atl. 27. See Moore v. Phœnix Ins. Co. 62 N. H. 240, 13 Am. St. Rep. 556. "The meaning of the words 'vacant and unoccupied,' as used in the contract of insurance, is that which the parties intended to give them; and that intention is to be found from the whole instrument, the subject-matter of the contract, and the situation of the property insured. The object of the stipulation against vacancy and nonoccupancy was to guard against the increased risk which arises from the absence of every body whose duty or interest might afford some protection. In the same clause of the contract, 'increase of risk' from the mode of occupation and use of the premises, and 'increase of risk by any means whatever,' are mentioned as express grounds for avoiding the policy. 'If the building shall be occupied or used so as to increase the risk, or become vacant and unoccupied for a period of more than ten days, or the risk be increased by any means whatever,' is a statement in which the leading

it is conditioned that vacancy for a period of thirty days avoids the policy, unless notice thereof be given, and a vacancy permit be issued, such clause should be construed with reference to its manifest purpose and contemplates protection against the hazard covered by the policy by the care and attention of a guardian of the premises, that is some individual in care thereof, who exercises a preserving superintendency over them. And within this rule a dwelling house may be vacant even though it is not actually occupied as a residence or place of abode and "it may be vacant even though far from empty of everything but air." [11] So the continued non-occupation of a dwelling-house from the time the policy was issued up to the time of the fire and over the period permitted by the policy is material to the risk.[12] Nor are the premises occupied even though the tenant and his servants had been engaged very shortly before the fire in cleaning and preparing the house for occupation.[13] And it constitutes a good defense that an insured dwelling-house became "vacant by the removal" of assured, was vacant when destroyed by fire and had been so vacant for more than thirty days prior thereto without insurer's consent, and it is unnecessary to allege also that the risk was thereby increased, nor is such vacancy clause modified by a statute relating to change increasing the risk.[14] And where a house situate on the outskirts of a city in a somewhat secluded and isolated location and quite a distance from the road with only a few neighbors but with none in close proximity and with inadequate fire protection, is permitted to remain vacant during the night, there is such a material increase or exposure to risk by said vacancy and

idea in the condition of forfeiture is 'increase of risk,' and that idea must have been intended as a part of the definition of the words 'vacant and unoccupied.' It was the increase of risk from the loss of care and attention of persons otherwise present which the parties intended to guard against by the stipulation of forfeiture in case of vacancy or non-occupancy for more than ten days. They intended by the words 'vacant and unoccupied,' as used in the policy and in the connection in which they were used, such a desertion of the premises and removal from them as would materially increase the risk." Moore v. Phoenix Fire Ins. Co. 64 N. H. 140, 142, 10 Am. St. Rep. 384, 6 Atl. 27, Allen, J.

On when insured property is vacant or unoccupied, see note in 2 L.R.A.(N.S.) 517.

[11] Robinson v. Mennonite Mutual Fire Ins. Co. 91 Kan. 850, 139 Pac. 420, condition was: "Becomes and remains vacant."

[12] Thomas v. Hartford Fire Ins. Co. 21 Ky. L. Rep. 1139, 56 S. W. 264.

[13] Thomas v. Hartford Fire Ins. Co. 21 Ky. Law Rep. 914, 53 S. W. 297, 21 Ky. L. Rep. 1139, 56 S. W. 264. Condition was: "Or if the premises . . . be unoccupied . . . or if the risk be increased." "Or if the premises . . . be unoccupied . . . or if the risk be increased."

[14] Doten v. Ætna Ins. Co. of Hartford, Conn. 77 Minn. 774, 80 N. W. 630; Laws 1895, c. 175, secs. 25, 53.

non-occupancy as to preclude recovery for loss, within a statute to that effect.[15]

But the risk is not necessarily, or prima facie, increased by the property becoming vacant or unoccupied.[16] And if the policy provides that if the premises become vacant it shall be void, it is not necessary that the vacancy should increase the risk, as the violation of the condition itself avoids the policy. So an instruction that if the jury believe that if the house was vacant as prohibited in the policy, and "further believe from the evidence that the risk was thereby increased," they should find for the defendant, was held erroneous.[17] It is also held that there must be a substantial change of risk to constitute a change of occupancy.[18] So an increase of risk or fraud of the insured is necessary to defeat a policy by reason of nonoccupancy, notwithstanding a provision in the policy that it shall be void in case of nonoccupancy without the insurer's consent, under a statute providing that the whole amount of insurance in case of total loss, or the full amount of a partial loss, shall be paid in the absence of any increase of risk without the consent of the insurer, and also of intentional fraud.[19] It is further decided that under a fire policy on household furniture non-occupation of the dwelling-house in which it is located is not of itself a change material to the risk.[20] And an independent clause in a standard fire insurance policy, providing that the policy shall be void if the property becomes vacant without the consent of the insurer, is not affected by another clause providing that the policy shall be void if the situation or circumstances affecting the risk shall be so altered as to cause increase in the risk, and such increase need not, therefore, be shown, to avoid the policy under the former clause.[1] And a statute requiring every person insuring any building to have an examination thereof made and its value fixed by his agent, and providing that, in the absence of any change in the risk without the consent of the insurers and also of fraud on the part of the assured, the whole amount of the policy shall be paid in case of a total loss, refers only to a change in the condition of the property

[15] Jones v. Granite State Fire Ins. Co. 90 Me. 40, 37 Atl. 326, 26 Ins. L. J. 611; Rev. St. c. 49, sec. 20.

[16] Moody v. Amazon Ins. Co. 52 Ohio St. 12, 26 L.R.A. 313, 49 Am. St. Rep. 699, 38 N. E. 1011.

[17] Galveston Ins. Co. v. Long, 51 Tex. 89.

[18] Driscoll v. German-American Ins. Co. 74 Hun (N. Y.) 153, 26 N. Y. Supp. 646.

[19] Moody v. Amazon Ins. Co. 52 Ohio St. 12, 26 L.R.A. 313, 49 Am. St. 699, 38 N. E. 1011; Rev. Stat. secs. 3643, 3644.

[20] Boardman v. North Waterloo Ins. Co. 31 Ont. 525, 20 Canadian L. T. 126.

[1] Knowlton v. Patrons' Androscoggin Mutual Fire Ins. Co. 100 Me. 481, 2 L.R.A.(N.S.) 517, 62 Atl. 289.

affecting its value, and does not refer to a change in the building or structure itself nor to a temporary vacancy nor does it prevent the operation of a condition of the policy making it void in the event of the property becoming vacant and unoccupied.[2] An instruction that the burden is upon assured to show that a change of occupancy if any there was, did not cause the fire or contribute thereto, and that the burden is upon assurer to show that such change, if any, increased the risk, is not error, especially so where such instruction is in accord with the statute.[3]

**§ 2225. Vacant or unoccupied and similar clauses: validity, construction and meaning thereof.**—A clause that the policy shall be void if the premises be or become vacant and unoccupied and so remain for a certain specified time, is reasonable, valid and binding.[4] So conditions avoiding a policy because the premises become "vacant or unoccupied," should receive a strict construction and when ambiguous, be construed most strongly against the insurer.[5] So the vacancy clause should, in connection with the entire contract, the property, the circumstances and intent of the parties, be reasonably construed [6] according to the ordinary acceptation of the language used and as it would be usually understood.[7] And a stipulation that the policy shall be void in case the premises become vacant or unoccupied is to be construed in view of the situation and character of the property insured, and the ordinary incidents and con-

[2] Germania Fire Ins. Co. v. Werner, 76 Ohio St. 543, 12 L.R.A.(N.S.) 456, 118 Am. St. Rep. 891, 81 N. E. 980.

[3] Seaman v. Anchor Fire Ins. Co. 149 Iowa, 583, 128 N. W. 934, 40 Ins. L. J. 370. Wording of clause does not appear.

On necessity of proof of increase of risk to avoid insurance policy because of the vacancy of the insured property, see note in 12 L.R.A.(N.S.) 456.

[4] Burner's Admr. v. German American Ins. Co. 103 Ky. 370, 20 Ky. L. Rep. 71, 45 S. W. 109, 31 Chic. Leg. N. 18, 27 Ins. L. J. 732, 733. Stipulation is "one of the parties could lawfully make and we must give it full force and effect unless it appears that it was abrogated" by subsequent agreement or waiver. Patterson v. American Ins. Co. 164 Mo. App. 157, 148 S. W. 448, 41 Ins. L. J. 1473, 1476, Johnson, J.

On when insured property is vacant or unoccupied, see note in 2 L.R.A.(N.S.) 517.

[5] Moody v. Amazon Ins. Co. 52 Ohio St. 12, 26 L.R.A. 313, 49 Am. St. Rep. 699, 38 N. E. 1011; Hampton v. Hartford Fire Ins. Co. 65 N. J. L. 265, 52 L.R.A. 344, 47 Atl. 433, 30 Ins. L. J. 141. See §§ 220 et seq. herein.

[6] Farmers' Mutual Equity Ins. Co. v. Smith, 158 Ky. 459, L.R.A.1915B, 844, 165 S. W. 675 (condition was: "Insurance will not be carried upon unoccupied buildings, unless," etc.); Home Fire Ins. Co. v. Peyson, 54 Neb. 495, 74 N. W. 960. *Examine* Silver v. London Assur. Co. 61 Wash. 593, 112 Pac. 666, 40 Ins. L. J. 479, *considered* under § 2230c herein.

[7] Stone v. Granite State Fire Ins. Co. 69 N. H. 438, 45 Atl. 235, 29 Ins. L. J. 250 clause was: "Vacant by the removal."

tingencies affecting the use to which it and other property situated similarly and of like character is subject.[8] These words should also be construed with respect to the use and adaptability of the building insured.[9] Again, in construing such a condition the courts will look to the subject matter of the contract. The occupancy of a dwelling, of a church, of a mill, or of a barn is each essentially different in its scope and character, and the construction must be with reference thereto.[10] So the word "vacant" means empty according to the ordinary sense in which the term is used.[11]

Both conditions need not be shown in order to avoid a policy of insurance under a clause making it void when "vacant or unoccupied." [12] And since these words are not synonymous, care must be taken in construing the conditions in which they are used. If a policy is conditioned to be void in case the premises become "vacant or unoccupied," the existence of either condition will avoid the policy.[13] But if, on the other hand, the policy contains the condition that it shall be void in case the premises are left "vacant and unoccupied," then they must be both vacant and unoccupied in order to defeat a recovery.[14] And the meaning of the words "vacant and unoccupied," as used in the contract of insurance, is that which the parties intended to give them; and that intention is to be found

[8] Whitney v. Black River Ins. Co. 72 N. Y. 117, 28 Am. Rep. 116.

[9] Limburg v. German Fire Ins. Co. 90 Iowa, 709, 23 L.R.A. 99, 48 Am. St. Rep. 468, 57 N. W. 626, condition was: "vacant or unoccupied."

[10] Continental Ins. Co. v. Kyle, 124 Ind. 132, 19 Am. St. Rep. 77, 9 L.R.A. 81, 24 N. E. 727; Hampton v. Hartford Fire Ins. Co. 65 N. J. L. 265, 52 L.R.A. 344, 47 Atl. 433, 30 Ins. L. J. 141.

"The better reason and clear weight of authority hold to the doctrine that a condition against vacancy and unoccupancy, usually found in insurance policies, must be construed with relation to the character or class of property to which it relates; that it should not have the same interpretation when applied to churches and schoolhouses as when applied to stores and dwellings; nor the same when applied to houses to be occupied by the owner and to houses to be occupied by tenants." Ohio Farmers Ins. Co. v. Vogel, 166 Ind. 239, 3 L.R.A.(N.S.) 966, 117 Am. St. Rep. 382, 76 N. E. 977, Hadley, J. condition was "vacant or unoccupied or occupied by tenants."

[11] Agricultural Ins. Co. v. Owens, — Tex. Civ. App. —, 132 S. W. 828. Condition was: "Vacant or unoccupied." See also Gash v. Home Ins. Co. of N. Y. 153 Ill. App. 31, 33, Shirley, J.; Norman v. Missouri Town Mutual Fire, Lightning, T. C. & W. Ins. Co. 74 Mo. App. 456, 1 Mo. App. Repr. 259. See § 2228 herein.

[12] Limburg v. German Fire Ins. Co. 90 Iowa, 709, 23 L.R.A. 99, 48 Am. St. Rep. 468, 57 N. W. 626.

[13] Herman v. Adriatic Ins. Co. 85 N. Y. 162, 39 Am. Rep. 644. See § 2230 herein. But *compare* Covey v. National Union Fire Ins. Co. Cal. App. 161 Pac. 35 ("vacant or unoccupied," tenancy; "unoccupied" and "vacant" synonymous.)

[14] Hermann v. Merchants' Ins. Co. 81 N. Y. 184, 37 Am. Rep. 488. See § 2229 herein.

from the whole instrument, the subject-matter of the contract, and the situation of the property insured.[15]

The word "occupied," in reference to a dwelling place, means actual use of the premises by human beings as their customary place of abode.[16] And if there is an exception of liability in case an insured dwelling-house remains unoccupied for seven days, and it is continuously unoccupied for a longer period, the court may properly direct a verdict for the insurer.[17] But a church is not "vacant" and "unoccupied," as a matter of law, within the meaning of a clause respecting such nonoccupancy for more than ten days without written consent of the insurer, merely because no services are held in it and the windows are boarded up for more than that period because there is no minister to officiate.[18] If, however, the policy be upon a factory or mill, and contains a vacancy clause, it is not necessary for any one to reside in the building during the night season, unless the policy expressly requires it. The occupation of the premises as a storehouse will not be a compliance with the condition; there must be some actual use thereof in accordance with the purposes and use of such a building.[19]

Inasmuch as vacancy provisions are to be construed with relation to the character or class of property insured, they should not have the same interpretation when applied to houses to be occupied by the owner, as to houses to be occupied by tenants.[20] And as the vacancy clause should, in connection with the entire contract, the property, the circumstances and intent of the parties be reasonably construed, and there is no such breach of a condition as to vacancy where the insured dwelling-house is only vacant for a reasonable time between the moving out and moving in of tenants.[1]

[15] Moore v. Phoenix Fire Ins. Co. 64 N. H. 140, 142, 10 Am. St. Rep. 384, 6 Atl. 27, Allen, J. See § 2229 herein.

[16] Bonefant v. American Fire Ins. Co. 76 Mich. 653, 43 N. W. 682; Weidert v. State Ins. Co. 19 Or. 261, 20 Am. St. Rep. 809, 24 Pac. 242, 19 Ins. L. J. 740; Burner's Admr. v. German American Ins. Co. 103 Ky. 370, 20 Ky. L. Rep. 71, 45 S. W. 109, 31 Chic. Leg. N. 18, 27 Ins. L. J. 732, White, J. "Unoccupied," "Occupancy," see Gash v. Home Ins. Co. of N. Y. 153 Ill. App. 31, 33, Shirley, J. See §§ 2227 et seq. herein.

[17] Thompson v. Caledonia Fire Ins. Co. 92 Wis. 664, 66 N. W. 801.

[18] Hampton v. Hartford Fire Ins. Co. 65 N. J. Law, 265, 52 L.R.A. 344, 47 Atl. 433, 30 Ins. L. J. 141.

[19] Halpin v. Insurance Co. of North America, 120 N. Y. 70, 23 N. E. 988.

[20] Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 3 L.R.A.(N.S.) 966, 117 Am. St. Rep. 382, 76 N. E. 977, condition was "vacant or unoccupied." As to tenements, see instances under §§ 2227 et seq. herein.

On effect on vacancy clause of tenant's removal without owner's knowledge, see note in 3 L.R.A.(N.S.) 966.

[1] Farmers' Mutual Equity Ins. Soc. v. Smith, 158 Ky. 459, L.R.A.1915B, 844, 165 S. W. 675. In this case one tenant vacated on Saturday evening and another was to move in the fol-

Nor is a policy for several years on premises to be occupied by tenants, rendered void by short vacancies caused by the lapse of a reasonable time in changing tenants.[2] And the rule is, that if a policy upon leased premises contains a condition prohibiting vacation of occupation without the written consent of the insurer, a reasonable time must be allowed to carry out a change of tenants or occupancy, without imposing upon the insured the penalty of either an intended or permitted vacation of the insured premises.[3] A building is not vacant or unoccupied where a tenant has only partially moved out his furniture the day preceding the fire, leaving a portion thereof remaining in the building.[4]

**§ 2225a. "Vacant, unoccupied and uninhabited:" "vacant, unoccupied or uninhabited."**—The words "vacant, unoccupied and uninhabited" mean that if the house insured should cease to be used as a place of human habitation, or for living purposes, there would be a forfeiture.[5] The term "uninhabited" should be used in its ordinary sense as not being a place of abode, a dwelling, a habitation.[6] The meaning of the terms "vacant, unoccupied or uninhabited" is a question of law, but whether at the time of the fire it was "vacant," etc., is a question of fact.[7] No recovery can be had under a policy stipulating that the policy shall be void if the property insured shall become vacant, unoccupied, or uninhabited without the consent of the insurer, where the loss by fire occurred while the building was vacant without the knowledge or consent of the insurer.[8] So merely storing furniture and going only occasionally to the house to look after the same and to do unimportant acts, not looking to the protection of the property, does not save a forfeiture under a condition voiding the policy if the house is vacant, unoccupied, and uninhabited.[9]

lowing Monday but the house burned in the interval condition was: "Insurance will not be carried upon unoccupied buildings unless covered by a vacancy permit."

On vacancy during change of tenant as violation of vacancy clause in fire policies covering rented premises, see note in L.R.A.1915B, 844.

[2] Worley v. State Ins. Co. 91 Iowa, 150, 51 Am. St. Rep. 334, 50 N. W. 16. Condition was: "or if there is any change in the occupant or occupancy of the premises insured, or if they become vacant."

[3] Doud v. Citizens' Ins. Co. 141 Pa. St. 47, 23 Am. St. Rep. 263, 21 Atl. 505. See § 2225c herein.

[4] Liverpool & London & Globe Ins. Co. v. Buckstaff, 38 Neb. 146, 41 Am. St. Rep. 724, 56 N. E. 695. See German American Ins. Co. v. Buckstaff, 38 Neb. 135, 136, 56 N. W. 692.

[5] Home Ins. Co. v. Boyd, 19 Ind. App. 173, 49 N. E. 285.

[6] Gash v. Home Ins. Co. of N. Y. 153 Ill. App. 31, 33, Shirley, J.

[7] Gash v. Home Ins. Co. of N. Y. 153 Ill. App. 31.

[8] Germania Fire Ins. Co. v. Werner, 76 Ohio St. 543, 12 L.R.A.(N.S.) 456, 81 N. E. 980.

[9] Home Ins. Co. v. Boyd, 10 Ind. App. 173, 49 N. E. 285.

§ 2225b. **"Untenanted or vacant."**—Where the clause is used "if the premises become untenanted or vacant" a synonymous word is "unoccupied" according to its usual acceptation and "untenanted" means "not occupied by a tenant; not inhabited." And absence from personal occupation for a short time, such as three days, would not be fatal. Such a condition, however, imports habitual actual residence in the house and the requisite incidental care, protection or supervision of the property insured. Such a condition is also a proper and reasonable one but a house is untenanted where the occupant discontinues residing therein for several weeks, and only sleeps there twice during such non-occupation even though furniture and clothing are left in said house and a person goes to the house for domestic purposes.[10]

§ 2225c. **Temporary vacancy or absence: owner, tenant or occupant.**—It may be broadly stated as a general rule that a mere temporary vacancy or absence of the owner, tenant, or occupant, or a temporary period of non-user, which is reasonable in view of the contemplated uses of the property and of all the circumstances, and which is evidenced by some act or acts fairly showing not only an intent to return but also an intent not to vacate or give up occupancy or use of the premises nor to abandon them for the purposes of their use, will not of itself operate as a breach of a condition as to vacancy or non-occupation, even though the doing of some act may have been commenced which when completed will constitute such a vacancy or non-occupancy. But this general rule must be governed by the wording of the particular condition or conditions of the policy, the character of the occupancy as well as of that of the premises insured, or of the purposes for which they were intended to be used, having also in view the object to be accomplished and the degree of protection to be effected or necessitated by the particular condition or conditions involved and applicable and by the insurance of the property.[11] So where a tenant, intending to remove,

[10] Boardman v. North Waterloo Ins. Co. 31 Ont. 525, 20 Canadian L. T. 126.

On effect of sleeping on premises to prevent their becoming vacant or unoccupied within insurance policy, see note in 40 L.R.A.(N.S.) 58.

[11] *Arkansas.*—Burlington Ins. Co. v. Lowery, 61 Ark. 108, 54 Am. St. Rep. 196, 32 S. W. 383. See Planter's Fire Ins. Co. of Little Rock v. Steele, 119 Ark. 597, 178 S. W. 910, 46 Ins. L. J. 617 (*considered* under § 2230a herein).

*Illinois.*—Home Ins. Co. v. Mendenhall, 144 Ill. 458, 36 L.R.A. 374, 45 N. E. 1078; Gash v. Home Ins. Co. of N. Y. 153 Ill. App. 31.

*Indiana.*—Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 3 L.R.A. (N.S.) 966, 117 Am. St. Rep. 382, 76 N. E. 277; Insurance Co. of North America v. Coombs, 19 Ind. App. 331, 49 N. E. 471.

*Iowa.*—Walrod v. Des Moines Ins. Co. 159 Iowa, 121, 140 N. W. 218, 42 Ins. L. J. 732; Worley v. State Ins. Co. 91 Iowa, 150, 51 Am. St. Rep.

goes away to meet his wife, leaves two of his children in the house, with instructions to remain there until he returns, and he removes only a small portion of the furniture, such temporary absence does not constitute a breach of a condition against the premises becoming vacant and unoccupied.[12] Other instances of the application of this rule and the qualifications thereof, or exceptions thereto, are given under the following sections covering the particular condition governing the decision. Cases, however, to which the above rule applies are those wherein the question is whether or not the condition has been broken, and not those where there has been a temporary breach and whether the policy has thereby been forfeited, or its operation merely suspended, although the underlying principle of the above rule may be involved in some degree in the latter question.[13]

**§ 2225d. Vacancy, etc.: several buildings or kinds of property: entirety or divisibility of risk.**—The vacancy of a house alone does not avoid a policy of insurance prohibiting vacancy of the "premises" and covering both such house and a barn.[14] So a policy

334, 59 N. W. 16; Eddy v. Hawkeye Ins. Co. 70 Iowa, 472, 59 Am. Rep. 444, 30 N. W. 808.

*Kentucky.* — Farmers' Mutual Equity Ins. Soc. v. Smith, 158 Ky. 459, 54 L.R.A.(N.S.) 844n, 165 S. W. 675.

*Massachusetts.*—Johnson v. Norwalk Fire Ins. Co. 175 Mass. 529, 56 N. E. 569, 29 Ins. L. J. 371; Ring v. Phoenix Ins. Co. 145 Mass. 426, 14 N. E. 525.

*Michigan.*—Shackleton v. Sun Fire Ins. Co. 55 Mich. 288, 54 Am. Rep. 379, 21 N. W. 343.

*Minnesota.*—Kampsen v. Farmers' Mutual Fire Ins. Co. 116 Minn. 68, 138 N. W. 163, 41 Ins. L. J. 115.

*Missouri.*—Norman v. Missouri Town Mutual Fire, Lightning, Tornado, Cyclone & Wind Ins. Co. 74 Mo. App. 456, 1 Mo. App. Rep. 259.

*Nebraska.*—Omaha Fire Ins. Co. v. Cinnott, 54 Neb. 522, 74 N. W. 955; Liverpool & London & Globe Ins. Co. v. Brickstaff, 35 Neb. 146, 41 Am. St. Rep. 724, 56 N. W. 692; Springfield Fire & Marine Ins. Co. v. McLimans, 28 Neb. 846, 45 N. W. 171.

*New Hampshire.*—Stone v. Granite State Fire Ins. Co. 69 N. H. 438, 45 Atl. 235, 29 Ins. L. J. 250. ("It is plain that a temporary absence of the character appearing in this case cannot be held to be within the condition as a matter of law," Blodgett, C. J.).

*New Jersey.*—Hampton v. Hartford Fire Ins. Co. 65 N. J. L. 265, 52 L.R.A. 344, 47 Atl. 433, 30 Ins. L. J. 141; Laselle v. Hoboken Fire Ins. Co. 43 N. J. L. 468.

*New York.*—Johnson v. New Bowery Fire Ins. Co. 39 Hun (N. Y.) 410.

*Pennsylvania.*—Doud v. Citizens' Ins. Co. 141 Pa. St. 47, 23 Am. St. Rep. 263, 21 Atl. 505; Franklin Fire Ins. Co. v. Kepler, 95 Pa. St. 492.

*Texas.*—Agricultural F. Ins. Co. v. Owens, — Tex. Civ. App. —, 132 S. W. 828.

See note L.R.A.1915B, 844–851.

On effect of temporary vacancy ceasing before loss under provisions against vacancy, see notes in 10 L.R.A.(N.S.) 740, and 28 L.R.A. (N.S.) 593.

[12] Burlington Ins. Co. v. Lowery, 61 Ark. 108, 54 Am. St. Rep. 196, 32 S. W. 383.

[13] See §§ 2239, 2240 herein, as to policy being suspended.

[14] Worley v. State Ins. Co. 91 Iowa, 150, 51 Am. St. Rep. 334, 59

which covered a "ten tenement frame block," which consisted of flats, was held not to be unoccupied while two of the tenements were in actual use and occupation as residences.[15] And if several buildings are insured by one policy conditioned to be void in case "the premises" become unoccupied, the word "premises" is held to cover the entire property insured, and so long as any building continues to be occupied, the policy is not avoided.[16] And where each of the insured buildings, although located independently of each other, is a part of a single plant or system, each necessary for its complete operation, and the description of the "property" or "mill," or "building," refers to the system or plant as a whole, and not to any particular building, and there is not a breach of the warranty or condition as to vacancy "or" nonoccupation where the operations are continued throughout the entire plant, only closing down a building as necessity requires.[17] So a policy issued upon several buildings for one gross sum as the consideration, the amount of the policy being apportioned among the different buildings, which is conditioned that if the premises "become vacant or unoccupied, then so long as the same shall remain vacant and unoccupied this policy shall cease and be of no force," it is not avoided by the vacancy of one of the buildings.[18]

But where a single premium is paid for a policy against fire and wind, the insurance is distributed in specific amounts over a house, hay and grain, and a cornerib, and there is a condition against the premises becoming vacant, there can be no recovery on the policy for a destruction of the cornerib by a wind storm after the tenant of the land, who occupied the house, has moved away.[19] So where a policy, covers sixteen tenement houses, with a separate valuation on each, provides that if the premises become unoccupied, and so remain for twenty days, without the consent of the insurer, the policy shall be void, no recovery can be had, in case of total loss, for such of the houses as have remained vacant beyond the prescribed time without the consent of the insurer after the insurance attached.[20] It is held in Texas, that if the policy is conditioned to

N. W. 16, condition was: "or if there is any change in the occupant or occupancy of the premises insured, or if they become vacant."

On divisibility of insurance, see notes in 19 L.R.A. 212, and 51 L.R.A. (N.S.) 1050.

[15] Harrington v. Fitchburg Fire Ins. Co. 124 Mass. 126.

[16] Herman v. Adriatic Fire Ins. Co. 85 N. Y. 162, 39 Am. Rep. 644.

[17] Central Montana Mines Co. v. Firemen's Fund Ins. Co. 92 Minn. 223, 99 N. W. 1120, 100 N. W. 3, 33 Ins. L. J. 745. See also Capital Fire Ins. Co. v. Carroll, 26 Okla. 286, 109 Pac. 535, 39 Ins. L. J. 1258.

[18] McQueeny v. Phœnix Ins. Co. 52 Ark. 257, 5 L.R.A. 744, 20 Am. St. Rep. 179, 12 S. W. 498.

[19] Republic County Mutual Fire Ins. Co. v. Johnson, 69 Kan. 146, 105 Am. St. Rep. 157, 76 Pac. 419. Condition was: "become vacant."

[20] Connecticut Fire Ins. Co. v.

be "entirely void in toto, as to every part and parcel, subject and divisions thereof," if a building described in the policy be or become vacant or unoccupied and so remain for ten days, the policy is forfeited if any one of the three insured buildings becomes and remains vacant and unoccupied for more than ten days where, although the contract recognizes the property insured as separate structures with occupation of a different character, still the evidence leaves no doubt that the three are so situated with reference to each other as to constitute but one risk.[1] So where the building insured consisted of a house and two barns, and the house was only occupied a part of the time during the currency of the policy, it was held that there was not an occupancy of the premises within the meaning of the condition.[2] And if both a building and personal property therein contained are insured and the building becomes vacant and unoccupied, such breach wholly voids the policy so that no recovery can be had for loss of the personal property.[3] This question however, as to entirety or divisibility of risk has been considered elsewhere herein.

§ 2225e. **Premises untenantable or unfit for occupancy: vacancy enforced.**—Where a tenant is compelled by a flood or overflow of water to vacate the premises, such enforced, unavoidable, absence does not vitiate a condition forfeiting the policy if the premises become "vacant, unoccupied, or uninhabited" without insurer's consent, where the tenant after the water has subsided attempts to prepare the house for occupation and before this can be done the loss by fire occurs.[4] And if there is a partial loss of the insured building so that it becomes unfit for occupancy, it is not within the intent of the parties that it should be occupied by a tenant or anyone else, and in such case there is no breach of the vacancy clause where assured permits the building to remain unoccupied with assurer's knowledge.[5] And a vacancy while repairs are being made may be justified under a grant of a privilege to make such repairs.[6] But where abandonment to insurer is precluded, a vacancy caused

Tilley, 88 Va. 1024, 29 Am. St. Rep. 770, 14 S. E. 851.

[1] Mecca Fire Ins. Co. v. Coughlin, — Tex. Civ. App. —, 134 S. W. 266, 40 Ins. L. J. 816, relying upon Bills v. Hibernia Ins. Co. 87 Tex. 547, 29 L.R.A. 706, 47 Am. St. Rep. 121, 29 S. W. 1063.

[2] Bishop v. Norwich Union Fire Ins. Co. 25 Nova Scotia, 472.

[3] Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 30 L.R.A. 633, 51 Am. St. Rep. 457, 33 Atl. 429. Condition was: "vacant or unoccupied."

[4] Gash v. Home Ins. Co. of N. Y. 153 Ill. App. 31.

[5] Schmidt v. Williamsburgh City Fire Ins. Co. 98 Neb. 61, 151 N. W. 920. Condition here was: "vacant or unoccupied."

[6] Chamberlain v. British America Assur. Co. 80 Mo. App. 589, 2 Mo. App. 748.

by fire and continuing over the time limit therefor under the policy, avoids the contract and precludes recovery for a subsequent fire, and this is so held notwithstanding an option to repair where it is not exercised before said second loss.[7]

**§ 2226. Provision as to notice in case premises become vacant or unoccupied: permit.**—A provision in a policy of insurance that if the premises become vacant or unoccupied notice must be given to the company, or else the policy shall be void, is binding, and in such case if notice is not given, the policy is avoided. Where a policy provided that if the house should be "left unoccupied" without giving immediate notice to the company "the policy shall cease and be of no force and effect," it was held that the absence of the occupant of the house for a period of six weeks, no notice being given, would avoid the policy.[8] And if a policy provides that insurer shall not be liable for loss "if the premises hereby insured becomes vacated by the removal of the owner or occupant without immediate notice to the company and consent indorsed thereon," notice must be given within a reasonable time after vacancy, and if so given the policy remains in force until consent is refused by the insurer. In such case immediate notice must be construed to mean notice within a reasonable time, in view of the circumstances and positions of the parties in respect to means of communication with each other. What would be reasonable time as between parties living in the same city or having ready means of communication, would be very unreasonable if applied to an insured who lives a considerable distance from a postoffice, or a railroad, or the agent of the company who has placed the insurance.[9] But if immediate notice is given, and the company does not cancel the policy it has been held that the insured may recover for a loss subsequently occurring, though no indorsement has been made on the policy.[10] The failure of the insured to give notice in such a case for such a period of time is inexcusable neglect.[11] But it has been held that notice is not necessary where there is only a temporary interruption incidental to changed tenants.[12] And it is also held that it is only when the change in the occupancy of the premises, containing property insured, increases the hazard, that the assured is under an obligation

[7] Kupfersmith v. Delaware Ins. Co. 84 N. J. L. 271, 86 Atl. 399, 45 L.R.A.(N.S.) 847. Condition here was: "vacant or unoccupied."

[8] Paine v. Agricultural Ins. Co. 5 Thomp. & C. (N. Y.) 619.

[9] Strunk v. Fireman's Ins. Co. 160 Pa. St. 345, 40 Am. St. Rep. 721, 28 Atl. 779.

[10] Wakefield v. Orient Ins. Co. 50 Wis. 532, 7 N. W. 647.

[11] Alston v. Old North St. Ins. Co. 80 N. C. 326.

[12] Alston v. Old North St. Ins. Co. 80 N. C. 326.

to inform the company thereof.[13] And the removal from a building in process of construction of mechanics, who have been in possession under a permit from the insurance company, does not create a forfeiture under a clause of the policy making it void in case the premises become vacant by the removal of the owner or occupant, since the permit for their presence refers to the clause relating to increase of risk, and is not a waiver of the provision against vacancy.[14] So a provision voiding the policy if the building becomes and remains vacant for five days, unless continued by consent of the insurer, and that it shall be the duty of the owner to report a vacancy within five days of such occurrence and as often as every ten days thereafter, applies only when no permit for vacancy has been issued.[15] If a vacancy permit has expired prior to the fire, recovery is precluded in the absence of waiver and estoppel or an extension of the time covered by said permit.[16] A permit or privilege granted to make repairs may justify vacating the premises while they are being made.[17] Where a policy required notice in case the premises became vacant for more than thirty days without notice to the company, it was held that the policy was avoided where the premises were vacated on January 12th, and so remained until February 13th, when a fire occurred.[18] A policy which provided that if premises insured should "become vacant or unoccupied, and so remain without notice to and consent from this company in writing . . . this policy is void," was held to be avoided where a tenant of the property covered by the policy vacated the building, and it remained unoccupied for seventeen days, no notice being given to the company.[19] Where a policy provided that if the insured premises become vacant notice of "the particulars of such vacation or removal" must be given to the company, or else the policy should be void, it was held that the policy was avoided by

[13] Snell v. Atlantic Fire & Marine Ins. Co. 98 U. S. 85, 25 L. ed. 52.

[14] Harris v. North American Ins. Co. 190 Mass. 361, 4 L.R.A.(N.S.) 1137, 77 N. E. 493.

On building in process of erection as vacant, see note in 4 L.R.A.(N.S.) 1137.

[15] Duncan v. National Mutual Fire Ins. Co. 44 Colo. 472, 20 L.R.A. (N.S.) 340, 98 Pac. 634.

[16] Maness v. Sun Ins. Co. — Tex. Civ. App. —, 32 S. W. 326. As to liability of executor in such case for failure to have vacancy permit extended, see Henderson Trust Co. v. Stuart, 108 Ky. 167, 48 L.R.A. 49, 55 S. W. 1082. See Planters Fire Ins. Co. of Little Rock v. Steele. 119 Ark. 597, 178 S. W. 910, 46 Ins. L. J. 617 (*considered* under § 2230a herein).

[17] Chamberlain v. British American Assur. Co. 80 Mo. App. 589, 2 Mo. App. 748.

[18] Hartford Fire Ins. Co. v. Webster, 69 Ill. 392.

[19] Dennison v. Phœnix Ins. Co. 52 Iowa, 457, 3 N. W. 500. *Compare* American Ins. Co. v. Foster, 92 Ill. 334, 34 Am. Rep. 134.

the removal of the occupant with substantially the whole of his household goods, notice being given to the company that the occupant was going away on a visit, but that his household goods were to remain in the building.[20]

An oral agreement to the effect that a vacancy permit will be granted whenever a future vacancy may occur, cannot be enforced so as to abrogate a stipulation as to vacancy, where it is unsupported by a new consideration, as there must be a consideration for a modification of a contract to give it force.[1]

§ 2227. **"Unoccupied premises."**—A fire policy which provides that so long as the insured premises shall be "unoccupied . . . these presents shall cease and be of no force and effect," is not absolutely void in case of nonoccupancy; the policy is only suspended, and will revive when the premises become occupied again.[2] It has been held that a stipulation in a policy that a house is to be "occupied all the year round" is satisfied if permanent occupation is resumed so long before the fire that the temporary absence of the occupant plainly appears to have had no connection with the loss.[3] In an action upon a policy upon a trip-hammer shop and machinery therein, the policy providing that it should be void if the premises remained unoccupied more than thirty days, it was held that the following instructions to the jury were correct: "It is not sufficient to constitute occupancy that the tools remained in the shop, and that the plaintiff's son went through the shop almost every day to look around to see if things were right, but some practical use must have been made of the building."[4] A provision in the policy upon a manufacturing establishment that the policy shall be void if the premises become unoccupied refers to more than a merely temporary suspension of business. Thus, where a mill stopped work for five days, it was held that the premises were not unoccupied,[5] and the premises were held not to be unoccupied where there was a temporary cessation of business occasioned by a prevalence of yellow fever.[6] The condition in a policy of insurance that if the house insured shall cease to be occupied, or shall be unoccupied at the time of effecting insurance and is not so stated in the ap-

[20] Hill v. Equitable Marine & Fire Ins. Co. 58 N. H. 82.

[1] Patterson v. American Ins. Co. 164 Mo. App. 157, 148 S. W. 448, 41 Ins. L. J. 1473.

[2] Ætna Ins. Co. v. Meyers, 63 Ind. 238. See §§ 2239, 2240 herein.

[3] Ring v. Phœnix Assurance Co. 145 Mass. 426, 14 N. E. 525. See §§ 2239, 2240 herein.

[4] Keith v. Quincy Mutual Fire Ins. Co. 10 Allen (92 Mass.) 228.

[5] Albion Lead Works v. Williamsburg City Ins. Co. 2 Fed. 479. See §§ 2239, 2240 herein.

[6] Poss v. Western Assur. Co. 7 Lea (75 Tenn.) 704, 40 Am. Rep. 68.

plication, the policy shall be void, is intended to protect the company against an increase of risk by reason of the house being vacant. Hence, it is not broken when a house which is insured as "unoccupied" is temporarily occupied and then vacated by a tenant before it is burned.[7] A dwelling house and barn are unoccupied, within the meaning of an insurance policy which provides that buildings unoccupied shall not be covered by the policy, where the house is only used by the insured and his servants for the purpose of taking their meals there, when engaged in carrying on a contiguous farm, and the barn is only used for the purpose of storing hay and farming tools.[8] A dwelling house is unoccupied where the tenant removes to another farm a considerable distance away, leaving only a few small articles of furniture in the insured building, and making only occasional visits to the same.[9] But vacancy of premises from Saturday to the following Monday pending change of tenants does not avoid a five-year policy of insurance thereon, which provides that insurance "will not be carried upon unoccupied buildings unless covered by a vacancy permit."[10] So a warranty that the insured house was and should continue to be occupied, is not as matter of law, broken by reason of the fact that a tenant had commenced to remove the furniture therefrom at the time of the loss, while some of the furniture still remained, and a jury finding that the house was not unoccupied will stand.[11] But a policy which provides that it shall be void in case the insured building is unoccupied for more than thirty days is avoided where the insured and tenant have abandoned the property for more than that period. So, the fact that the building is occupied by a person will not protect the policy if the person has no authority to occupy it and pays no rent.[12] Where a summer dwelling-house was insured against fire, and it was provided that it was "not to be left unoccupied any portion of the year," and at the time the policy was issued S., an employee of the former owner, with his family, occupied four rooms in one wing, and in March

[7] Bennett v. Agricultural Ins. Co. 106 N. Y. 243, 12 N. E. 609.

[8] Ashworth v. Builders' Mutual Fire Ins. Co. 112 Mass. 422, 17 Am. Rep. 117.

[9] Hartshorn v. Agricultural Ins. Co. 50 N. J. L. 427, 14 Atl. 615, 13 Cent. Rep. 132.

[10] Farmers' Mutual Equity Ins. Soc. v. Smith, 158 Ky. 459, L.R.A. 1915B, 844n, 165 S. W. 675. See Eureka Fire & Marine Ins. Co. v. Baldwin, 17 Ohio C. C. 143, 9 Ohio C. D. 118, house held not "unoccupied," exact words of conditions do not appear.

On vacancy during change of tenants as violation of vacancy clause in fire policy covering rented premises, see note in L.R.A.1915B, 844.

[11] Omaha Fire Ins. Co. v. Sinnott, 54 Neb. 522, 74 N. W. 955, exact wording of clause does not appear.

[12] Western Assurance Co. v. McPike, 62 Miss. 740.

of that year, the plaintiff employed H., a gardener, to take charge of the place, who was to take S's quarters when he moved out, and S. moved out the 5th of April, and on March 22d H. went to the place alone, in consequence of his wife's sickness, and took board at a neighbor's and continued there, having charge of the place and the keys of the house after S. moved out, and on April 19th the house was destroyed by fire, it was held that the policy was avoided.[13] So a policy which provides that it shall be void if the building becomes unoccupied is void the instant such building is unoccupied, and no recovery can be had for a loss occurring a few hours after the occupant has removed.[14] A building is still unoccupied though it is let to a tenant who has placed certain articles therein for the purpose of cleaning, but has not taken up his residence in the building.[15]

§ 2228. **"Vacant" premises.**—The mere temporary absence of the occupant of a building will not avoid a policy conditioned to be void in case the building becomes "vacant." To render the building vacant there must be a permanent removal from the house, and an abandonment of the same as a place of residence.[16] And a mere temporary absence from one's dwelling house with intent to return and occupy the premises is not a vacancy.[17] A house is not vacant so as to avoid a policy if, on the same day on which a tenant moves from the building, the insured remains in and about the premises, and also on the same day makes preparation to move into the insured building, and leaves a man in charge of it while he is so doing.[18] And a house is not vacant which is occupied by a tenant as a residence and for a restaurant, where he commences to move his furniture, but being unable to complete the moving leaves a substantial part thereof in the building, intending to finish the removal the next day, and although his family did not sleep there

[13] Sonneborn v. Manufacturers' Ins. Co. 15 Vroom (44 N. J. L.) 220, 43 Am. Rep. 365.

[14] Bennett v. Agricultural Ins. Co. 51 Conn. 504. See also Insurance Co. of North America v. Garland, 108 Ill. 220; Dennison v. Phœnix Ins. Co. 52 Iowa, 457, 3 N. W. 500; Cook v. Continental Ins. Co. 70 Mo. 610, 35 Am. Rep. 438, 9 Ins. L. J. 887; Farmers' Ins. Co. v. Wells, 42 Ohio, 519.

[15] Litch v. North British & Mercantile Ins. Co. 136 Mass. 491. See Barry v. Prescott Ins. Co. 35 Hun (N. Y.) 601; Johnson v. The New York Bowery Fire Ins. Co. 39 Hun (N. Y.) 410, where it is held that the building was not "vacant or unoccupied."

[16] Springfield Fire & Marine Ins. Co. v. McLimans, 28 Neb. 846, 45 N. W. 171; Cummins v. Agricultural Ins. Co. 67 N. Y. 260, 23 Am. Rep. 111. See § 2225c herein.

[17] Kampson v. Farmers' Mutual Fire Ins. Co. 116 Minn. 68, 133 N. W. 163, 41 Ins. L. J. 115.

[18] Doud v. Citizens' Ins. Co. 141 Pa. 47, 28 Wkly. Not. Cas. 20, 23 Am. St. Rep. 263, 21 Atl. 505.

that night he retained the key.[19] And a farm dwelling house and barn are held not to be vacant even though no one slept at night in the house and meals are only occasionally eaten there.[20] Where a house that has been rented has been vacated by the tenant, and the owner, intending to occupy it himself, takes possession the next day, has it papered and painted, moves his furniture, etc., into it, keeps his employees in and about the house from six in the morning till seven or eight in the evening, preparing it for occupancy, and the day before he expects to move in the house is destroyed by fire, it will not be considered as vacant within the meaning of a policy declaring that the insured shall not be liable for any loss or damage occurring while the insured property is vacant or unoccupied.[1] And in another case, where the tenant moved out and the landlord immediately moved his things in and began preparations for his own occupancy of the building, it was held that the building was not "vacant," and that he could recover for a loss occurring while he was away on a business trip and before he had slept in the house.[2] If a policy provides that it shall be void in case the premises are vacated, the fact that the use of the premises for the purpose for which they were used when the insurance was affected has ceased will not defeat the policy, where the insured continues to reside on the premises,[3] or about which he constantly has men, and also uses it as a place of deposit for his papers.[4]

But where the occupants of an insured building moved to another town, taking all of the wearing apparel and part of the furniture, it was held that the premises must be considered as "vacated" within the meaning of the policy.[5] A policy of insurance which provides that it shall be void if the premises become vacant without the written consent of the insurer indorsed on the policy is avoided where the buildings are unoccupied and the furniture removed therefrom, some fodder only being left in one of the outer buildings.[6] Where a policy containing a condition as to vacancy was

[19] Norman v. Missouri Town Mutual Fire, Lightning, Tornado, Cyclone & Wind Ins. Co. 74 Mo. App. 456, 1 Mo. App. Rep. 259. Condition was: "as soon as buildings become vacant the insurance should be void."

[20] Robinson v. Mennonite Mutual Fire Ins. Co. 91 Kan. 850, 139 Pac. 420. Condition was: "becomes and remains vacant."

[1] Eddy v. Hawkeye Ins. Co. 70 Iowa, 472, 59 Am. Rep. 444, 30 N. W. 808.

[2] Shackleton v. Sun Fire Ins. Co. 55 Mich. 288, 54 Am. Rep. 379, 21 N. W. 343.

[3] Kimball v. Monarch Ins. Co. 70 Iowa, 513, 30 N. W. 862.

[4] Williams v. North-German Ins. Co. 24 Fed. 625.

[5] Sleeper v. New Hampshire Ins. Co. 56 N. H. 401. See also American Ins. Co. v. Padfield, 78 Ill. 167.

[6] Watertown Fire Ins. Co. v. Cherry, 84 Va. 72, 3 S. E. 876.

issued upon a schoolhouse, and the school was discontinued, and the building was subsequently occupied as a dwelling until April, and was then vacated until the 14th of October, when it was burned while unoccupied, it was held that the insurance was forfeited.[7] Where the insured who, upon renewing his policy, had been in the habit of receiving merely a receipt therefor, but on this occasion was given a new form of policy, which contained a new vacancy clause, being changed from a thirty-day clause to a ten-day one, it was held that he was presumed to know the contents of the new policy, and that equity would not relieve him from a forfeiture where the premises had been vacant for over ten days prior to the loss.[8] So a policy conditioned to be void if the premises become vacant will be avoided where they become vacant by the removal of the tenant without the knowledge or consent of the insured.[9] It is also decided that a house is vacant where the family is away for recreation or health and only a servant with a family is left in charge who lived a short distance away and stayed in the house every night.[10] It is held error to take from the jury the question whether the premises had in fact become vacant, under a condition voiding the policy if the premises became and remained vacant, etc., where although it appeared that the house had been abandoned without intent to return, still there had been a return and occupation within the policy limit of time, before the fire.[11]

§ 2228a. **Vacant by removal: personally unoccupied.**—The condition as to vacancy by removal should have a reasonable interpretation according to the ordinary acceptation of the language used, or as such clause would be reasonably understood, and the terms "absence" and "removal" when applied to the occupant of a dwelling house, do not convey the same, but a widely different meaning so that as a matter of law the premises must not only have been vacant for more than the time permitted under the contract, but it must have been occasioned by the removal of the occupant therefrom, under a clause voiding the policy if the premises shall become vacant by the removal of the owner or occupant and

[7] American Ins. Co. v. Foster, 92 Ill. 334, 34 Am. Rep. 134.

[8] Thomson v. Southern Mutual Ins. Co. 90 Ga. 78, 15 S. E. 652.

[9] McClure v. Watertown Fire Ins. Co. 90 Pa. St. 277, 35 Am. Rep. 656.

On effect on vacancy clause of tenant's removal without owner's knowledge, see note in 3 L.R.A.(N.S.) 966.

[10] Lester v. Mississippi Home Ins. Co. — Miss. —, 19 So. 99. Exact wording of condition does not appear. But *compare* decisions under §§ 2229, 2230 herein.

On effect of sleeping on premises to prevent their becoming vacant and unoccupied, see note in 40 L.R.A. (N.S.) 58.

[11] Roach v. Aetna Ins. Co. 108 Minn. 127, 121 N. W. 613, under Minnesota standard form.

so remain, etc., and the question of vacancy and whether temporary absence is a "removal" is for the jury.[12] So a mere temporary absence of the occupant on business, does not render the premises vacant by removal,[13] and a temporary vacancy by an occupant, there being an intention to return, is held not to be a "removal." [14]

But the policy is avoided by a vacancy continuing more than one year.[15] So buildings are vacant, or personally unoccupied, within the meaning of a clause in an insurance policy making it void in case they become so, where, because of sickness, the occupant moves his family to a nearby village for medical attention, with the intention of returning when the sick recover, although he himself is at the house nearly every day in carrying on the work about the place.[16] A standard insurance policy which by its terms, becomes void by vacancy of the premises, is not revived by reoccupancy of the property before loss.[17] A provision in an insurance policy rendering it void in case the premises "become vacant by the removal of the owner or occupant," has no application to a policy issued on a building in process of erection, which because not fully fitted for occupancy, is never occupied prior to the fire.[18]

**§ 2229. Conditioned to be void if premises become "vacant and unoccupied."**—As we have stated in a preceding section,[19] if a policy is conditioned to be void in case the premises become "vacant and unoccupied," the premises must not only be vacant, but unoccupied. Both conditions must exist. Thus, where a person procured an insurance on his summer dwelling, and removed from it in November, leaving the furniture in it, and leaving it in care of

[12] Stone v. Granite State Fire Ins. Co. 69 N. H. 438, 45 Atl. 235, 29 Ins. L. J. 250.

[13] Johnson v. Norwalk Fire Ins. Co. 175 Mass. 529, 56 N. E. 569, 29 Ins. L. J. 371.

[14] Cummins v. Agricultural Ins. Co. 67 N. Y. 260, 23 Am. Rep. 111. See § 2225c herein.

[15] Baldwin v. German Ins. Co. 105 Iowa, 379, 75 N. W. 326, 8 Am. & Eng. Corp. Cas. N. S. 664, 27 Ins. L. J. 794. Conditions were: "If the premises insured shall be vacated without the consent," etc., and: "If the premises hereby insured shall become vacant by the removal of the owner or occupant and so remain vacant," etc.

[16] Knowlton v. Patrons' Androscoggin Mutual Fire Ins. Co. 100 Me. 481, 2 L.R.A.(N.S.) 517n, 62 Atl. 289. Condition was: "If the buildings . . . shall become vacant by the removal of the owner or occupant, or shall become personally unoccupied . . . without the consent," etc.

[17] Dolliver v. Granite State Fire Ins. Co. 111 Me. 275, 50 L.R.A. (N.S.) 1106, 89 Atl. 8. Condition was: "If the premises . . . shall become vacant by removal of the owner or occupant."

[18] Harris v. North American Ins. Co. 190 Mass. 361, 4 L.R.A.(N.S.) 1137n, 77 N. E. 493.

On building in process of erection as vacant, see note in 4 L.R.A.(N.S.) 1137.

[19] See § 2225 herein.

a person residing near it, intending to re-occupy it the next spring, it was held that the dwelling was not thus "vacant and unoccupied," and the insurance was not void.[20] A dwelling house was held not to become "vacant and unoccupied" when the tenant and his family left it for twelve days to visit a sick daughter, and another person, at his request, visited it daily and looked after it.[1] A building used for manufacturing purposes is not "vacant and unoccupied" where a company temporarily stops work and makes repairs, but retains the night and day watchman on duty up to the time of the fire, the plant and some manufactured material not being disturbed.[2] Where active work in a sawmill is temporarily discontinued from causes incident to the business, the premises are not thereby "vacant and unoccupied."[3] But a vessel which is beached, the furniture being removed and there being no occupant thereon, is "vacant and unoccupied."[4] And an insured building is "unoccupied," within the meaning of an insurance policy stipulating that it shall be void if the premises are "vacant and unoccupied" for a certain length of time, in a case where the tenant, who occupies the building as a store, closes and abandons it before the end of the term, leaving therein only a small amount of merchandise of nominal value, although he retains the key to the building at the request of the insured.[5] So the mere use of a store building as a place in which to store a few articles of personal property, no other business being carried on therein, renders the building "vacant and unoccupied" within the meaning of those words as used in an insurance policy.[6] So a condition against vacancy of an insured dwelling house is not complied with by the placing of farm implements therein by the insured after the removal of a tenant therefrom.[7] And an insured building used by a tenant as a store and cigar factory, is rendered "vacant and unoccupied" when the tenant, upon the expiration of his lease, removes with

[20] Herman v. Merchants' Ins. Co. 81 N. Y. 184, 37 Am. Rep. 488.

[1] Stupetski v. Trans-Atlantic Fire Ins. Co. 43 Mich. 373, 38 Am. Rep. 195, 5 N. W. 401.

[2] Brighton Manufacturing Co. v. Redding Fire Ins. Co. 33 Fed. 232; Brighton M. Co. v. Fire Assoc. of Philadelphia, 33 Fed. 234; Brighton Mfg. Co. v. Reliance Ins. Co. 33 Fed. 235; Brighton Mfg. Co. v. Fire Ins. Co. of Pennsylvania, 33 Fed. 236; American Fire Ins. Co. v. Brighton Manufacturing Co. 125 Ill. 131, 17 N. E. 771, 15 West. Rep. 180.

[3] Whitney v. Black River Ins. Co. 72 N. Y. 117, 28 Am. Rep. 116.

[4] Reid v. Lancaster Fire Ins. Co. 19 Hun (N. Y.) 284.

[5] Home Ins. Co. v. Scales, 71 Miss. 975, 42 Am. St. Rep. 512, 15 So. 134.

[6] Limburg v. German Fire Ins. Co. 90 Iowa, 709, 28 L.R.A. 99, 48 Am. St. Rep. 468, 57 N. W. 626.

[7] Martin v. Rochester German Ins. Co. 86 Hun (N. Y.) 35, 33 N. Y. Supp. 404.

most of his stock from the building, and leaves stored therein, without the landlord's consent or knowledge, only a counter for sale and a few articles belonging to himself and another, and retains a key to the premises in order to show intending purchasers the counter while the landlord is seeking another tenant.[8]

If the policy has become void by reason of a violation of a condition against nonoccupancy without the consent of the insurer indorsed on the policy it is not revived when occupation of the premises is subsequently resumed.[9] So in Texas, if the policy provides that vacancy without the consent of the company will avoid the policy, and the unearned premium will be returned, a temporary vacancy without the knowledge of the owner avoids the policy, and subsequent re-occupancy of the building does not revive the policy, unless the forfeiture has been waived.[10]

**§ 2230. Conditioned to be void if the premises become "vacant or unoccupied."**—Under a condition containing these words, it is not necessary that the premises should be both vacant and unoccupied. The existence of either condition will avoid the policy.[11] The meaning of the term "vacant or unoccupied," as used in a policy, and its construction with other clauses, is a question of law. But whether a building is vacant or unoccupied within the meaning of an insurance policy, at the time a loss by fire occurs, is a question of fact for determination by the jury.[12]

Occupancy implies actual use of a dwelling house as such, and an insurer has a right, under a policy employing such word, to the care and supervision of the insured premises involved in such an occupancy.[13] So occupancy of a dwelling house means that some one is living therein and if not it is unoccupied, but a watchman or caretaker may occupy a house even though it is not their place of residence or abode.[14] Again, to constitute occupancy of a dwelling house within the meaning of a fire policy, it need not be used continuously. The family may be absent for health, pleasure, busi-

[8] Limburg v. German Fire Ins. Co. 90 Iowa, 709, 23 L.R.A. 99, 48 Am. St. Rep. 468, 57 N. W. 626. See also Robinson v. Aetna Ins. Co. 18 Ky. L. Rep. 865, 38 S. W. 693, 26 Ins. L. J. 823, exact wording of clause does not appear.

[9] Moore v. Phœnix Ins. Co. 62 N. H. 240, 13 Am. St. Rep. 556. See §§ 2239, 2240 herein.

[10] East Texas Ins. Co. v. Kempner, 87 Tex. 229, 47 Am. St. Rep. 99, 27 S. W. 122.

[11] See § 2225 herein.

[12] Schuermann v. Dwelling-House Ins. Co. 161 Ill. 437, 52 Am. St. Rep. 377, 43 N. E. 1093.

[13] Limburg v. German Fire Ins. Co. 90 Iowa, 709, 711, 23 L.R.A. 99, 48 Am. St. Rep. 468, 57 N. W. 626. Condition here was: "vacant or unoccupied."

[14] Walton v. Phoenix Ins. Co. 162 Mo. App. 316, 141 S. W. 1138, 41 Ins. L. J. 413. Condition was: "vacant or unoccupied." See also Weidert v. State Ins. Co. 19 Oreg. 261, 20 Am. St. Rep. 809, 24 Pac. 242.

ness, or convenience for reasonable periods, and it will not therefore be considered as unoccupied upon its ceasing to be used as a family residence, where the household goods remain ready for use, and it continues to be occupied by one or more members of the family, who have access to the entire building for the purpose of caring for it, and who do care for it and make some use of it as a place of abode.[15] So occupation of a house implies its actual use as a dwelling house; and that of a barn, its use as ordinarily incident to a barn belonging to an occupied house.[16]

The general and usual condition against vacancy in insurance policies on property occupied by the owner, which is inserted in a policy on a building occupied by a tenant, will not operate to avoid the policy immediately upon the removal of the tenant, of which the owner has no notice or reasonable opportunity to obtain it.[17] And if insurance is taken on tenement property, a provision for forfeiture, in case the premises become vacant, will operate only after a reasonable time has elapesd in which to obtain other tenants.[18]

A condition that if the premises become "vacant or unoccupied, or not in use," the policy shall be void, cannot be made to depend upon the insured's knowledge of the fact of such vacancy.[19]

Altering or repairing a building does not constitute occupancy within the meaning of an insurance policy, which provides that mechanics may be employed for a certain number of days in such work.[20]

**§ 2230a. Same subject: when premises "vacant or unoccupied:" instances.**—A house used as a dwelling which is merely in charge of and not actually occupied by a person living in the same inclosure is vacant.[1] So a policy is forfeited where the premises on

[15] Moody v. Amazon Ins. Co. 52 Ohio St. 12, 26 L.R.A. 313, 49 Am. St. Rep. 699, 38 N. E. 1011. Condition was: "no liability shall exist under this policy for loss or damage on vacant or unoccupied buildings unless consent," etc.

[16] Stoltenberg v. Continental Ins. Co. 106 Iowa, 565, 568, 68 Am. St. Rep. 323, 76 N. W. 835, Ladd, J., condition was: "vacant or unoccupied."

[17] Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 3 L.R.A.(N.S.) 966n, 76 N. E. 977. Condition was "vacant or unoccupied."

On effect on vacancy clause of tenant's removal without owner's knowledge, see note in 3 L.R.A.(N.S.) 966.

[18] Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 3 L.R.A.(N.S.) 966, 117 Am. St. Rep. 382, 76 N. E. 977. Condition was "vacant or unoccupied."

[19] Schuermann v. Dwelling House Ins. Co. 161 Ill. 437, 52 Am. St. Rep. 377, 43 N. E. 1093, aff'g 57 Ill. App. 200. See also Farmers' Ins. Co. v. Wells, 42 Ohio St. 519.

[20] Limburg v. German Fire Ins. Co. 90 Iowa, 709, 23 L.R.A. 99, 48 Am. St. Rep. 468, 57 N. W. 626. Condition here was: "vacant or unoccupied."

[1] Burmer v. German American Ins. Co. 103 Ky. 370, 20 Ky. L. Rep. 71, 31 Chic. Leg. N. 18, 45 S. W. 109, 27 Ins. L. J. 732.

which insured buildings stand are leased to and cultivated by one who lives near by, but does not occupy nor make any use of such buildings, and they are not occupied by anyone else.[2] A dwelling house is vacant or unoccupied in the sense in which those terms are employed in a policy, when it is used otherwise than a fixed abode, although employees occasionally sleep there and some provisions are kept in the house, which is visited to obtain them.[3] And the fact that after a dwelling house became vacant the insured, or his hired men, or some member of his family, visited the house every day to see that things were all right, is not an occupancy.[4] A vacancy beyond the time limit, without a permit or consent, forfeits the policy.[5] So an insured dwelling which has been abandoned as a dwelling two days before its loss by fire, and with no intention to return, is in law vacant within the meaning of an insurance policy providing that it shall be void if at any time the house shall become vacant or unoccupied.[6] And where property is insured as a private dwelling and is leased to tenants and a vacancy permit is procured and the tenant returned, but again removed after the vacancy permit had expired, and the property burned before the owner could again occupy the same as he intended to do and would have done except for the fire, the policy is avoided. The distinction between "vacant" and "unoccupied," and "vacant and unoccupied" and "vacant or unoccupied" not being discussed as the condition here was "vacant or unoccupied," and in addition, whatever might be the effect as to the intent that rented premises may become vacant at times, such intent did not apply as the property was insured as a private dwelling.[7] If a house is left for an entire season with no one in it, a policy containing a condition that it shall be void if the premises become "vacant or unoccupied" is avoided, though the furniture be left therein.[8] And where the family removes to another locality, tak-

[2] Stoltenberg v. Continental Ins. Co. 106 Iowa, 565, 68 Am. St. Rep. 323, 76 N. W. 835. Condition was: "vacant or unoccupied."

[3] Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 30 L.R.A. 633, 51 Am. St. Rep. 457, 33 Atl. 429. Condition was: "vacant or unoccupied."

On effect of sleeping on premises to prevent their becoming vacant or unoccupied, see note in 40 L.R.A. (N.S.) 58.

[4] Weidert v. State Ins. Co. 19 Oreg. 261, 20 Am. St. Rep. 809, 24 Pac. 242.

[5] Piscataqua Savings Bank v. Traders' Ins. Co. 8 Kan. App. 241, 55 Pac. 496. *Examine* Phoenix Ins. Co. v. Burton, — Tex. Civ. App. —, 39 S. W. 319.

[6] Richards v. Continental Ins. Co. of New York, 83 Mich. 508, 21 Am. St. Rep. 611, 47 N. W. 350.

[7] Planters Fire Ins. Co. v. Steele, 119 Ark. 597, 178 S. W. 910, 46 Ins. L. J. 617. See Covey v. National Union Fire Ins. Co. — Cal. App. —, 161 Pac. 35. ("Vacant or unoccupied," tenancy).

[8] Herman v. Adriatic Fire Ins. Co.

ing most of the furniture and refurnishing the new dwelling in part, and remains away for more than the specified time limit in the policy, and does not reoccupy the old residence, even though occasional visits are made to that locality, there is such vacancy as forfeits the policy.[9] Fire insurance policies contemplate the use and occupancy of the insured property as a normal school and dwelling and make the same a condition to the acceptance and continuance of the risk, where one of the policies insures the premises as a "normal school and dwelling" and the other insures it "occupied, and only while occupied, as a normal school and dwelling," both policies further providing that they shall be void in case of change of use or occupants except change of occupants without increase of hazard, or if the building become vacant or unoccupied.[10]

Insured buildings appearing to have been recently vacated by a tenant before the loss are presumed to continue vacant, unless shown to have been subsequently occupied.[11] And there is a forfeiture if the tenant in possession had vacated such building a short time before the loss and it was not subsequently occupied by a tenant or other occupant.[12] If a policy provides that it shall be void in case the premises become wholly or partially vacant or unoccupied, it is avoided by the removal of a tenant, and the fact that the owner visits the building each day and some tools are kept there will not preserve the policy.[13] And merely leaving furniture where the building is unoccupied at night, is insufficient, even though a hired man has general oversight of the property and frequently inspects the same.[14] So a dwelling or tenement house is vacant and unoccupied if the occupant or occupants have moved out, although some trifling articles of furniture of little value are left in one of the rooms.[15] But it is declared in an Indiana case

85 N. Y. 162, 39 Am. Rep. 644. See also Alston v. Old North State Ins. Co. 80 N. C. 326; Fitzgerald v. Connecticut Fire Ins. Co. 64 Wis. 463, 25 N. W. 785.

[9] Norris v. Connecticut Fire Ins. Co. 115 Md. 174, 80 Atl. 960.

[10] Connecticut Fire Ins. Co. v. Buchanan, 141 Fed. 877, 73 C. C. A. 111, 4 L.R.A.(N.S.) 758.

[11] Stoltenberg v. Continental Ins. Co. 106 Iowa, 565, 68 Am. St. Rep. 323, 76 N. W. 835. Condition was: "vacant or unoccupied."

This point as to vacancy being presumed to continue, etc., ought, it would seem to depend primarily upon what constitutes vacancy. See § 2225 and other sections herein on vacancy.

[12] Stoltenberg v. Continental Ins. Co. 106 Iowa, 565, 68 Am. St. Rep. 323, 76 N. W. 835. Condition was: "vacant or unoccupied."

[13] Feshe v. Council Bluffs Ins. Co. (Fehse v. Council Bluffs Ins. Co.) 74 Iowa, 676, 39 N. W. 87. See also Franklin Savings Inst. v. Central Mutual Fire Ins. Co. 119 Mass. 240.

[14] Hanscom v. Home Ins. Co. 90 Me. 333, 38 Atl. 324, 27 Ins. L. J. 19.

[15] Schuermann v. Dwelling-House Ins. Co. 161 Ill. 437, 52 Am. St. Rep. 377, 43 N. E. 1093.

that: "We think it may be fairly said that in the cases in which dwelling houses have been held to be vacant by removal of tenants therefrom, where they have left a portion of their property, the articles were either so inconsiderable in value as to preclude the idea that the owner would return for them, or that they were left with the consent of the landlord without a definite time for their removal." [16]

A policy containing a provision that it shall be void if the premises become vacant or unoccupied is avoided where the tenant, being notified to leave, does so with the consent and knowledge of the owner of the premises,[17] and it is held that a policy containing such a condition is avoided by the permanent removal of the tenant, though made without the landlord's knowledge.[18] Conditions in fire insurance policies that they shall be void if the use of the insured building be changed or if it become vacant or unoccupied, are broken and no recovery can be had in an action on the policy where, at the time of the loss, the building was used for the temporary storage of the library and a portion of the household effects of a teacher formerly living therein, but its use for school purposes had been suspended for an indefinite period, although a lease contemplating the establishment of a new school of the same character had been negotiated, but the tenant had not arrived or taken possession.[19]

**§ 2230b. Same subject: when premises not "vacant or unoccupied:" instances.**—A vacancy for less than the specified time limit does not avoid the policy,[20] nor does a temporary absence of members of the family constitute a vacancy.[1] And an insured building is not "vacant or unoccupied" from the mere absence of the insured from the building for a few days in order to attend a funeral, though no occupant is left in the house,[2] nor by the absence of the family from the house for several days for the purpose of making a visit,[3] or by the absence of the occupants of the insured house on

[16] Insurance Co. of North America v. Coombs, 19 Ind. App. 338, Comstock, J. Condition was: "vacant or unoccupied."

[17] Richards v. Continental Ins. Co. of New York, 83 Mich. 508, 21 Am. St. Rep. 611, 47 N. W. 350.

[18] Farmers' Ins. Co. v. Wells, 42 Ohio St. 519. See Schuermann v. Dwelling House Ins. Co. 161 Ill. 437, 52 Am. St. Rep. 377, 43 N. E. 1003, aff'g 57 Ill. App. 200.

[19] Connecticut Fire Ins. Co. v. Buchanan, 141 Fed. 877, 4 L.R.A. (N.S.) 758, 73 C. C. A. 111.

[20] Phoenix Ins. Co. v. Burton, — Tex. Civ. App. —, 39 S. W. 319.

[1] Georgia Home Ins. Co. v. Brady, — Tex. Civ. App. —, 41 S. W. 513.

[2] Franklin Fire Ins. Co. v. Kepler, 95 Pa. St. 492.

[3] Johnson v. New York Bowery Fire Ins. Co. 39 Hun (N. Y.) 410; O'Brien v. Commercial Fire Ins. Co. 6 Jones & S. (N. Y.) 517.

the night of the fire.[4] Nor does absence during the summer for health, even though continued over the time limit, preclude recovery, where the household goods and a general oversight of the premises is undertaken by a neighbor.[5] And where the house is temporarily vacated to obtain medical treatment for insured's wife, and it is, with the exception of a few days at a time, occupied by insured to sleep in and cooking is done there, and during such absence some supervision is had of the house by a neighbor with whom the key is left, the policy is not voided for nonoccupancy.[6] And a house is not vacant where, although a greater part of the furniture is moved out, it is occupied by the husband and his hired man for sleeping nights and the horses and part of the furniture are left there.[7] So where a policy issued upon a building occupied as a store and dwelling house was conditioned to be void in case it became vacant or unoccupied, it was held that the policy was not avoided by the insured ceasing to occupy it as a dwelling-house, where he continued to occupy it as a store.[8] Again, the fact that a previous policy on the same property did not contain any condition against the property being vacant or unoccupied does not prevent such condition from being operative when there is no pretense of fraud or mistake, and the assured had ample opportunity to examine his policy and learn its contents.[9] So although a house is built for a dwelling-house, the fact that the insured lodges and eats in an adjacent house, but uses the former building for cooking and general work in connection with the latter, does not make the former "vacant or unoccupied." [10] It is also held that the premises are not "vacant or unoccupied" where the person, who is engaged in repairing the buildings, sleeps there nightly.[11]

A building leased to a woman for a boarding house does not become vacant or unoccupied within the meaning of a clause in an insurance policy rendering it void under such circumstances, if, after the tenant has removed the most of her furniture to another building, her husband and his man continue to occupy the build-

[4] Laselle v. Hoboken Fire Ins. Co. 43 N. J. L. 468.

[5] Phoenix Ins. Co. v. Burton, — Tex. Civ. App. —, 39 S. W. 319.

[6] Home Fire Ins. Co. v. Peyson, 54 Neb. 495, 74 N. W. 960.

[7] Seubert v. Fidelity-Phoenix Ins. Co. of N. Y. 29 S. Dak. 261, 40 L.R.A.(N.S.) 58, 136 N. W. 103, 41 Ins. L. J. 1203.

On effect of sleeping on premises to prevent their becoming vacant or unoccupied, see note in 40 L.R.A. (N.S.) 58.

[8] Burlington Ins. Co. v. Brockway, 138 Ill. 644, 28 N. E. 799, aff'd 39 Ill. App. 43.

[9] England v. Westchester Fire Ins. Co. 81 Wis. 583, 29 Am. St. Rep. 917, 51 N. W. 954.

[10] Dwelling House Ins. Co. v. Osborn, 1 Kan. App. 197, 40 Pac. 1099.

[11] Hartford Fire Ins. Co. v. Smith, 3 Colo. 422.

ing nights, looking after his stock, which remains on the premises.[12] And where insurance is to cover the premises, only while they are occupied by a tenant, as a private dwelling, and that the policy shall be void in case of vacancy or non-occupation for more than ten days, whether intended for occupancy by the owner or tenant, it is not avoided and the house is occupied where, after the removal of a tenant, occupation, control and actual possession is taken by a person who moves in at assured's request and remains there every night, with the exception of not more than four days at any one time, up to the time of loss, and this is so, even though only one room in the house is furnished, occupied or used during said time.[13] So a house out of which a tenant has moved, but in which some trifling articles of his still remain, while other goods of his are in a smokehouse a few steps away, and into which an incoming tenant has moved a portion of his effects, including a stove in which he has built a fire, and into which he would have brought his family except for rain, may be found, as a question of fact, not to be vacant and unoccupied within the meaning of an insurance policy.[14] Nor are the premises "vacant or unoccupied' where the tenant commenced the removal of his household effects in the morning, but the fire occurred during his absence with intent to return on the afternoon of the same day for the remainder of his goods.[15] So where a tenant moved out of an insured house on Tuesday, the owner took possession on Wednesday, and until Friday evening was engaged in preparing the house for his own occupation, intending to move into it on Saturday, and on Friday night the house was burned, it was held that the policy was not invalidated on the ground that the house was vacant or unoccupied.[16] Again, where the tenant moved out on March 15th and on May 5th the premises were burned, it was held that the building was not "vacant or unoccupied" when during the interval, the owner had visited

[12] Seubert v. Fidelity-Phenix Ins. Co. 29 S. Dak. 261, 40 L.R.A.(N.S.) 58n, 136 N. W. 103.

[13] Agricultural Ins. Co. v. Owens, — Tex. Civ. App. —, 132 S. W. 828.

[14] Home Ins. Co. v. Mendenhall, 164 Ill. 458, 36 L.R.A. 374, 45 N. E. 1078, aff'g 64 Ill. App. 30. Condition was: "vacant and unoccupied."

[15] Insurance Co. of North America v. Coombs, 19 Ind. App. 331, 49 N. E. 471, *citing:*

*Illinois.*—Phoenix Ins. Co. v. Tucker, 92 Ill. 64, 34 Am. Rep. 106.

*Indiana.*—Continental Ins. Co. v. Kyle, 124 Ind. 132, 9 L.R.A. 81, 19 Am. St. Rep. 77, 24 N. E. 727.

*Iowa.*—Eddy v. Hawkeye Ins. Co. 70 Iowa, 472, 59 Am. St. Rep. 444, 30 N. W. 808.

*Nebraska.*—Liverpool Ins. Co. v. Buckstuff, 38 Neb. 146, 41 Am. St. Rep. 724, 56 N. W. 695.

*New Hampshire.*—Moore v. Phoenix Ins. Co. 64 N. H. 140, 10 Am. St. Rep. 584, note 390, 6 Atl. 27.

*Pennsylvania.*—Doud v. Citizens' Ins. Co. 141 Pa. St. 47, 21 Atl. 505.

[16] Eddy v. Hawkeye Ins. Co. 70 Iowa, 472, 59 Am. Rep. 444, 30 N. W. 808.

the house frequently, and had had one of her servants sleep there every night.[17]

A policy upon a mill conditioned to be void in case the "premises shall become vacant or unoccupied" is not avoided by a temporary suspension of business.[18] Where an insured manufacturing establishment is leased by the insured, and the tenant thereafter ceases business, leaving the building closed and in charge of one who lives in a house upon the premises about fifteen feet from the factory, who is intrusted with the keys and visits the premises three or four times a week, the premises are unoccupied within the meaning of a condition that the policy shall be void in case of the premises becoming vacant or unoccupied.[19]

**§ 2230c. Same subject: watchman acting under legal process.**—Where the condition was "be or become vacant or unoccupied and so remain for ten days" and the policy covered a building "occupied as a saloon" and it was contended that the word "occupied" should be given its ordinary and popular meaning, and as applied to said building meant such occupancy as ordinarily attends or is exercised over a saloon building, while being used as such, it was held that this contention was untenable in that it was not provided that the building should be devoted to saloon purposes and that the words "occupied as a saloon" were words of description only, and, therefore, since the object to be attained was a protection against an increase of hazard by reason of nonoccupancy, the possession of a watchman acting under a sheriff under legal process would be sufficient to satisfy the burden imposed upon assured, the burden of proving nonoccupancy being upon the assurer. The court, however, per Gose, J., declared that there was a conflict of authorities upon the point as to the possession of a watchman being an occupancy, and that an attempt to harmonize them would be futile, and that each case must be determined largely upon its own peculiar circumstances. The question of continuing warranty is, however, considered herein under the chapter on warranties.[20]

[17] Traders' Ins. Co. v. Race, 29 N. E. 846, 21 Ins. L. J. 363, aff'd 142 Ill. 338, 31 N. E. 392.

[18] City Planing & Shingle Mill Co. v. Merchants' Ins. Co. 72 Mich. 654, 16 Am. St. Rep. 552, 40 N. W. 777.

[19] Halpin v. Ætna Fire Ins. Co. 118 N. Y. 165, 19 Ins. L. J. 459, 23 N. E. 988.

[20] Silver v. London Assurance Corp. 61 Wash. 593, 112 Pac. 666, 40 Ins. L. J. 479, the court considers the following cases:

*Illinois.*—Traders Ins. Co. v. Race, 29 N. E. 846, aff'd 142 Ill. 338, 31 N. E. 392; Burlington Ins. Co. v. Brockway, 138 Ill. 644, 28 N. E. 799.

*Michigan.*—Shackleton v. Sun Fire Ins. Co. 55 Mich. 288, 54 Am. Rep. 379, 21 N. W. 343.

*Minnesota.*—Stensgaard v. National Fire Ins. Co. 36 Minn. 181, 30 N. W. 468.

*Nebraska.* — German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698.

**§ 2231. Waiver of condition as to premises being vacated.**—These conditions, like all of the others which are inserted for the benefit of the insurer, may be waived by the insurer, either by some acts dispensing with a performance of the conditions, or by some act which constitutes a waiver of a forfeiture incurred as a consequence of a breach of the conditions. In such a case the insurer is estopped from setting up a breach of such conditions in defense to an action upon the policy.[1]

Where the policy was conditioned to be void if the premises became vacant and so remained for twenty days, the issuance of the policy upon unoccupied premises is not a waiver of the condition, as by the terms thereof the insured is bound to have the house occupied with a period of twenty days.[2] Waiver of condition against a building continuing vacant for ten days, will not be presumed, from the mere fact that it was vacant when the insurance was effected, when nothing whatever occurred or took place between the parties upon this subject at the time or thereafter before the loss.[3] And the terms of an insurance policy making it void in case of vacancy of a building cannot be changed by implied waiver in the issuance of a policy on a building known to be unoccupied, since the provision refers to a possible future, and not a present, use of the property.[4] A waiver of forfeiture resulting from a breach occasioned by change in occupancy of a building increasing the risk extends not only to breaches occasioned by the occupancy before such waiver, but to those resulting from a continuation of such occupancy.[5] If at the date of the policy, and subsequently, the insurer knew that the building was vacant and unoccupied, and so remained, it is presumed that the condition as to vacancy is waived.[6] A permission to remove a building does not constitute a waiver of the vacancy clause where notice is given assured after the removal that the condition will be in force.[7] And

*Pennsylvania.*—Doud v. Citizens Ins. Co. 141 Pa. 47, 23 Am. St. Rep. 263, 21 Atl. 505.

[1] Viele v. Germania Ins. Co. 26 Iowa, 9, 96 Am. Dec. 83. See also Coursin v. Pennsylvania Ins. Co. 46 Pa. St. 323; Hansen v. Home Ins. Co. Co. 90 Me. 333, 38 Atl. 324, 27 Ins. L. J. 19 (defense precluded); Quinsigamond Lake Steamboat Co. v. Phoenix Ins. Co. 172 Mass. 367, 52 N. E. 531, 28 Ins. L. J. 211 (insurer not estopped).

[2] Connecticut Fire Ins. Co. v. Tilley, 88 Va. 1024, 29 Am. St. Rep. 770, 14 S. E. 851, 21 Ins. L. J. 558.

[3] England v. Westchester Fire Ins. Co. 81 Wis. 583, 29 Am. St. Rep. 917, 51 N. W. 594.

[4] Harris v. North American Ins. Co. 190 Mass. 361, 4 L.R.A.(N.S.) 1137, 77 N. E. 493.

[5] Viele v. Germania Ins. Co. 26 Iowa, 9, 96 Am. Dec. 83.

[6] West Coast Lumber Co. v. State Investment & Ins. Co. 98 Cal. 502, 33 Pac. 258.

[7] Firemen's Fund Ins. Co. v. Lyon, — Tex. Civ. App. —, 171 S. W. 801.

where insurer is notified of the vacancy and is asked for a permit, it is bound either to issue the permit or cancel the policy, and return the unearned premium. It cannot retain the premium and so affirm the contract and then repudiate it after a loss.[8] So where insurer knew that an elevator had not been in use for hoisting and that it would not be again used for that purpose, but that it was at the time of the fire used as a storehouse for machinery and tools preparatory to their removal to a new plant and the engine was, after the policy was issued, removed from said elevator, it is not vacant or unoccupied within the forfeiture clause relating thereto.[9] And where insurer knows that the house insured is to be occupied by tenants and such is the intent of the parties it will be held that that is the agreement and a provision in the policy has no application where it provides that it shall be void if the insured building shall "become vacant, or unoccupied, or occupied by tenants."[10] Again, if a policy of insurance is void at its inception because it contains a warranty that the premises were occupied, when in fact they were vacant, a subsequent notice to the insurer that they were vacant at the time of the giving of the notice cannot give life to the policy; and the consent of the insurer to the vacancy will not constitute a waiver by it of the forfeiture caused by the premises not being occupied when the policy was issued, unless such consent was given with full notice of all the facts.[11] Where a policy was issued upon a building in the course of construction, and there was a vacancy permit for a period of thirty days indorsed on the policy, and it appeared that the agent of the insurers promised to renew this indorsement if the building was not completed at the end of that time, and to continue making such renewal until completed, and such renewal was twice indorsed by the agent, but omitted a third time by inadvertence, it was held that the provision declaring the policy void if the building was unoccupied for a period of ten days had been waived.[12] Issuance by an insurer of a vacancy permit with knowledge that the building has been vacant, waives a forfeiture because of such vacancy.[13] An insurance company with-

[8] Patterson v. American Ins. Co. 164 Mo. App. 157, 148 S. W. 448, 41 Ins. L. J. 1473.

[9] Clifton Coal Co. v. Scottish Union & National Ins. Co. of Edinburgh, 102 Iowa, 300, 71 N. W. 433, 26 Ins. L. J. 1007.

[10] Ohio Farmers Ins. Co. v. Vogel, 166 Ind. 239, 3 L.R.A.(N.S.) 966, 117 Am. St. Rep. 382, 76 N. E. 977.

[11] Boyd v. Vanderbilt Ins. Co. 90 Tenn. 212, 25 Am. St. Rep. 676, 16 S. W. 270.

[12] Dupuy v. Delaware Ins. Co. 63 Fed. 680, 24 Ins. L. J. 161.

[13] Duncan v. National Mutual Fire Ins. Co. 44 Colo. 472, 20 L.R.A. (N.S.) 340, 98 Pac. 634.

On vacancy permit as waiver of previous vacancy, see note in 47 L.R.A.(N.S.) 619.

out knowledge of the breach of a condition against vacancy until after a fire has occurred may, if it does not waive the forfeiture, insist upon the same.[14] The fact that the custodian had access to only one room of a house did not render it vacant so as to avoid a policy of insurance on it, where the agent was notified that the owner's family was to be absent, and agreed that it would be sufficient to have a man in the yard, the furniture being left in the building, and the custodian occupying an adjoining building only thirty feet away, and part of the time sleeping in the room to which he had access.[15] Where a policy of fire insurance provided that it should be void if the building insured became vacant without the indorsed consent of the insurer, that no agent had power to waive any condition, that no waiver of a condition was valid unless indorsed, and that any person other than the insured who procured an insurance to be taken by the company was deemed the agent of the insured, and not of the insurer, and a building insured thereunder became vacant with the knowledge of the agent authorized to receive and issue policies, but not of the company, and the insured presented proofs of a loss occurring during such vacancy, and the company, without raising the objection of vacancy, required further proofs, which the insured furnished at an expense to himself, it was held that the insured was entitled to recover on the policy.[16] If the company or its agent when the policy is issued has knowledge that the premises are vacant or unoccupied, it is held that the issuance of the policy under such conditions will be a waiver of any cause therein as to non-occupancy or vacancy.[17] So a temporary absence does not constitute vacancy of a dwelling

[14] Schmidt v. Williamsburgh City Fire Ins. Co. 95 Neb. 43, 51 L.R.A. (N.S.) 261, 144 N. W. 1044.

[15] Home Ins. Co. v. Hancock, 106 Tenn. 513, 52 L.R.A. 665, 62 S. W. 145.

On effect on provisions as to vacancy of agent's representations or knowledge, see note in 4 L.R.A. (N.S.) 758.

[16] Gans v. St. Paul Fire & Marine Ins. Co. 43 Wis. 108, 28 Am. Rep. 535.

[17] *Illinois.*—Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Germania Fire Ins. Co. v. Klewer, 27 Bradw. (Ill. App.) 590.

*Iowa.*—Jordan v. State Ins. Co. 64 Iowa, 216, 19 N. W. 917.

*Maine.*—Hilton v. Phoenix Ins. Co. 92 Me. 272, 42 Atl. 212, 28 Ins. L. J. 309.

*Missouri.*—Chamberlain v. British American Assur. Co. 80 Mo. App. 589, 2 Mo. App. Rep. 748; German Ins. Co. v. Frederick, 57 Neb. 538, 77 N. W. 1106.

*New York.*—Haight v. Continental Ins. Co. 92 N. Y. 51; Sentell v. Oswego County Farmers' Ins. Co. 16 Hun (N. Y.) 516.

*South Carolina.*—Wilson v. Commercial Assur. Co. 51 S. Car. 540, 64 Am. St. Rep. 700, 29 S. E. 245.

*Tennessee.*—Home Ins. Co. v. Hancock, 106 Tenn. 513, 62 S. W. 145.

*Wisconsin.*—Devine v. Home Ins. Co. 32 Wis. 471.

See Short v. Home Ins. Co. 90 N. Y. 16, 43 Am. Rep. 138; Williams v.

house although a part of the building is not occupied at all, such nonoccupation being known to the assurer's agent.[18] And where assurer's agent, from whom the policy had been received, was given the policy to obtain a vacancy permit, informs insured that it had been given insurer, is bound.[19] And although the adjuster declares that he does not waive the breach as to vacancy, still if he proceeds to adjust the loss and requires from assured statements of loss, and expense is incurred by the latter by reason thereof, there is a waiver of the forfeiture.[20] So a forfeiture for vacancy is waived where assurer's authorized local agent assents to the continuance of the policy in force upon being notified by the owners of such vacancy.[1] And the term "vacant or unoccupied," relating to a clause of forfeiture of insurance on a dwelling "to be occupied by the assured or tenant," has not such a definite signification that the assured is not entitled to rely on the statement of the agent that the policy would remain valid for thirty days after a tenant removed.[2]

§ 2232. **Restrictions in life policy as to residence: travel, etc.: waiver.**—A condition ordinarily inserted in policies of life insurance is that imposing a restriction upon the insured as to the limits within which he may reside or travel. The companies may prescribe certain limits for travel or residence in life policies, and where such conditions exist, they are binding upon the insured, and a violation thereof will avoid the policy.[3] A policy of life insurance providing that it shall be null and void if a condition therein in regard to residence is violated, is not absolutely void upon the happening of such event, but merely voidable, at the election of the company.[4] And a mere temporary or transitory stay in prohibited limits, does not breach a condition prohibiting residing in or removal thereto, as "residing" implies a legal residence or domicil and a removal applies to removal of residence. So a member of a benefit society who goes south of the line permit-

Niagara Fire Ins. Co. 50 Iowa, 561. See chapters on agency herein.

[18] Walrod v. Des Moines Ins. Co. 159 Iowa, 121, 140 N. W. 218, 42 Ins. L. J. 732 (wording of clause does not appear).

[19] Morgan v. Illinois Ins. Co. 130 Mich. 427, 90 N. W. 40.

[20] German American Ins. Co. v. Evans, 25 Tex. Civ. App. 300, 61 S. W. 536.

[1] Home Fire Ins. Co. v. Wilson, 118 Ark. 442, 176 S. W. 688. See §§ 565, 566 herein.

[2] Hotchkiss v. Phœnix Ins. Co. 76 Wis. 269, 20 Am. St. Rep. 69, 44 N. W. 1106. See § 2225a herein.

[3] Nightingale v. State Mutual Ins. Co. 5 R. I. 38.

On character of residence or sojourn in prohibited place which will avoid policy, see note in L.R.A. 1915F, 1056.

[4] Germania Life Ins. Co. v. Koehler, 168 Ill. 293, 61 Am. St. Rep. 108, 48 N. E. 297.

ted by his contract, to secure work, and stays there a few months, leaving his family at his former place of residence, does not forfeit his certificate under the provisions of the order that no certificate shall be granted to one residing outside of a specified section of country, and that any member who shall remove therefrom shall forfeit his benefit.[5]

Where a person escaped from imprisonment from New York, and went to Vigo, Spain, which was beyond the limits stated in the policy, it was held that the policy was avoided, and that the insured could not claim a paid-up policy.[6]

This condition restricting the right of the insured as to travel and residence may, like other conditions, be waived by the insurer or his agents. Thus, where the agent of the insurer received premiums from the insured with knowledge of the violation of this condition, it was held that the forfeiture was waived.[7] And if a person holding a policy of life insurance violates a condition therein respecting residence, under penalty of a forfeiture and a local agent empowered to receive premiums, receives a premium from him after knowledge of the breach of condition, the transmission of the premium to the company, and the retention thereof by it, operates as a waiver by the company of the breach.[8] But the receipt of a premium by an agent, with knowledge of the previous residence of the assured within a prohibited district, is not a waiver of the forfeiture incurred thereby, where there is no evidence of a disregard of the condition as to the residence of the assured in any previous year, and the insurer directed a return of the premiums as soon as it was informed of the facts.[9] And where a party had

[5] Lane v. Grand Fraternity, 132 Tenn. 235, L.R.A.1915F, 1056, 177 S. W. 941.

[6] Douglas v. Knickerbocker Life Ins. Co. 55 How. Pr. (N. Y.) 104.

[7] Wing v. Harvey, 23 L. J. Ch. 511, 5 De G. M. & G. 265, 18 Jur. 394, 2 W. R. 370; Girdlestone v. North British Mercantile Ins. Co. 11 L. R. Eq. Cas. 197.

[8] Germania Life Ins. Co. v. Koehler, 168 Ill. 293, 61 Am. St. Rep. 108, 48 N. E. 297.

[9] Globe Mutual Life Ins. Co. v. Wolff, 95 U. S. 326, 24 L. ed. 387. *Cited* in:

*United States.* — Supreme Lodge Knights of Pythias v. Kalinski, 163 U. S. 289, 298, 41 L. ed. 163, 166, 16 Sup. Ct. 1047.

*Connecticut.*—McGurk v. Mutual Life Ins. Co. 56 Conn. 528, 540, 1 L.R.A. 563, 567, 16 Atl. 263.

*District of Columbia.*—McElhone v. Massachusetts Ben. Assoc. 2 App. D. C. 297, 402.

*Illinois.*—Germania Life Ins. Co. v. Koehler, 168 Ill. 293, 303, 61 Am. St. Rep. 108, 48 N. E. 297.

*Indiana.* — Northwestern Masonic Aid Assoc. v. Bodurtha, 23 Ind. App. 121, 127, 77 Am. St. Rep. 414, 53 N. E. 787.

*Kansas.*—Bingler v. Mutual Benefit Life Ins. Co. 10 Kan. App. 6, 8, 61 Pac. 673.

*New York.*—Quinn v. Mutual Life Ins. Co. 41 N. Y. Supp. 1060, 10 App. Div. 483, 486.

*West Virginia.* — Medley v. Ger-

forfeited his policy by residing within prescribed limits without a permit, and after his death, but before knowledge of the fact, an agent of the company gave a receipt to a friend of the insured for the money to pay for a permit, but the company never issued the permit, and the agent upon hearing of the death tendered back the money, it was held that there was no waiver of the forfeiture.[10]

The attempt of the grand secretary of a fraternal society to suspend a member for taking up his residence out of the permitted territory is without effect where, by the laws of the order, such power is vested only in the general council or board of directors.[11]

**§ 2233. Same subject: construction of phrase "settled limits of the United States."**—The phrase in a policy "settled limits of the United States," has been construed as meaning the geographical limits or boundaries of the United States, without regard to the fact as to whether such portions are all inhabited or not.[12] The contention was made in this case by the company that this phrase referred to the region of settlements. Upon this point the court said: "What are we to understand by the 'region of settlements,' and when can a man be said to be within or beyond them? How quickly must or how sparsely may any given section of country be populated to come clearly within the scope of these terms? We have in the very heart of this state a vast region almost entirely untenanted by a man, . . . it is far enough beyond the region of settlements, and yet it would be a rather startling proposition

man Alliance Ins. Co. 55 W. Va. 351, 47 S. E. 101; Maupin v. Scottish Union National Ins. Co. 53 W. Va. 557, 590, 45 S. E. 1003.

[10] Bennecke v. Connecticut Mutual Life Ins. Co. 105 U. S. 355, 26 L. ed. 990.

*Cited* in: *United States.*—Supreme Lodge Knights of Pythias v. Kalinski, 163 U. S. 289, 298, 41 L. ed. 163, 166, 16 Sup. Ct. 1047; Supreme Lodge Knights of Pythias v. Wellenvoss, 119 Fed. 671, 676, 56 C. C. A. 287, 292; Georgia Home Ins. Co. v. Rosenfield, 95 Fed. 358, 368, 37 C. C. A. 96, 106; Hubbard v. Mutual Reserve Fund Life Assoc. 80 Fed. 681, 682; Olsen v. Hunter-Benn, 54 Fed. 530, 532; Ball & Sage Wagon Co. v. Aurora Fire & Marine Ins. Co. 20 Fed. 232, 235.

*Georgia.*—United Benevolent Soc. v. Freeman, 111 Ga. 355, 360, 36 S. E. 764.

*Iowa.*—Garretson v. Equitable Mutual Life & Endowment Assoc. 93 Iowa, 402, 412, 61 N. W. 952.

*Maryland.* — Baltimore Life Ins. Co. v. Howard, 95 Md. 244, 259, 52 Atl. 397.

*Michigan.*—Moore v. Mutual Reserve Fund Life Assoc. 133 Mich. 526, 533, 95 N. W. 573.

*New York.*—Wyman v. Phoenix Mutual Life Ins. Co. 45 Hun, 184, 186.

*Oregon.*—Whigham v. Independent Foresters, 44 Oreg. 553, 554, 75 Pac. 1067.

*Utah.*—Reed v. Union Central Life Ins. Co. 21 Utah, 295, 310, 61 Pac. 21.

[11] Lane v. Grand Fraternity, 132 Tenn. 235, L.R.A.1915F, 1056, 177 S. W. 941.

[12] Casler v. Connecticut Mutual Life Ins. Co. 22 N. Y. 427 (three judges dissenting).

that anyone who should happen to have such a policy as this, and who for the purposes of relaxation, amusement, or the love of adventure should penetrate that great wilderness, would by that act run the risk of forfeiting all his interest in the policy. . . . Considerations like these seem inevitably to lead to the conclusion that the language of the policy must have been used to indicate the established boundaries of the country, and such, on the whole, I am satisfied is the interpretation that shall be given to them." If an indemnity policy of insurance covers only injuries received "within the United States (not including its parts beyond the seas), Mexico and Canada," there is no liability for an injury to, and the death of, the insured occurring in the Canal Zone on the Isthmus of Panama.[13]

§ 2234. **Restriction as to travel: construction of permit to go beyond prescribed limits.**—A permit to travel beyond the limits prescribed by the policy is held to be an independent agreement, unless it be indorsed on the policy when the policy is issued, in which case it is considered a part of the contract.[14] Where a permit is couched in unambiguous terms, it must be strictly complied with by the insured.[15] Thus, where a person whose life was insured within the United States had permission to go to California and return home around Cape Horn, or by Vera Cruz, and, being taken sick in California, he returned home by way of Panama and Chagres, without the United States, and soon after died, it was held that the policy was thereby avoided, although there was then no usually traveled route by Vera Cruz, and although he returned the shortest and safest way.[16] If, however, the permit is expressed in language which is not perfectly clear, and a doubt arises, then it is to be construed strictly against the insurer so as to prevent a forfeiture.[17] So where the insured was granted a permit to go to Cuba, "he to take his own risk of epidemics," and while there he died of yellow fever, it was held that as yellow fever was not prevalent during the season in which he died, the company was liable.[18] And an insured

[13] Currie v. Continental Casualty Co. 147 Iowa, 281, 140 Am. St. Rep. 300, 126 N. W. 164.

[14] Rainsford v. Royal Ins. Co. 52 N. Y. 626.

[15] Hathaway v. Trenton Mutual Life Ins. Co. 11 Cush. (65 Mass.) 448; Rainsford v. Royal Ins. Co. 52 N. Y. 626, s. c. 33 N. Y. Sup. Ct. 453.

[16] Hathaway v. Trenton Mutual Life Ins. Co. 11 Cush. (65 Mass.) 448.

[17] Notman v. Anchor Assurance Co. 4 Com. B. (N. S.) 476, 27 L. J. C. P. 275, 4 Jur. N. S. 712; Converse v. Knights Templars' & Masons' Life Indemnity Co. 93 Fed. 148, 60 U. S. App. 288, 28 Ins. L. J. 481, certiorari denied 175 U. S. 726, 44 L. ed. 338, 20 Sup. Ct. 1022.

[18] Pohalski v. Mutual Life Ins. Co. 45 How. Pr. (N. Y.) 504.

person who has a permit to go by sea between certain ports "on first-class decked vessels," does not forfeit his policy by taking a steerage passage.[19] A permit to reside or travel in a prohibited territory, where it is intended to secure a present right or privilege, will, though it is post-dated, operate according to the intent of the parties.[20] If the insured by the terms of the application and the policy is described as residing in a certain locality, he has the right, without further permission, to continue his residence in that place, and the indorsement of a permit in such a case cannot restrict his rights.[1] Where stipulations as to residence and travel in the United States gave permission to reside in settled portions north of a certain parallel of latitude at all seasons of the year, and south of that parallel at all times except during certain months and "to pass as a passenger by the usual routes of public conveyance, to and from any port or place within the foregoing limits" but if he shall "pass beyond or be without the foregoing limits" the policy "shall become null and void," the words "foregoing limits" have the same meaning with reference to all seasons and embrace as a unit all regions in which residence is permitted at any season in both hemispheres. The right to travel is permitted by any of the usual routes of conveyance in or through the region where residence is permitted and is not limited to any part of the year. And "foregoing limits" in the second clause have a wider scope than in the clause preceding as they extend beyond the regions of permitted residence and include the usual routes of travel to and from ports and places in that region. The meaning is that the policy shall be void if assured shall pass beyond or be without the regions in which residence is permitted except to go, as a passenger, by the usual lines of conveyance between ports or places within those regions. The rights "to pass as a passenger by the usual routes of conveyance" does not mean that assured is bound to be in constant conveyance on the line of his journey from start to end, but he is entitled as a traveler to reasonable stops on the way for whatever reasonable purpose consistent with the character of a traveler, whether such stop be for business, pleasure, health, or sickness, but he may not stay on his way long enough to become a sojourner.[2]

**§ 2235. Where insured is prevented by sickness from returning within time limited by permit.**—There are two cases in New York

[19] Taylor v. Ætna Ins. Co. 13 Gray (79 Mass.) 434.

[20] Walsh v. Ætna Ins. Co. 30 Iowa, 133, 6 Am. Rep. 664.

[1] Forbes v. American Mutual Life Ins. Co. 15 Gray (81 Mass.) 249, 77 Am. Dec. 360.

[2] Converse v. Knight Templars' & Masons' Life Indemnity Co. 93 Fed. 148, 35 C. C. A. 232, 28 Ins. L. J. 481, certiorari denied, 175 U. S. 726, 44 L. ed. 338, 20 Sup. Ct. 1022, 1023, for facts of this case see § 2235 herein.

in which this question has arisen. In the earlier case[3] the facts were as follows: The insured was by an indorsement upon the policy permitted "to reside and travel on land in any part of the United States or by any of the regular steamers, to be north of the south bounds of Virginia by the tenth day of July, 1854." While in Florida, the insured was taken sick on June 11th, and died there on July 20th, being unable at any time during his sickness to return. The company was held liable, on the ground that absolute performance of the condition was excused by sickness, which was the act of God. Chief Justice Bosworth says: "As the policy in question is one upon the life of the deceased, I think the terms of the license or consent should be so construed as not to require him to attempt to return north of the south bounds of Virginia by the 10th of July, when in consequence of sickness suddenly and unexpectedly contracted or developed an attempt to do so would be certain, so far as the human mind can foresee results, to produce the death of the insured. . . . He was taken and became so sick and ill in body as to be unfit and unable to travel and to start on his return home; and continued so until he died. I do not think the consent or license should be so construed as to require him to start in that condition with the certainty that if he did start he would die, in consequence of his sickness and of such acts on his part south of the south bounds of Virginia before the 10th of July, or north of those bounds immediately thereafter; that it could not have been the intention of the parties that the insured, under the state of facts established by the special verdict, should do acts which would make his death inevitable, in order to a proper performance on his part of his duty as prescribed and disclosed in such license and consent." In a later case[4] in the same state the insured, under a permit to go to New Orleans and remain there until July 1, 1870, went to that place, but remained there until his death on March 18, 1872. The plaintiff claimed that the insured became so sick and feeble that he was unable to return north, and consequently such return being rendered impossible by the act of God, he was excused from so doing, and the policy was not avoided. It appeared from the evidence that he was in feeble health when he went south. It did not, however, appear that he was unable at any time before July 1, 1870, to return north. The court, however, did not

[3] Baldwin v. New York Life Ins. Co. 3 Bosw. (N. Y.) 530.

[4] Evans v. United States Life Ins. Co. 64 N. Y. 304, s. c. 3 Hun (N. Y.) 587, *cited* in Douglas v. Knickerbocker Life Ins. Co. 83 N. Y. 492, 502, to the point that where an ocean voyage was taken without a permit in violation of the express terms of the policy it was avoided and there was nothing for a court of equity to act upon and relieve from the forfeiture though assured returned in safety to this country.

decide it upon this ground, though it considered it. The basis of the decision was that "he was feeble when he went, and he could not go so far south that he could not return, and, after remaining there until he was too feeble to return, enable the holder of the policy to claim that his return was rendered impossible by the act of God, and that thus the breach of the condition was executed." These two cases are not in conflict. In one the insured left the north in good health and was taken suddenly ill, and was unable to return, while in the other instance it appeared that he had left the north in feeble health. The rule to be drawn from the one case is, that if an insured person in good health, by permit, goes to a locality prohibited by the policy, and while there is taken ill, or becomes unable to return, the policy is not forfeited, as performance is rendered impossible by the act of God. In the other case, which does not deny this rule, it is held that if an insured person, while in feeble health obtains a permit and goes to prohibited localities, he does so at his own risk, and cannot allege that his return is rendered impossible by the act of God.[5] In a Federal case, the contract stipulation as to residence and travel in the United States, gave permission to reside in settled portions north of a certain parallel of latitude at all times of the year and south of that parallel at all times, except during certain months, and "to pass as a passenger by the usual routes of public conveyance, to and from any part or place within the foregoing limits." It also provided that if assured should "pass beyond or be without the foregoing limits" the policy "shall become null and void." It appeared that assured removed from a place in Michigan to W. in the pine regions of Mississippi, a few miles south of the above stated parallel of latitude, but assurer had consented that he should reside in the pine regions of Mississippi subject to the exception that if he should there die of yellow fever it would not be liable upon the policy. It further appeared that being in poor health, assured went, with his wife,

[5] The Baldwin case first above noted in the text, was *cited* and *relied* on by appellant in Wheeler v. Connecticut Mutual Life Ins. Co. 82 N. Y. 543, 37 Am. Rep. 594, and it was declared by the court that it involved no question as to the nonpayment of the premium and had no application to the case before the court, and it was remarked incidentally, and not otherwise, that it was overruled by the Evans case without any evident intent that such brief statement should have any weight as an authority because there was no discussion, and as above stated it was expressly declared that the point was not involved, and the binding force of any statement by the court in its opinion must be limited in its application to the issues before it. In addition said Baldwin case is not mentioned at all by the court in the Evans case, noted in the text, either as being overruled or otherwise.

from his said home in W. to L. B., also in the pine regions of said state, going by the usual route of travel. A few days thereafter, he went from L. B. to New Orleans, to consult a physician, but returned on the same day to L. B. His condition of health, however, grew constantly worse, and shortly thereafter he started, with his wife, to return to his home in W., arriving en route by the usual course of travel, at New Orleans, he went at once to see his physician, and on his advice went to the house of his friend and associate in business, and shortly thereafter died there. It was held, that assured was not bound to be in constant conveyance on the line of his journey from the start to the end; but, like a traveler, he was entitled to stop on the way for whatever reasonable purpose was consistent with the character of a traveler, and as a passenger or traveler is to be expected to do, for any purpose of business, health or pleasure, but that he might not stay on his way so long, and under such circumstances as to become a sojourner, and if by reason of sickness he was compelled to interrupt his journey it could not be said that on that account his policy became void, and whether in this instance the interruption in the journey was improper, was, in the view most favorable to assurer, a question of fact, or of mixed law and fact, to be submitted to the jury on proper instructions.[6]

**§ 2236. Prohibiting change of occupation: prohibited occupations: hazardous and extra hazardous: construction of clauses as to.**—A frequent condition in a life policy is one prohibiting the insured from engaging in a more hazardous occupation or employment than the one which he is engaged in at the time of the issuance of the policy, or in contemplation of which the risk is assumed. This prohibition as to a change of occupation does not refer to work which the insured may be merely temporarily or casually engaged in, and such work will not avoid the policy. It refers to work which the insured may be employed in as a regular or usual business.[7] So engaging temporarily, accidentally, or casually in another business, or vocation, with no intention of abandoning that specified in the contract, but to return thereto, does not con-

[6] Converse v. Knight Templars' & Masons' Life Indemnity Co. 93 Fed. 148, 35 C. C. A. 232, 28 Ins. L. J. 481, certiorari denied 175 U. S. 726, 44 L. ed. 338, 20 Sup. Ct. 1022.

[7] Stone v. United States Casualty Co. 34 N. J. L. 371; North American Life & Accident Ins. Co. v. Burrows, 69 Pa. St. 43, 8 Am. Rep. 212. See also Guiltinan v. Metropolitan Life Ins. Co. 69 Vt. 469, 38 Atl. 315, 27 Ins. L. J. 93. *Compare* Malicki v. Chicago Guaranty Fund Life Soc. 119 Mich. 151, 77 N. W. 690, 28 Ins. L. J. 216 (both the Vermont case and this case are *considered* under § 2236b herein).

Occupation of insured: loss of time; change of occupation, see § 2870 herein.

stitute a change of business or vocation within the intent of those words in a condition requiring notice to and consent of the society in case of such change to prevent a forfeiture.[8] And the rule, that a temporary change of occupation, as where one engages incidentally or occasionally in other pursuits, does not avoid the policy,[9] applies where a foreman, in charge of construction of a lock or dam, occasionally, and in connection therewith, did diving work inspecting a cofferdam, but received no extra pay therefor, and it was held that there was no such change of occupation as avoided the policy.[10] So a person who for a short time engages in hunting for a recreation is not engaged even temporarily in a prohibited occupation even though the policy prohibits engaging temporarily or otherwise in certain occupations.[11] And it is held no breach of such a condition that the assured, who was a teacher

[8] Taylor v. Illinois Commercial Men's Assoc. 84 Neb. 799, 24 L.R.A. (N.S.) 1174n, 122 N. W. 41.

On temporary pursuit of other activities as change of occupation within meaning of accident insurance policy, see note in 24 L.R.A.(N.S.) 1174.

On effect of temporary violations of condition as to occupation in policy of life insurance, ceasing before loss, see note in 50 L.R.A.(N.S.) 592.

On provision for forfeiture or reduction of benefit in event of injury while engaged in more hazardous occupation, or variations of that provision, as applied to occasional or temporary acts, see note in L.R.A.1915D, 312.

[9] Southern Ins. Co. v. Anderson, 130 Tenn. 482, 172 S. W. 318, 45 Ins. L. J. 393; Gottfredson v. German Commercial Accident Co. 218 Fed. 582, 134 C. C. A. 319, 45 Ins. L. J. 525. See § 2870 herein.

[10] Southern Ins. Co. v. Anderson, 130 Tenn. 482, 172 S. W. 318, 45 Ins. L. J. 393. The court said: "The rule is that, where one casually or incidentally engages in activities other than those immediately connected with his regular employment, such a temporary change of his ordinary pursuits is not a change of occupation, within the prohibition of insurance policies. While there are provisions in the policy sued on against a change in occupation to one more hazardous, such provisions will not be held to apply to a case like this." —Green, J., *citing* and *considering:*

*Illinois.*—Union Mutual Accident Assoc. v. Frohard, 134 Ill. 228, 10 L.R.A. 383, 23 Am. St. Rep. 664, 25 N. E. 642; Travelers' Preferred Accident Assoc. v. Kelsey, 46 Ill. App. 371.

*Iowa.*—Holiday v. American Mutual Accident Assoc. 103 Iowa, 178, 64 Am. St. Rep. 170, 72 N. W. 448.

*Michigan.*—Hess v. Preferred Masonic Mutual Accident Assoc. 112 Mich. 196, 30 L.R.A. 444, 70 N. W. 460.

*New Jersey.*—Stone v. United States Casualty Co. 34 N. J. Law, 371.

*North Carolina.* — Hoffman v. Standard Life Co. 127 N. Car. 337, 37 N. E. 466.

*Pennsylvania* — North American Life & Accident Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212.

*Wisconsin.* — Stevens v. Modern Woodmen of America, 127 Wis. 606, 107 N. W. 8, 7 Ann. Cas. 566, and note to Taylor v. Illinois Commercial Men Assoc. 84 Neb. 799, 122 N. W. 41, 24 L.R.A.(N.S.) 1174, supra.

[11] Union Mutual Accident Assoc. v. Frohard, 134 Ill. 228, 23 Am. St. Rep. 664, 10 L.R.A. 383, 25 N. E. 642.

and so described in the policy, occupied himself while out of professional employment in superintending the erection of a couple of buildings designed for his own use. Such superintending did not make him a builder.[12]

**§ 2236a. Same subject.**—A condition in a fraternal benefit certificate is reasonable and binding which classifies certain occupations as hazardous and provides that if any one of them is entered upon after the certificate is issued, the liability of the society shall be limited or extinguished, and also exempting the society from any and all liability in case of certain hazardous occupations on account of death directly traceable thereto.[13] So engaging in a prohibited occupation in violation of the conditions avoids the policy.[14] But the liability of a beneficial association may be limited to an amount rated according to the hazardous occupation in which assured was engaged at the time of his injury.[15] And unless a policy by express terms restricts the company's liability to accidents occurring in that occupation in which the insured was engaged when the insurance was effected, a change in occupation, as to that of a brakeman from that of a switchman, will not avoid the policy.[16]

If a person procures a permit to engage in an occupation prohibited by the policy, and continues in such occupation beyond the time allowed by the permit, the policy will be avoided.[17]

It is held that a certificate of a benefit society is not rendered void by a change of occupation to one which is denominated as extra hazardous under a by-law of the society, where certain conditions

[12] Stone v. United States Casualty Co. 34 N. J. L. 371.

On what amounts to a breach of warranty as to business profession or occupation of the insured in a policy of life or accident insurance, see note in L.R.A.1916F, 1030.

As to time covered by provision or representation with respect to the habits or occupation of insured, see note in 5 L.R.A.(N.S.) 283.

[13] Modern Woodmen of America v. Weekley, 42 Okla. 25, 139 Pac. 1138.

As to amendments or change of by-laws in such cases, see §§ 379d et seq. herein.

[14] North Western Mutual Life Ins. Co. v. Ammerman, 119 Ill. 329, 59 Am. Rep. 799, 10 N. E. 225.

[15] Railway Officials & Employees Accident Assoc. v. Bradley, 97 Ill. App. 355. See also Union Mutual Accident Assoc. v. Frohard, 134 Ill. 228, 10 L.R.A. 383, 23 Am. St. Rep. 664, 25 N. E. 642.

[16] Provident Life Ins. Co. v. Fennell, 49 Ill. 180.

[17] Ayers v. New England Mutual Life Ins. Co. 109 Mass. 430. If a case is fairly left to the jury, a new trial will not be granted for "not directing the jury that the deceased was engaged at the time of his death in braking cars, which occupation was more hazardous than that of a shoemaker," the deceased being described as a shoemaker in his application, and his death being caused by accident while braking cars: Day v. Dominion Safety Fund Life Assoc. (N. B. S. C. 1894) 14 Can. L. T. 349.

are specified in the certificate and application, for a violation of which the contract shall be void, and this is not one of the conditions named.[18] If a condition in a fraternal benefit certificate totally exempts the society from any and all liability on account of the death of a member directly traceable to employment in a classified hazardous occupation such as "linemen in the employment of electric light company, or power or electric light company," and such condition prohibits entering upon said hazardous occupation at any time after the certificate is issued, entering upon such hazardous occupation does not render the certificate void, but the society is exempt from liability on account of death of the member by accident or disease directly traceable to said hazardous employment; the certificate however remaining in full force and effect, and the associations liability continuing from any other cause.[19]

**§ 2236b. Engaging in liquor or saloon business.**—It may be stated as a general rule, subject to certain qualifications or exceptions, principally dependent upon such questions as the form thereof, or amendments thereto, or changes therein,[20] that a by-law prohibiting engaging in the retail liquor business is not unreasonable.[1] And it is held that provisions are not self-executing which prohibit the admission and retention as members of those engaging in the sale of intoxicating drinks.[2] So it is held that a by-law of a benefit society providing that any member engaging in the saloon business, shall stand suspended from that date and forfeit all interest in the beneficiary fund, operates, without any formal suspension or notice, to forfeit the certificate of one who engaged in such business before the passage of the by-law, where at the time he became a member, the by-laws prohibited members from engaging in the saloon business, but provided in such case for formal suspension and notice thereof, and his application for membership contained a stipulation that he would comply with all the laws, rules, and usages of the association which were then in force or which might thereafter be adopted, since the new by-law creates no new ground of forfeiture but operates merely to repeal the provisions of the prior by-law as to the manner of proceeding in case of a violation of rules.[3] The determination of this last point as to self-execution

[18] Hobbs v. Iowa Mutual Benefit Assoc. 82 Iowa, 107, 31 Am. St. Rep. 466, 11 L.R.A. 299, 20 Ins. L. J. 434, 47 N. W. 983.

[19] Modern Woodmen of America v. Weekley, 42 Okla. 25, 139 Pac. 1138.

[20] See §§ 368 et seq., 379e herein.

[1] Grand Lodge Ancient Order United Workmen v. Burns, 84 Conn. 356, 80 Atl. 157, 40 Ins. L. J. 1676, 1682.

[2] Steinert v. American Brotherhood of Carpenters & Joiners of America, 91 Minn. 189, 97 N. W. 668.

[3] Moerschbaecher v. Supreme Council Royal League, 188 Ill. 9, 52 L.R.A. 281, 59 N. E. 17. *Compare* § 379e herein.

and provisions however, is dependent upon the same principles as govern in other cases of forfeiture, which depend largely upon the wording of the particular condition and the intent of the parties as evidenced by their contract, as is instanced by provisions expressly declaring that the member shall be ipso facto suspended from all rights in the society or order, if he has entered, or shall thereafter enter, the retail liquor business.[4]

In applying, so far as are deducible from the decisions, such rules as govern this prohibitory condition there are in general three classes of cases: those wherein the prohibition relates to the admission and retention of members; those which preclude such subsequent business or occupation; and those which determine whether certain persons and their occupation come within the prohibition.

The adoption, by a fraternal insurance order, of a by-law declaring that no person shall be admitted or retained as a member who is engaged in the sale of intoxicating liquors, does not, in the absence of a specific provision to that effect, avoid the beneficiary certificate of a member who is already engaged in that business in a state where it is not unlawful, who continues therein, and against whom no action is taken.[5] And a provision in a life policy that the insured shall not be connected with the liquor business, unless so specified in his application or a written permit be given, refers wholly to the insured's occupation after the contract of insurance has taken effect.[6] So it is decided that a by-law of a fraternal order which provides that any member who shall, after the date of its adoption, have entered, or who shall thereafter enter, into the business of selling intoxicating liquors, shall stand suspended from his rights to participate in the beneficial fund, and that his certificate shall become void from the date of his engaging in such occupation, does not in terms, apply to a member who, before the adoption of such by-law, was engaged in such business, and who has remained in it continuously thereafter.[7] But re-entering the retail liquor business is within a by-law suspending all who have entered, or thereafter enter such business.[8]

By-laws of a fraternal society excluding from membership or

[4] Meister v. Boetcher (Pa.) 59 Pitts. L. J. 391.

[5] Grand Lodge Ancient Order United Workmen v. Haddock, 72 Kan. 35, 1 L.R.A.(N.S.) 1064n, 82 Pac. 583.

On effect of adoption of by-laws by fraternal insurance order upon benefit certificates already issued, see note in 1 L.R.A.(N.S.) 1065.

[6] McGurk v. Metropolitan Life Ins. Ins. Co. 56 Conn. 528, 1 L.R.A. 563, 16 Atl. 263.

[7] Grand Lodge Ancient Order United Workmen v. Haddock, 72 Kan. 35, 1 L.R.A.(N.S.) 1064n, 82 Pac. 583.

[8] Meister v. Boetcher (Pa.) 59 Pitts. L. J. 391.

benefits those engaged in the sale of intoxicating liquors, either as proprietor or agent, apply to an administrator who operates a saloon for the benefit of a deceased member's estate.[9] But an employee in a bonded warehouse engaged in bottling aged whisky is not within a provision in a by-law of a mutual benefit society making void certificates of all members engaged in the manufacture or sale of intoxicating liquor as a beverage in the capacity of proprietor, stockholder, agent, or employee.[10] Nor does one who owns only a half interest in a saloon "keep" it within the meaning of a condition prohibiting such keeping, and providing that only the reserve value of the policy should be paid in case of his death during or by reason of the violation of the condition, and this is so even though he had kept a saloon up to the time of becoming an invalid.[11] Nor is a person, who does not himself personally sell or serve liquors, within the meaning of a prohibition specifying a "barkeeper or other person who sells or serves intoxicating liquors." [12] This point involves also that of temporary or occasional occupation, considered under a preceding section [13] so the word "engaged" means "occupied" and does not relate to an occasional act outside of one's regular employment, and this applies to an employee of a hotel, who is employed generally to do what he is called upon to do and who occasionally, and as no part of his general employment, but not out of the ordinary line of his duties, by direction of his employer or otherwise, furnishes the guests with intoxicating liquors and receives pay for them. In such case he is not engaged in the sale thereof. If, however, he sells alcoholic beverages as a part of his regular employment to guests as they called for them, he would be engaged in such sale.[14] But as bearing upon this question, one who attends bar while his regular bartender is absent at his meals and on other occasions, is held to falsify a representation that his bar trade is attended to exclusively by his clerk.[15]

[9] National Council Junior Order United American Mechanics' v. Thompson, 153 Ky. 636, 45 L.R.A. (N.S.) 1148, 156 S. W. 132.

As to who is engaged in the liquor business within the meaning of an insurance contract, see note in 45 L.R.A.(N.S.) 1144.

[10] Brackett v. Modern Brotherhood of America, 154 Ky. 340, 45 L.R.A. (N.S.) 1144, 157 S. W. 690.

[11] Union Central Life Ins. Co. v. Hughes, Admr. 110 Ky. 26, 22 Ky. L. Rep. 1549, 60 S. W. 850.

[12] Supreme Council Royal Arcanum v. Urban, 137 Ill. App. 292.

[13] § 2236 herein.

[14] Guiltinan v. Metropolitan Life Ins. Co. 69 Vt. 469, 38 Atl. 315, 27 Ins. L. J. 93.

[15] Malicki v. Chicago Guaranty Fund Life Soc. 119 Mich. 151, 77 N. W. 690, 28 Ins. L. J. 216. See § 2074 herein.

**§ 2236c. Prohibited occupations: waiver and estoppel.**—If assured in a fraternal order engages in prohibited occupation of saloon keeper, the breach may be waived by slight evidence of an intention to do so, as where knowledge of the fact is shown to have been had by the supreme lodge and a forfeiture by reason of the same act cannot be thereafter enforced, even though the statute restricts the power of subordinate lodges to waive forfeitures unless the supreme lodge has notice of the breach.[16] So an acceptance and retention by officers of a grand lodge, of assessments paid, with knowledge that the member had forfeited his rights by engaging in the liquor business operates as an estoppel against claiming a forfeiture even though it is ultra vires under the by-laws for the association to waive forfeitures.[17] But the receipt of assessments after re-entering the retail liquor business contrary to the prohibitory condition, does not prevent suspension of the member as stipulated.[18] And a fraternal society is not estopped from setting up a breach of a condition against engaging in the liquor business, by reason of the fact that the local lodge had knowledge of the facts constituting the breach, where said local lodge in the application made by it for the certificate agreed to make no claim for benefits on the death of anyone engaging in such business, and the certificate was conditioned to pay the local lodge the specified benefit only on condition that the member was not engaged in said business.[19] And where it constitutes no part of the duty of the recorder of a local lodge to decide when a certificate was annulled, nor to ascertain by inquiries or otherwise outside the lodge when not engaged in his official duties in what business the members were engaged, and he is not required to record the fact that a member was engaged in the retail liquor business or to report the same to the grand lodge, the receipt assessments from insured up to the time of his death does not preclude the right to enforce a forfeiture by reason of the knowledge on the part of said recorder of the occupation of assured.[20] If an occupation is specially classified as hazardous and prohibited under a condition in a fraternal benefit certificate which

[16] Thompson v. Modern Brotherhood of America, 189 Mo. App. 15, 176 S. W. 706; Laws 1911, p. 292; act March 30, 1911, sec. 22.

[17] Peterson v. Grand Lodge Ancient Order United Workmen, 36 S. Dak. 539, L.R.A.1916F, 751, 156 N. W. 70. See also Taylor v. American Patriots, 152 Ill. App. 578.

On waiver of provision as to change of occupation by continued receipt of dues, see notes in 27 L.R.A.(N.S.) 446, and L.R.A.1916F, 755.

[18] Meister v. Boetcher (Pa.) 59 Pitts. L. J. 391.

[19] National Council Junior Order United American Mechanics v. Thompson, 153 Ky. 636, 45 L.R.A. (N.S.) 1148, 156 S. W. 132.

[20] Grand Lodge Ancient Order United Workmen v. Burns, 84 Conn. 356, 80 Atl. 157, 40 Ins. L. J. 1676.

also exempts the society from any and all liability on account of death directly traceable to employment in such hazardous occupation, when entered into after the policy is issued and the member's death is so traceable the society is not estopped from denying liability by reason of the fact that the member's dues and assessments for a permissible occupation are accepted and retained up to and until the time of the death.[1]

**§ 2237. Prohibition as to entering military or naval service.**—If a provision is inserted in a life policy that it shall be void in case the insured shall enter the military or naval service without the consent of the company, such a stipulation includes such service as will render the insured liable to duty as a combatant, and has been held not to include a mere clerical occupation, as that of a clerk in the office of an adjutant-general who does not engage in an active service against the enemy.[2] So also it was held that service under the military authorities in the construction of a bridge was not within the meaning of such a provision.[3] If, however, the insured engages in military service in violation of the policy conditions it will be avoided although the service may be involuntary.[4]

**§ 2237a. Same subject: subsequently enacted prohibitory law by successor society.**—In a California case which involved as a controlling point the binding force of a by-law subsequently enacted by a successor or assignee society rather than the question of a noncompliance with a prohibition as to entering the military or naval service, it is decided that, where said order after assured became a mem-

[1] Modern Woodmen of America v. Weekley, 42 Okla. 25, 139 Pac. 1138.

[2] New York Life Ins. Co. v. Hendren, 24 Gratt. (Va.) 536, 540.

[3] Welts v. Connecticut Mutual Life Ins. Co. 48 N. Y. 34, 8 Am. Rep. 518.

[4] Dillard v. Manhattan Ins. Co. 44 Ga. 119, 9 Am. Rep. 167. In this case one of the conditions on which the policy was to become void, was that if assured should enter "into any military or naval service whatever, the militia not in actual service excepted," another condition was as to nonpayment of premiums. Assurer refused payment claiming that the policy was of no force because of a breach of the conditions. Upon demurrer the cause was dismissed and judgment was affirmed. It was urged by counsel for the plaintiff in error that the war excused payment of premiums, which were unpaid between 1862 and March 1866, and that when the war ended the contract revived, and that being in the military service was no breach, because it was compulsory and that the Post Quartermaster's place, to which assured was appointed, and which was accepted to avoid conscription, did not increase the risk and was immaterial. These points were in issue and contested. But the court, per McCay, J., while declaring that, "We recognize fully the doctrine contended for by the plaintiff in error," discussed only the effect of nonpayment of the premiums because of the war and the illegality of such payment by reason of the act of Congress, and as above stated dismissed the case and affirmed the judgment on demurrer sustaining thereby the ground of demurrer, including that with relation to entering the military service.

ber and after it had obtained a new charter, assuming all the liabilities and obligations of the order of which assured was a member and without his knowledge or consent, enacted a law or rule prohibiting engaging in the army or navy service in time of war, assured was not bound thereby and owed no duty or obligation to the new corporation of the existence of which he knew nothing, even though he had agreed to be governed by thereafter enacted laws of the original order, and therefore a judgment for a recovery for the amount of said certificate was affirmed although assured had entered into active military service of the United States and was killed in the Philippines at the hands of Spanish forces.[5]

[5] Richter v. Supreme Lodge Knights of Pythias, 137 Cal. 8, 69 Pac. 483, 31 Ins. L. J. 1060. It was declared, per curiam: "It appears that the charter of the corporation existing when Richter became a member had not expired either by limitation or dissolution, when the new corporation was formed. Plaintiff contends that defendant, having assumed all obligations of the corporation whose certificate he held, could not, without his consent, adopt any law affecting or forfeiting his contract as a member of the existing corporation; that defendant is a different entity, and, while the old organization might transfer its funds to the new upon the latter agreeing to pay its obligations, it could not delegate power to make laws as to existing contracts. Defendant's only reply is that, where one seeks the benefits under a contract, he must first perform all of the obligations and conditions devolving upon him. But Richter's obligation was 'compliance with all the laws governing this rank (endowment rank) now in force, or that may hereafter be enacted by the Supreme Lodge Knights of Pythias of the world.' He did not agree to comply with all the laws governing this rank which some other corporation, as assignee of the certificate, might enact. Richter did not have actual knowledge or notice that defendant existed, nor that his obligation had been assigned to defendant, nor that any law had been passed by defendant forfeiting his certificate should he enter active military service in time of war. How can he, as a member of the endowment rank under the old corporation, be held to constructive notice of laws passed by the new corporation, of whose existence he was in entire ignorance? How can he be held to have forfeited his certificate for an act which was not forbidden under his contract? How, in conscience, can defendant, as assignee of the contract, claim a forfeiture because of Richter's violation of a condition which the assignee imposed without his knowledge or consent? It seems to us too plain for argument that, before the successor in interest of these obligations held by the old company could pass laws affecting their substance, the holders of certificates should, by some act, or by some conduct, consent to be governed by the new company, and should agree to be bound by its laws. We do not think Richter was bound by the law now sought to be enforced, of which he had no knowledge, and that was passed by a corporation to which he owed no duty or obligation. Defendant assumed and agreed to pay the policy, but Richter agreed to nothing with defendant beyond his original obligation to the corporation with which he contracted. The correctness of this view seems to us too obvious to call for further comment."

**§ 2237b. Same subject: armed resistance or insurrection in territory of United States.**—Where liability was limited to the reserve on the policy in case of death where notice was not given and an extra premium paid for war hazard at the time the risk was incurred under a provision also permitting insured to serve in the military or naval service of the United States in time of war by giving notice and paying an extra premium for war risk, it was held that the company was not liable for more than said reserve, where insured, without paying the required extra premium, enlisted in the service of the United States and was killed on the island of Mindanao, one of the Philippines, after those islands became by treaty with Spain a part of the territory of the United States, and while they were in a state of insurrection against our government, said hostile opposition being in the nature of a civil war beginning by insurrection, said insurrection not having ended, so far as the island of Mindanao was concerned at the time when insured was there killed, and, therefore, the peril to which insured was exposed as a soldier was increased in the service of the United States. It was claimed that the place where assured was killed was in a region where there was no armed resistance against the forces of the United States, but the court decided as above.[6]

**§ 2238. Change in possession, title, or interest.**—The word "interest" in the clause as to change of interest, title, or possession, is limited to an insurance of an interest less than ownership of the title,[7] that is, it has application only where the insured owns and insures an interest less than title, and has no application where the insured owns the full title.[8] And where the policy provides that it shall be void if any change takes place in the interest, title, or pos-

See chapter as to change of by-laws, amendments, etc., §§ 377 et seq. herein.

As to change of plan of company or society, consolidation, merger, etc., see §§ 350m et seq. herein.

[6] La Rue v. Kansas Mutual Life Ins. Co. 68 Kan. 539, 75 Pac. 494, 33 Ins. L. J. 370. Another point decided was that the court would take *judicial notice* that said islands became a part of our territory under the treaty with Spain of Dec. 10, 1898, and also that the insurrection had not ended in the island of Mindanao in 1902.

[7] Pomeroy v. Aetna Ins. Co. 86 Kan. 214, 38 L.R.A.(N.S.) 142n, 120 Pac. 344, 41 Ins. L. J. 475; Garner v. Milwaukee Mechanics' Ins. Co. 73 Kan. 127, 4 L.R.A.(N.S.) 654, 117 Am. St. Rep. 460, 84 Pac. 717.

[8] Garner v. Milwaukee Mechanics' Ins. Co. 73 Kan. 127, 4 L.R.A.(N.S.) 654, 117 Am. St. Rep. 460, 84 Pac. 717.

*As to the validity of this provision* it is said that: "It may be admitted that such stipulations and provisions against change of interest, title and possession as the policy in question contains have been upheld by this court:" German Fire Ins. Co. v. Duncan, 140 Ky. 27, 130 S. W. 804, 39 Ins. L. J. 1598, 1602, Clay, C., *citing* McKinney v. Western Assurance Co. 97 Ky. 479, 17 Ky. L. Rep. 325, 30 S. W. 1004.

session of the subject of insurance, such provision has reference to change subsequent to the time of effecting the insurance.[9] If the policy is conditioned to be void in case of any change in title or possession, a conveyance by deed absolute, which is in fact a mortgage, in order to enable the mortgagor's father to obtain a loan, is not such a change in title or possession as will avoid the policy.[10] And an increase of the risk or hazard is not shown by the mere fact of the levy of attachments and executions upon property.[11] But leasing the property and surrendering possession to the lessee is a change in the possession.[12] If a policy is conditioned to be void in case "any change takes place in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured, or otherwise," an assignment for the benefit of the creditor will avoid the policy.[13]

**§ 2239. Effect of temporary increase of risk: temporary violation of condition.**—Is the policy rendered absolutely void from that instant by a temporary increase of risk, or is it merely suspended during such temporary increase, again reviving, without the mutual consent of the parties, upon the cessation of such temporary increase? Must the increase of risk exist at the time of loss, irrespective of the fact whether the loss is occasioned thereby or not? The difficulty of formulating any positive rule governing this point is apparent from the decisions and opinions given in the note below. This question is, in reality, independent of the consideration whether a breach of condition or warranty avoids the policy from the in-

What does and does not amount to an alienation, sale, transfer, change of title, see §§ 2290, 2291 herein.

On contract to convey as breach of condition against change in title or interest, see note in 3 L.R.A.(N.S.) 107.

On delivery of deed in escrow as such change, see note in 38 L.R.A. (N.S.) 142.

[9] Morotock Ins. Co. v. Rodefer, 92 Va. 747, 53 Am. St. Rep. 84, 24 S. E. 93.

[10] German Ins. Co. v. Gibe, 162 Ill. 251, 44 N. E. 490.

On mortgage as affecting change of title or interest in insured property, see note in 38 L.R.A. 562.

[11] Herman v. Katz, 101 Tenn. 118, 41 L.R.A. 700, 47 S. W. 86. See §§ 2276 et seq. herein.

On levy of execution, attachment, or other process upon insured property as change in interest, title, or possession, see note in 24 L.R.A. (N.S.) 803.

[12] Wenzel v. Commercial Ins. Co. 67 Cal. 438, 7 Pac. 817. See Planters' Mutual Ins. Assoc. v. Dewberry, 69 Ark. 295, 86 Am. St. Rep. 195, 62 S. W. 1047, 30 Ins. L. J. 913, 918.

[13] Orr v. Hanover Fire Ins. Co. 158 Ill. 149, 49 Am. St. Rep. 146, 41 N. E. 859. See § 2341 herein.

On effect of bankruptcy and insolvency proceedings or assignment for benefit of creditors on fire insurance, see note in 15 L.R.A.(N.S.) 827.

On sale of insured property by judicial proceedings as change in title, interest, or possession, see note in 24 L.R.A.(N.S.) 807.

On judgment as change of interest to title, see note in 50 L.R.A.(N.S.) 1164.

stant of the breach, except where a breach of such condition also involves an increase of the risk. The most important factor is, What is meant by a temporary increase of risk?[14] Has the word "temporary" a mere reference to time, or to a substantial increase materially enlarging the risk to the injury of the assurer, or is the injury to assurer of importance? or does the word "temporary" have reference to any increase of risk not existing at the time of loss. Again, it would seem a pertinent inquiry whether the increase of risk was such a substantial one as that the insurer might have forfeited the policy at the time, had he been aware of it. If the increase is of such a character as to justify a forfeiture at the time, can it not be justly held that the insurer is injured thereby if the policy be deemed merely suspended, and the insurer is subsequently compelled to pay the amount of the insurance, simply because, without his fault, he had no knowledge at the time that his right to declare a forfeiture existed? Is this injury, if it be one, to the insurer offset by his nonliability during the existence of the increase of risk? Irrespective of the question of the breach of condition, it would seem that a mere temporary increase of risk can rarely be such a substantial, material increase as that the insurer might, upon the ground of increase of risk alone, have avoided the policy had he known the facts at the time. Therefore, time is an important factor, as well as the factors of substantial and material increase, since in determining the latter points the duration of the increase would in most cases have a bearing of greater or less weight, according to the circumstances. Again, the injury to the insurer cannot necessarily and of itself determine whether there is a substantial, material increase of risk. And we are inclined to the opinion that whatever temporary injury to the insurer may arise from a mere temporary, unsubstantial, and immaterial increase of risk, it is offset by the nonliability of the insurer in case of loss arising during said time. In this connection it may be added that if it be true that something more than a mere temporary increase of risk is necessary to justify a forfeiture, then the risk is merely suspended, and the question of revival of a forfeited policy is unimportant. Again, it may reasonably be argued that if the words of the con-

[14] Temporary is defined thus: "1. Lasting for a time only; 2. Existing or continuing for a time only; 3. Not permanent:" Century Dictionary; Webster's Dictionary; Webster's New International Dictionary. "1. Lasting for a time only; 2. Transient; 3. Not in perpetuity:" Stormouth's Dictionary (Harper's, 1885). "1. Lasting for a time only; 2. Intended to be used for a time only; 3. Not permanent:" Standard Dictionary (Funk & Wagnalls, 1895). "Temporary removal with intention to return and reoccupy same as a homestead." *Construed* in Blackburn v. Lake Shore Traffic Co. 90 Wis. 362, 366, 63 N. W. 289,—Winslow, J.

tract are clear and unambiguous, the courts ought not to ingraft by construction upon the express terms of the policy a contract which the parties themselves have failed to incorporate, and which no legitimate rules of construction will show to have been intended, for conditions are not to be enlarged or extended in favor of assured or assurer contrary to the plain import of the words used.

We conclude, therefore, that the weight of authority sustains the following: (1) that a mere temporary increase of risk, or a mere casual or accidental violation of the exact terms of the policy, operates only to suspend the risk: (2) if a loss occurred during such suspension, the insurer would be released; (3) a mere temporary increase of risk would rarely be a substantial, material one; (4) the temporary increase of risk must be such a material and substantial increase as that the insurer could, had he known of it at the time, have declared a forfeiture therefor; (5) if it is a sufficiently substantial and material increase to justify a forfeiture at the time, the policy is avoided, and the increase of risk has become something more than a temporary one; (6) in such case as this last the question whether the increase of risk has ceased to exist at the time of loss is unimportant, unless involved in the question whether the policy has been revived by consent or waiver; (7) in determining whether the violation is a substantial and material one, the fact that it extends continuously over a considerable period of time ought to be an important factor, although there might be a mere temporary increase of risk occurring at infrequent intervals. (8) If the temporary increase has contributed to the loss the policy would be avoided. In such case it would be an increase material to the risk.[15] Certain standard forms of policies, however, qualify conditions as to forfeiting the policy for a breach thereof, by the proviso that the loss occurs during the continuance of the breach, or that such breach shall be the primary or contributory cause of the loss, or that assured may establish that the failure to observe and comply with such provisions and conditions did not contribute

[15] See Ohio Farmers' Ins. Co. v. Burget, 65 Ohio St. 119, 55 L.R.A. 125, 61 N. E. 712, 31 Ins. L. J. 75.

On effect of temporary condition which ceased before loss under general provision against increase of risk or specific provision against certain conditions, see notes in 10 L.R.A. (N.S.) 736; 28 L.R.A.(N.S.) 593; 32 L.R.A.(N.S.) 340; and 48 L.R.A. (N.S.) 1221.

As to distinction between forfeitures and suspension, see Adair v. Southern Mutual Ins. Co. 107 Ga. 297, 45 L.R.A. 204, 73 Am. St. Rep. 122, 33 S. E. 78, 28 Ins. L. J. 510, 515.—Lewis, J.

The question as to forms of warranty, distinctions, the effect of a breach and non-revival of the policy are discussed under the consideration of that subject. See §§ 1949 et seq., 1970–1976 herein.

to the loss, or in case of the property being vacant and unoccupied and so continuing until the time of fire.[16]

[16] Cronin v. Fire Association of Philadelphia, 123 Mich. 277, 6 Det. L. N. 1048, 82 N. W. 45, 29 Ins. L. J. 564, *considered* under § 2240 herein.

Opinions of text-writers.—*Mr. Wood* is of opinion that "while it is true that the tendency of the cases, and perhaps justly, is to hold that the policy is only suspended, and not in fact vitiated, by the increase of risk during its continuance, and that it is revived as an operative instrument when such increase in the hazard ceases, yet it is not necessary that the loss should have resulted from such hazardous use:" 1 Wood on Fire Ins. (2d ed.) 593. *Mr. Biddle* says: "It is submitted that logically a recovery cannot be had on the policy if the risk be increased, though such increase may not exist at the loss. . . . Though in certain courts, apparently, a temporary increase not existing at loss will not avoid. But in any event it has been held that a clause against an increase of risk within the control of the insured contemplates a permanent increase by an act of the insured, and will not apply to a mere act of negligence, as an omission to repair an airpump: 2 Biddle on Ins. (ed. 1893) 714. Mr. *Ostrander,* referring to the condition in reference to occupancy, says, substantially, that occupation at the time of the loss is sufficient, but adds: "This construction, while just, is somewhat strained and exceedingly liberal toward the insured. When the policy stipulates that it shall become void if the building insured is left without an occupant, it is not clearly apparent how the dead policy can be again restored to life without some affirmative act of the insurer. While it appears to us that this is the better legal view, it must be admitted that it is sustained by no equitable consideration:" Ostrander on Fire Ins. (ed. 1892) p. 330, sec. 141. *Mr. Griswold* states this rule, which bears upon the subject: "The change in the occupancy of a building must be a permanent one; a mere temporary exercise therein of a more hazardous trade or vocation will not affect the validity of the policy, in the absence of specific stipulations against such temporary occupancy." He also says: "Where there are no express stipulations in the policy to the contrary, unauthorized use of the property after insurance, by which the hazard is increased, suspends the insurance during the continuance of such 'unauthorized use:'" Griswold's Fire Underwriters (ed. 1872) pp. 372, 373, secs. 1117, 1121. *Mr. Parsons* considers that the doctrine is doubtful that the policy may attach as soon as a ship becomes seaworthy, if the deficiency is temporary and easily remedied, but that if the policy has attached and there is a breach of this warranty, as in case of the master's neglect to repair in the first port, such breach may only suspend the liability; that the insurers are discharged for a loss from the unseaworthiness during such suspension, but not for a loss from other causes: 1 Parsons on Marine Ins. (ed. 1868) 377, 378, 381–83. This statement must, however, be considered in relation to the point whether the implied warranty of seaworthiness is extended beyond the commencement of the voyage. See c. 62, on seaworthiness, herein. *Mr. Phillips'* opinion has been noted in part under the quotation above given from Allen, J., in Hinckley v. Germania Ins. Co. 140 Mass. 38, 54 Am. Rep. 445, 1 N. E. 737. There may, however, be added as pertinent the following general rule stated by that author, "namely, that the forfeiture is to be extended only far enough to put the other party, that is, the insurer in this case, in the same condition as he would have been had the stipulation been

**§ 2240. Same subject: authorities.**—In view of the above conclusion the following authorities are pertinent. A change of use means a permanent change or habitual use, as distinguished from a single circumstance of change or use, providing the loss does not result therefrom.[17] So in a Pennsylvania case it was held that a change of the use of the property after the contract, which increases the hazard, suspends the insurance during its continuance.[18] There was an express stipulation in this case, but the court says: "Without this stipulation, such is the nature of the contract." Under an Ohio case where the clause is "if any change takes place in the location of the property" the policy shall become void unless upon written consent, etc., of the insurer, and the property is removed without such consent, assured is not exempt if the hazard of the new location is not operative at the time of loss, so that if after the first removal there is another change of location with assurer's consent

complied with. This rule will always operate in favor of the insurer and against the assured, but only commensurately with the noncompliance on the part of the latter:" 1 Phillips on Ins. (3d ed.) p. 541, sec. 975. *Mr. Richards* says: "Where, as in case of the New York Standard fire policy, it is expressly provided that the entire contract shall be avoided by breach of a condition or warranty, it is held by the weight of reason and by the better authority, that a temporary breach avoids . . . though in many courts the opposite view prevails." And he notes also that certain statutes and other standard policies permit forfeiture only for loss during the breach, etc. Richards on Ins. (3d ed.) p. 309, sec. 247. *Mr. Cooley* says: "It is a principle established by weight of authority that a temporary breach of a stipulation or condition in a policy, to which there is not attached a specific forfeiture, and which breach did not exist at the time of the fire and of the loss, will not defeat a recovery upon the policy." Although he states that the application of the principle to the particular conditions of the policy is difficult and that the law is unsettled. 2 Cooley Briefs on the Law of Ins. (ed. 1905) pp. 1883 et seq. *Mr. Clement* states, that a temporary increase of risk suspends the policy but if a loss occurs during the increased hazard a recovery will be defeated, and if the temporary increase ceases and it has not affected the risk when the loss occurs, there is no reason for a forfeiture. 2 Clement on Fire Ins. (ed. 1905) p. 296. *Mr. Elliott* says: "The weight of authority seems to support the view that a violation of a condition that works a forfeiture of the policy merely suspends the insurance during the violation, and if the violation is discontinued during the life of the policy and does not exist at the time of the loss, the policy revives and the company is liable, although it had never consented to the violation of the conditions in the policy, and such violation has been such that the company could, had it known of it at the time, have declared a forfeiture therefor. But the decisions are not uniform. Elliott on Ins. (ed. 1907) p. 170, sec. 205.

[17] Shaw v. Robberds, 6 Ad. & El. 75; 1 N. & P. 279, W. W. & D. 94; 6 L. J. K. B. 106; 1 Jur. 6; State Ins. Co. v. Hughes, 10 Lea (78 Tenn.) 461; Williams v. People's Ins. Co. 57 N. Y. 274.

[18] Cumberland Valley Mutual Protection Co. v. Schell, 29 Pa. St. 31.

and a loss there occurs, the first removal does not avoid the policy.[19] And in the same state where the condition of the insured premises, used for manufacturing, was substantially the same at the time of loss as when the policy was delivered and the risk assumed by assurer, the clauses as to vacancy and non-operation were held not to defeat the policy.[20] And where it was claimed that the policy on a creamery should not be held void if the machinery was being operated within the ten days immediately preceding the fire, even though there might otherwise be a forfeiture for ceasing operations contrary to the condition relating thereto, it was declared that such was not the law, "we have frequently held that the breach of such a condition renders the policy void. . . . This has now been changed by statute as to Michigan standard policies." [1] In a New Hampshire case the procurement, contrary to a policy condition, of other insurance, which expired before the fire, was held to avoid the policy.[2] So where further insurance was obtained, but before the loss the amount was brought within the limit allowed by the policy by the cancelation of some other policies, it was held a suspension only during the continuance of the overinsurance, but that the policy was not avoided and the company was held liable.[3] Upon a time policy covering a steamboat, in which the navigation of certain waters was excepted, and the boat made a trip upon those waters, returning in safety, and was subsequently burned, it was held that the navigation of those waters only constituted an exception to the perils covered and not a warranty; that the risk was merely suspended, and upon the vessel's safe return the insurers were liable under the policy.[4] Again, where a tugboat was insured against fire, under a clause requiring it to navigate within certain limits, it was held that the insurer was not relieved from liability for loss occurring after the tug had returned to or while she was within the specified limits. In this case the policy contained nothing expressly stipulating that it should be void in case it navigated

[19] Ohio Farmers' Ins. Co. v. Burget, 65 Ohio St. 119, 55 L.R.A. 825, 87 Am. St. Rep. 596, 61 N. E. 712, 31 Ins. L. J. 75. See § 1747 herein.

On temporary absence of insured property from location stated in the policy, see note in 22 L.R.A.(N.S.) 848.

[20] National Union Fire Ins. Co. v. Gump, 34 Ohio Cir. Ct. R. 36, aff'd (mem.) 86 Ohio St. 325, 99 N. E. 1130. The point is, however, not made very clear in the report of this case either from the evidence or otherwise.

[1] Cronin v. Fire Association of Philadelphia, 123 Mich. 277, 6 Det. L. N. 1048, 82 N. W. 45, 29 Ins. L. J. 564, Hooker, J. Comp. Laws sec. 5182.

[2] Fabyan v. Union Mutual Fire Ins. Co. 33 N. H. 203.

[3] Overmeyer v. Globe Mutual Ins. Co. 43 Mo. 573, Alb. Law Jour. 15, p. 324, 5 Benn. F. I. Cas. 235.

[4] Greenleaf v. St. Louis Ins. Co. 37 Mo. 25.

without the limits.[5] If a policy is issued on a sawmill, specifying its size, and it is so used, but an addition is built thereon, but with no partition between the two parts, and machinery is placed for a sash and blind factory in a larger portion of the entire building, there is no such misdescription or change as to avoid the policy, where the use of the sash and blind factory has been discontinued at the time of the fire.[6]

So the use of gasolene for light, it being named as increasing the risk, does not avoid the policy, where it was removed and subsequently the building was burned.[7] The court in this case placed stress upon the fact that there was no provision in the policy making it void for temporary increase of risk ipso facto, but that such increase rendered the policy liable to be avoided if a loss arose therefrom, but that, "in the absence of a stipulation to this effect, the validity of the policy necessarily depends on the state of the premises at the time of the loss." [8] So the temporary introduction of benzine is not keeping it.[9] And the policy is only suspended by the keeping or use of gasolene in a quantity in excess of that permitted, where such excess has been removed from the premises before the fire and there is no provision voiding the policy for such temporary breach, but only a condition for nonliability for loss while the hazard is increased by said keeping or use.[10] And recovery on a fire insurance policy is not prevented by the fact that prohibited articles were kept upon the premises during the life of the policy, if such practice was discontinued prior to the loss and did not contribute thereto, and insurer had taken no steps to forfeit the policy and premiums were paid and renewal receipts issued after the discontinuance.[11] The mere temporary use in an insured barn of a gasolene engine to thresh grain is not within a provision in the policy making it void if the situation or circumstances affecting the risk shall be so altered as to cause an increase of the risk.[12]

[5] Hennesey v. Manhattan Fire Ins. Co. 28 Hun (N. Y.) 98.

[6] Garrison v. Farmers' Mutual Fire Ins. Co. 56 N. J. L. (27 Vroom) 235, 28 Atl. 8.

On effect of the unauthorized use of mill or factory which has been abandoned before loss, see note in 45 L.R.A.(N.S.) 127.

[7] Mutual Fire Ins. Co. v. Coatesville Shoe Factory, 80 Pa. St. 407.

[8] Mutual Fire Ins. Co. v. Coatesvill Shoe Factory, 80 Pa. St. 407, 412.

On effect of temporary presence of prohibited articles on premises, see notes in 3 B. R. C. 7, and L.R.A. 1917C, 278.

[9] Maryland Fire Ins. Co. v. Whiteford, 31 Md. 219, 1 Am. Rep. 45.

[10] O'Neill v. Caledonian Ins. Co. of Edinburgh, Scotland, 166 Cal. 310, 135 Pac. 1121.

[11] McClure v. Mutual Fire Ins. Co. 242 Pa. 59, 48 L.R.A.(N.S.) 1221n, 88 Atl. 921.

[12] Bouchard v. Dirigo Mutual Fire Ins. Co. 113 Me. 17, L.R.A.1915D, 187n, 92 Atl. 899.

On use of engine on farm premises as violation of general provisions in

Under a Georgia decision mere temporary changes on the use and occupation of the premises are not within a provision in a fire insurance policy for forfeiture by any change in the use or condition of the property, by which the risk is increased, so that a mere temporary use of a threshing machine operated by an engine for a few hours on premises where insured property is located, will not per se work either a forfeiture or a suspension of the policy. If, however, the use and occupancy is so materially increased by an act or acts whch would not be done in the use of ordinary care and diligence under the circumstances, or there is a material increase of the hazard so great as to be apparent to any person of ordinary intelligence, made by some temporary change in the use of the property, the insurer would be relieved from liability for loss thereby caused.[13]

In a Maryland case it is held that making repairs or alterations or additions to or erecting adjacent building will not prevent a recovery, although the risk is materially increased thereby, unless the loss is produced wholly or in part in consequence thereof, provided the policy contains no condition avoiding the same therefor.[14]

Where assured had at the time the policy was issued a license to keep a billiard or pool table, or a bowling-alley for hire, under a statute requiring the same, and after the expiration of the license, during the life of the policy, he used the property without a renewal of the license for a short time, it was held that such temporary illegal use only suspended the policy during the continuance of said use. Such temporary use being uncontemplated at the time of taking out the policy, and it not appearing that the insurer was or could be in any way affected injuriously thereby after the illegal use had ceased, and the insurer had the benefit of the temporary suspension of the risk without rebate of premium. And this is true even though the policy provides against the keeping of certain specified articles, "or other articles subject to legal restriction." [15] In this case the court, per Allen, J. says: "There is no rule of law preventing a revival of a policy of insurance after a temporary suspension. 'The doctrine that the risk may be sus-

policy against increase of risk or specific provisions relating to engine, see note in L.R.A.1915D, 187.

[13] Adair v. Southern Mutual Ins. Co. 107 Ga. 297, 42 L.R.A. 204, 73 Am. St. Rep. 122, 33 S. E. 78, 28 Ins. L. J. 510. Rule on last point approved in same case, Southern Mutual Ins. Co. v. Hudson, 113 Ga. 434, 38 S. E. 964, 30 Ins. L. J. 733, s. c. 115 Ga. 638, 42 S. E. 60.

[14] Washington Fire Ins. Co. v. Dawson & Symington, 30 Md. 92.

[15] Hinckley v. Germania Ins. Co. 140 Mass. 38, 54 Am. Rep. 445, 1 N. E. 737. *Explained* in Harris v. North American Ins. Co. 190 Mass. 361, 371, 4 L.R.A.(N.S.) 1137, 77 N. E. 493.

pended and again revived without an express provision on that subject seems to be within the strictest judicial principles.' . . . And in Worthington v. Bearse,[16] it was held on great consideration that if assured in a marine policy temporarily parts with his interest in the property insured, and afterward buys it again, the policy will revive if there are no express provisions making it void and there is no increase of risk. . . . It is not the necessary meaning of the word 'void,' as used in policies of insurance, that it shall, under all circumstances, imply an absolute and permanent avoidance of a policy that has once begun to run; but the meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being. In Phillips on Insurance[17] it is said: 'After it (the policy) has begun so that the premium is become due, it surely is but equitable that a temporary noncompliance should have effect only during its continuance. To carry it farther is to inflict a penalty upon the assured and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it. A forfeiture certainly ought not to be extended beyond the grounds on which it is incurred. . . . And there does not appear to be any good reason why, in the absence of all fraud and of all prejudice to the underwriter, the same doctrine should not be applicable to express stipulations in the nature of warranties or conditions, unless by the circumstances or the express provisions of the policy such application is excluded.' In accordance with this doctrine, a provision of the policy that it should be void and be surrendered to the directors of the company to be canceled in case of alienation of the property by sale or otherwise, was held to mean that it should be inoperative for the time being; and the assured, upon regaining title after a sale of the property by him, was held entitled to recover.[18] So where a policy provided that 'in case of any transfer or termination of the interest, either by sale or otherwise, without such consent i. e., of the company, this policy shall from henceforth be void and of no effect,' it was held that after such sale the policy revived upon the assured's acquiring again the title and holding it at the time of the fire.[19] The same rule of construction has been applied to provisions against other insurance.[20] The court in Illinois has gone so far as to apply it also to a provision against

[16] 12 Allen (94 Mass.) 382, 90 Am. Dec. 152.

[17] Sec. 975.

[18] *Citing* Lane v. Maine Ins. Co. 12 Me. 44, 28 Am. Dec. 150.

On effect of sale of insured property in case of reconveyance before loss, see note in 10 L.R.A.(N.S.) 738.

[19] *Citing* Power v. Ocean Ins. Co. 19 La. (O. S.) 28, 36 Am. Dec. 665, 10 La. (N. S.) 23.

[20] *Citing* Obermeyer v. Globe Ins. Co. 43 Mo. 573.

an increase of risk which has ceased before loss." [1] It is noteworthy that in both the Maine case, above noted, and in the case in which the above opinion is given, the question was one concerning the continuance of insurable interest, and the court remarked, per Parris, J., in Lane v. Maine Insurance Company: [2] "The party insured must, in all cases of fire insurance, have an interest in the property at the time of insuring and at the time the fire happens." While in the Louisiana case above noted the court, per Murphy, J., says: "It is sufficient if the insured has an interest in the subject matter of insurance at the time of insuring and at the time the fire happens." In the Obermeyer case, also above noted, the court declared,[3] per Bliss, J.: "that the policies relied on to avoid the one containing the covenant of forfeiture should exist and be in force at the time of the loss." In New England Insurance Company v. Schettler,[4] it was held that if such other insurance had ceased to exist at the time of the loss, the right or recovery would not be defeated. And in Mitchell v. Lycoming Insurance Company,[5] the court, per Agnew, J., says,[6] referring to the other policies, "if they were void at the time of the loss they constituted no obstacle." In the case of Schmidt v. Peoria Insurance Company,[7] cited by the Massachusetts court above, it was expressly provided that "if, after insurance is effected, the risk be increased by any means or the premises occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of noneffect, and the question was whether the use of certain stoves therein, not in the building when the policy was issued, and in which fires had been used at a time more or less remote from the time of the loss, avoided the policy within the exception. The court, per Lawrence, J., who delivered the opinion, said: "This is a very material provision in the policy. . . . This language admits of no controversy as to its meaning, and the only question under it is, Was there such increased risk in consequence of these stoves at the time of the fire? This court held in New England Fire and Marine Insurance Company v. Wetmore,[8] that the true construction of a clause like this was, that the policy became inoperative only while the increased risk was in existence and when it terminated the liability of the company would recommence. . . . The point for the consideration

[1] *Citing* Schmidt v. Peoria Ins. Co. 41 Ill. 295; Insurance Co. of North America v. McDowell, 50 Ill. 120, 129, 99 Am. Dec. 497.

[2] 12 Me. 44, 47, 28 Am. Dec. 150.

[3] Id. 578.

[4] 38 Ill. 166.

[5] 51 Pa. St. 402.

[6] Id. 409.

[7] 41 Ill. 295.

[8] 32 Ill. 221, 245.

of the jury was, not whether an increase of the number of fires in a building does or does not ordinarily increase the risk, but whether, in the case then before the court, the risk to the building at the time it was destroyed, at 11 o'clock at night, was or was not increased by the two stoves, in one of which there had been no fire for eight days and in the other none after 8:30 o'clock of the preceding morning. Was the risk to this particular building at the time it was burned greater in consequence of the presence of these two stoves, placed as they were and used in the manner shown by the witnesses." This case is cited in North British and Mercantile Insurance Company v. Steiger,[9] when at the time the insurance was effected a steam drier was used, and subsequently a fire drier was substituted, and the court, per McCulloch, P. J.,[10] says: "It is peculiarly within the province of the jury to determine, under proper instruction, whether or not there was an actual increase of risk, or whether or not the cause of such increase of risk was in operation at the time of the destruction of the building." The principal case was also cited in Aurora Fire Insurance Company v. Eddy,[11] which case, together with the principal one and that last above noted, covered questions really of continuing warranties. In this last decision it was held that a substantial compliance as to keeping buckets filled with water in the building was necessary. The principal case is also cited in Insurance Company of North America v. Garland,[12] where the condition was that "if assured shall allow the building herein insured to become vacant and unoccupied and so remain," and the court, per Mulkey, J., says: "It is well settled that if the company should not exercise this power, that is upon notice of the breach to declare the policy forfeited, and the premises should again become occupied, its right to do so would cease and its liability on the policy would again attach." The Massachusetts decision above noted also cites Insurance Company of North America v. McDowell,[13] which was a case of increase of hazard from repairs, and it was held that such increase only suspended the policy during its continuance, but that the insurer's liability was restored when the increase terminated.[14]

In another Massachusetts case a condition in a policy of insurance that it should become void if the situation or circumstances

[9] 13 Ill. App. 482, 484.

[10] *Citing* also North Eastern Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221.

[11] 55 Ill. 213, 221.

[12] 108 Ill. 220.

[13] 50 Ill. 120, 129, 99 Am. Dec. 497.

[14] *Citing* Schmidt v. Peoria Marine & Fire Ins. Co. 41 Ill. 295; New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 245.

affecting the risk shall be so altered as to cause an increase thereof is not ordinarily violated by a mere temporary change increasing the risk, but a change existing continuously during the working hours of nearly a month is not temporary and is continued sufficiently long to be deemed a change in the situation and circumstances affecting the risk.[15] A temporary increase of hazard, which ceases before loss, will not prevent recovery on a fire insurance policy which provides that it shall be void if the hazard is increased.[16] And it is held that a policy on goods against loss by fire is not avoided by the use for a single night of the building in which they are stored as a shelter for the crew of a vessel, where the ship had filled with water, and the insurers are liable for a loss occasioned by the crew's making a fire, contrary to the express directions of the insured, in a stove which was in an unsafe condition at the time.[17] So a change of use of an insured building increasing the hazard will not prevent recovery, where such use has been abandoned without the declaration of a forfeiture by the company before a loss occurs, and such an increase of hazard in no way affects the risk at the time of the loss; but if an increase exists at such time, the discontinuance of such use will not entitle the assurer to recover. In other words, a clause voiding the policy in case of change of use of the property increasing the risk, will cease to operate when the more hazardous use ceases, so that a recovery may be had for a loss subsequently occurring to which the more hazardous use did not contribute.[18] Again, a policy prohibiting assignment without consent was held suspended merely, and not avoided, where an assignment, made without consent of company and objected to by their agent, was afterward so altered to a special assignment as to be acceptable to the agent.[19]

Under a provision that the policy shall be void in case the premises shall be vacant or unoccupied, the contract is held only suspended during the time the premises are vacant.[20] The condition here was: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if any change take place in the interest, title, or possession of the subject of insurance, except change of occupants without vacancy

[15] First Congregational Church v. Holyoke Mutual Fire Ins. Co. 158 Mass. 475, 19 L.R.A. 587, 35 Am. St. Rep. 508, 33 N. E. 572.

[16] Sumter Tobacco Warehouse Co. v. Phœnix Ins. Co. 76 S. Car. 76, 10 L.R.A.(N.S.) 736n, 56 S. E. 654.

[17] Loud v. Citizens' Mutual Ins. Co. 2 Gray (68 Mass.) 221.

[18] Traders' Ins. Co. v. Catlin, 163 Ill. 256, 35 L.R.A. 595, 45 N. E. 255.

[19] Manley v. Insurance Co. of North America, 1 Lans. (N. Y.) 20, 5 Ben. F. I. Cas. 241.

[20] Schuermann v. Dwelling House Ins. Co. 57 Ill. App. 200, 201.

or unoccupancy or other increase of hazard, whether by legal process or judgment or by voluntary act of the insured or otherwise . . . or if the building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied or not in use." So a temporary suspension of some parts of the business, or a temporary suspension of all work for want of materials, is not a breach of condition as to being "vacant and unoccupied."[1] Where the policy stipulated that it should be void in case the building should become vacant and unoccupied for more than ten days without the company's consent indorsed on the policy, it was held that the policy was terminated upon a breach of the condition and could not be revived without the consent of both parties to the contract, and that it was immaterial, then whether the loss of the buildings was due to unoccupancy or some other cause.[2] The court, per Smith, J., says: "The defendants might have waived the condition altogether or might have waived its breach, but having had no opportunity before the loss to make their election to waive the breach, their refusal to pay when notified of the loss and unoccupancy was an effectual election that they insisted upon the condition in the policy." In Washington it is held that a contention that a vacancy for a period exceeding the time permitted under the policy, terminates the policy, and that its operative force is not restored by reoccupancy will not be sustained as the question is no longer an open one in that state.[3] Where a house was vacant for several weeks, it was held that if there was no intentional abandonment, but the insured was using reasonable diligence to obtain a tenant, there was no forfeiture.[4] Where a building was insured to be occupied as a dwelling house, it was held that a temporary use of a part of the building, which was terminated before any loss occurred, would not avoid the policy if the building had not ceased to be occupied as a dwelling house, and the temporary change of use in a part of the building had in no way contributed to the loss.[5] Reoccupation, before the fire

[1] American Fire Ins. Co. v. Brighton Cotton Manufacturing Co. 125 Ill. 131.

[2] Moore v. Phœnix Ins. Co. 62 N. H. 240, 13 Am. St. Rep. 556.

[3] Silver v. London Assurance Corp. 61 Wash. 593, 112 Pac. 666, 40 Ins. L. J. 479. Following Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co. 59 Wash. 501, 110 Pac. 36, 28 L.R.A.(N.S.) 596n, 140 Am. St. Rep. 863, 39 Ins. L. J. 447 (s. c. 56 Wash. 681, 28 L.R.A.(N.S.) 593n, 106 Pac. 194, 40 Ins. L. J. 352; Port Blakely Mill Co. v. Royal Ins. Co. 186 Fed. 716, 108 C. C. A. 586, 40 Ins. L. J. 1610).

[4] Gamwell v. Merchants' Ins. Co. 12 Cush. (66 Mass.) 167, *cited* in Albion Lead Works v. Williamsburgh City Fire Ins. Co. 2 Fed. 479, 488.

[5] Kircher v. Milwaukee Mechanics' Mutual Ins. Co. 74 Wis. 470, 5 L.R.A. 779, 43 N. W. 487.

occurs of an insured building after vacancy, sufficient to avoid a policy under a condition against vacancy, revives the policy, so as to permit a recovery in case the fire occurs during the occupancy.[6] A temporary vacation of insured premises for four days, occurring upon a change of tenants and to suit the convenience of the departing tenant, is not such a cessation of occupancy as will avoid a policy, under a condition voiding it if the building insured shall "become vacant or unoccupied, or not in use," and provided also that the loss occurred during such vacation.[7] But it is also decided that permitting insured property to become vacant without consent of the insurer immediately forfeits the insurance, under a penalty providing that it shall be null and void in case of nonoccupancy without consent indorsed on the policy; and the policy cannot be revived, without consent, by reoccupancy before loss occurs.[8] Under a comparatively recent decision in Maine, where the question is "raised sharply for the first time" in that state, it is held that a reoccupation of the premises after a vacancy, continued without further permission, after a permit therefor had expired, does not reinstate or revivify the policy but avoids it under the standard policy form of that state providing that the policy shall be void if the premises insured shall become vacant by the removal of the owner or occupant and so remaining vacant for more than thirty days without assurers consent "in writing or in print" and it is declared that it is not a question whether the insurer has been injured by the breach of the contract but whether the contract has itself been broken, and if it has, it is then rendered "void" by its own terms, which word "void" is neither ambiguous nor technical and should under the statute be "construed according to the common meaning of the language." [9]

[6] Insurance Co. of North America v. Pitts, 88 Miss. 587, 7 L.R.A. (N.S.) 627, 117 Am. St. Rep. 756, 41 So. 5. Condition was: "Vacant or unoccupied."

See also Silver v. London Assur. Corp. 61 Wash. 593, 112 Pac. 666, 40 Ins. L. J. 479. Clause was: "Be or become vacant and unoccupied and so remain for," etc.

[7] Roe v. Dwelling-House Ins. Co. 149 Pa. St. 94, 34 Am. St. Rep. 595, 23 Atl. 718.

[8] German Ins. Co. v. Russell, 65 Kan. 373, 58 L.R.A. 234, 69 Pac. 345. Condition was: "Vacant or unoccupied."

[9] Dolliver v. Granite State Fire Ins. Co. 111 Me. 275, 50 L.R.A. (N.S.) 1106, 89 Atl. 8, 43 Ins. L. J. 234. *Citing and considering or explaining:*

*United States.*—Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. 379; Georgia Home Ins. Co. v. Rosenfield, 95 Fed. 358, 37 C. C. A. 96.

*Connecticut.*—Lounsbury v. Protection Ins. Co. 8 Conn. 458, 21 Am. Dec. 686.

*Georgia.*—Athens Mutual Ins. Co. v. Toney, 1 Ga. App. 492, 57 S. E. 1013.

*Illinois.*—Traders' Ins. Co. v. Catlin, 163 Ill. 256, 35 L.R.A. 595, 45 N. E. 255; Germania Fire Ins. Co. v.

Under a Nebraska decision recovery under a fire insurance policy is not prevented by a conveyance of the property in violation of its conditions, if, prior to the loss, the property is reconveyed to the insurer.[10] If one procures a chattel mortgage on property contrary to the policy conditions, but at the time of the fire the property is free from the mortgage lien, there may be a recovery on the policy and the rule applies as to any incumbrance.[11] In North Carolina a chattel mortgage was given on an insured automobile, including other personal property, but said mortgage was satisfied and canceled before loss, and it was held that the policy was revived and in force when the loss occurred as the title of

Klewer, 129 Ill. 599, 22 N. E. 489; Insurance Co. of North America v. Garland, 108 Ill. 220; New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221.

*Iowa.*—Born v. Home Ins. Co. 110 Iowa, 379, 80 Am. St. Rep. 300, 81 N. W. 676.

*Kansas.*—German Ins. Co. v. Russell, 65 Kan. 373, 58 L.R.A. 234, 69 Pac. 345.

*Kentucky.*—Phœnix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, 91 Am. Dec. 521.

*Maine.*—Carleton v. China Mutual Ins. Co. 109 Me. 79, 39 L.R.A. (N.S.) 95, 82 Atl. 649; Knowlton v. Patrons' Androscoggin Fire Ins. Co. 100 Me. 481, 2 L.R.A.(N.S.) 517, 62 Atl. 389; Bigelow v. Granite State Fire Ins. Co. 94 Me. 39, 46 Atl. 808; Jones v. Granite State Fire Ins. Co. 90 Me. 44, 37 Atl. 326; White v. Phœnix Ins. Co. 85 Me. 97, 26 Atl. 1049; Thayer v. Providence Ins. Co. 70 Me. 531; Cannell v. Phœnix Ins. Co. 59 Me. 582.

*Maryland.*—Reynolds v. German-American Ins. Co. 107 Md. 110, 15 L.R.A.(N.S.) 345, 68 Atl. 262; United States Fire & Marine Ins. Co. v. Kimberly, 34 Md. 224, 6 Am. Rep. 325.

*Massachusetts.*—Stuart v. Delaware Ins. Co. (Stuart v. Reliance Ins. Co.) 179 Mass. 434, 60 N. E. 929; Hill v. Middlesex Mutual Assurance Co. 174 Mass. 542, 55 N. E. 319; Wainer v. Mulford Mutual Fire Ins. Co. 153 Mass. 335, 11 L.R.A. 598, 26 N. E. 877; Kyte v. Commercial Union Ins. Co. 149 Mass. 116, 3 L.R.A. 508, 21 N. E. 361; Ring v. Phœnix Assurance Co. 145 Mass. 426, 14 N. E. 525; Hinckley v. Germania Fire Ins. Co. 140 Mass. 38, 54 Am. Rep. 445, 1 N. E. 737.

*Mississippi.*—Insurance Co. of North America v. Pitts, 88 Miss. 587, 7 L.R.A.(N.S.) 624, 41 So. 5, 9 Ann. Cas. 54.

*Missouri.*—Hoover v. Mercantile Town Mutual Ins. Co. 93 Mo. App. 111, 69 S. W. 42.

*New Hampshire.*—Moore v. Phœnix Ins. Co. 62 N. H. 240, 13 Am. St. Rep. 56.

*New Jersey.*—Jersey City Ins. Co. v. Nichol, 35 N. J. Eq. 291, 40 Am. Rep. 625.

*New York.*—Mead v. Northwestern Ins. Co. 4 N. Y. 530.

*Pennsylvania.*—Hardiman v. Fire Association of Philadelphia, 212 Pa. 383, 61 Atl. 900; Bemis v. Harborcreek Mutual Fire Ins. Co. 200 Pa. 340, 49 Atl. 769.

*Texas.*—East Texas Fire Ins. Co. v. Kempner, 87 Tex. 229, 47 Am. St. Rep. 99, 27 S. W. 122.

[10] German Mutual Fire Ins. Co. v. Fox, 4 Neb. (Unof.) 833, 63 L.R.A. 334, 96 N. W. 652.

[11] Omaha Fire Ins. Co. v. Dierks, 43 Neb. 473, 61 N. W. 740, reaffirming State Ins. Co. v. Schrenk, 27 Neb. 527, 6 L.R.A. 524, to the same point.

assured at the time of the loss was the same as when the policy was delivered and that the deed of trust in no way contributed to the loss; but while the mortgage exists there can be no recovery and the above construction is not against public policy.[12] But it is held that a policy is not merely suspended during the continuance of a chattel mortgage, which is paid off before the loss occurs, but it is absolutely avoided by giving such mortgage contrary to a provision avoiding the policy if it becomes encumbered by a chattel mortgage.[13] In Iowa the payment of a mortgage before loss revives the policy and permits recovery even though it is conditioned to be forfeited if mortgaged without assurer's consent.[14]

Where a policy was issued upon a building to be used for storage purposes only, conditioned to be void in case it was used for any other purpose, and during a part of the term of the policy the building was used for canning purposes, but active work ceased before issuance of the renewal, it was held upon a fire being built in the furnace after the policy was renewed, for the purpose of emptying the water out of the pipes and boiler, that the insurers were liable for a loss occurring after such act.[15] In another case the policy contained a condition prohibiting the appropriation or use of the premises for the exercise of certain specified trades, including those of "cooper, carpenter, cabinetmaker," except under special agreement in writing in or on the policy. The premises at the time the insurance was effected were used for making and storing barrels. Subsequently, small circular saws and a workbench were introduced, and boxes were manufactured, but this work had ceased from two to four months when a loss by fire occurred. The saws and workbench had remained in the building, and a lathe had been put up the day preceding the fire, for the purpose of making broomhandles and brushblocks. In an action upon the policy it was held that the policy was suspended during the prohibited use of the premises, but was revived when the use ceased to

[12] Cottingham v. Maryland Motor Car Ins. Co. 168 N. Car. 259, L.R.A. 1915D, 344, 84 S. E. 274, 45 Ins. L. J. 491.

[13] German American Ins. Co. v. Humphrey, 62 Ark. 348, 35 S. W. 428, 25 Ins. L. J. 658. Contra, Weiger v. Council Bluffs Ins. Co. 104 Iowa, 410, 73 N. W. 862, 27 Ins. L. J. 260; Johanson v. Home Fire Ins. Co. 54 Neb. 548, 74 N. W. 866, 27 Ins. L. J. 610; Tompkins v. Hartford Fire Ins. Co. 49 N. Y. Supp. 184, 22 App. Div. 380. *Examine* Insurance Co. of North America v. Wicker, 93 Tex. 390, 55 S. W. 740, 29 Ins. L. J. 790.

[14] Born v. Home Ins. Co. 110 Iowa, 379, 80 Am. St. Rep. 300, 81 N. W. 676.

[15] Krug v. German Fire Ins. Co. 147 Pa. 272, 30 Am. St. Rep. 729, 23 Atl. 572.

exist, and that there was no such "appropriation" of the premises at the time of the fire to a prohibited use as was contemplated in the policy or as prevented a recovery.[16] In this case Brent, J., said: "There is no doubt that the insured could not have recovered if the premises had been used for the manufacture of boxes at the time of the fire. The parties, however, have contracted that such use destroys the effect of the policy 'so long as the premises shall be appropriated or used' for any of the prohibited purposes. The plain meaning is that it is to have no effect only during the time that the premises are so used."[17] In Delaware, if the risk is changed or increased, and no notice thereof is given according to the requirements of the contract, the policy is forfeited.[18] In a case in the supreme court of the United States,[19] it was held that the alteration and repairs of the insured premises without conforming to the requirements of the policy in respect thereto avoided the contract, that the fact that the increase of risk did not continue to the time of the loss was immaterial, and that insurer was not responsible to assured for damage and injury to the insured premises after such repairs and alterations, although not happening in consequence of the repairs. The court, per Jackson, J., considers the case of Kyte v. Commercial Union Assurance Company,[20] and quotes from the court therein, and follows the same. It also says: "The court below proceeded upon the theory that the fire having occurred after the employment of the mechanics had ceased, such employment and the making of the alterations and repairs described did not constitute a breach at the time of the fire; that the increased risk which was necessary to render the policy void must be found to have existed at the time of the fire, and not at any preceding date. In Ferree v. Oxford Fire and Life Insurance Company,[1] the policy contained the provision that it should not 'be assignable without the consent of the company indorsed thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company in virtue of said policy shall thenceforth cease.' The assured assigned the policy, and the court held that the condition was a perfectly legal one and that the company was not liable, although the plaintiff had redeemed the policy previously

[16] United States Fire & Marine Ins. Co. v. Kimberly, 34 Md. 224, 6 Am. Rep. 325.

[17] See also, Shaw v. Roberts, 6 Ad. & E. 75, 1 Nev. & P. 279; Moore v. Protection Ins. Co. 29 Me. 97, 48 Am. Dec. 514; Leggett v. Ætna Ins. Co. 10 Rich. Law (S. C.) 202.

[18] Lattomus v. Farmers' Mutual Fire Ins. Co. 3 Houst. (Del.) 404.

[19] Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 465, 38 L. ed. 231, 14 Sup. Ct. 379.

[20] 149 Mass. 116, 122, 3 L.R.A. 508, 21 N. E. 361.

[1] 67 Pa. St. 373, 5 Am. Rep. 436.

assigned and was the holder thereof at the time of the suit. In Moore v. Phoenix Insurance Company,[2] the policy contained, among other provisions, the following conditions: 'If the above mentioned premises shall become vacant or unoccupied for a period of more than ten days without the assent of the company indorsed hereon, then and in every such case this policy shall be void.' At the time the premises were destroyed they were occupied, but for a period of at least three months prior to that time they were unoccupied, although without the knowledge of the insured or insurer. The court held that the condition of the policy had been broken by the unoccupancy of the premises, and that 'the contract once being terminated could not be revived without the consent of both the contracting parties. It is immaterial, then, whether the loss of the buildings is due to unoccupancy or to some other cause.'" It is held in New Hampshire that if there is a stipulation that the policy shall be avoided by the use of an article expressly named, and there is nothing in the policy from which a permission to use the article in a partial, limited, or temporary way can be inferred, full effect is usually given to the prohibitive clause by a forfeiture of the policy for its violation.[3]

Again, an increase of risk from means, "within the control of the assured" refers to a permanent change purposely undertaken in the structure, use or occupation of the premises, and not to a mere negligence of assured, as in case of a failure to repair a pump.[4] So the condition that "if the hazard be increased by any means within the control or knowledge of the insured" the policy will be void, is intended obviously to protect the property during the life of the policy from fire by change in structure, methods of heating, addition of new outbuildings on the premises, and like means within assured's knowledge or control whereby the hazard might be increased.[5] It is held in Wisconsin, that if a clause in a policy provides that "it shall be void" upon the breach of a specified condition, the insurer's exemption from liability becomes absolutely fixed as soon as that condition is broken, and does not depend on whether he notifies or omits to notify the insured, after such breach, what action he intends to take in regard to the continuance of forfeiture of the policy.[6] But it is also held in that state that a provision or condition avoiding a

[2] 62 N. H. 240, 13 Am. St. Rep. 556.

[3] Wheeler v. Traders' Ins. Co. 62 N. H. 450, 13 Am. St. Rep. 582.

[4] Albion Lead Works v. Williamsburgh City Fire Ins. Co. 2 Fed. 479.

[5] Collins v. London Assur. Co. 165 Pa. St. 298, 305, 30 Atl. 924.

[6] Carey v. German-American Ins. Co. 84 Wis. 80, 20 L.R.A. 267, 36 Am. St. Rep. 907, 54 N. W. 18.

policy if the risk is increased, means that the insured shall not allow or permit a change to be made in the structure, nature, or habitual use of the insured property materially different from that which the insurer has agreed to undertake. But trivial or temporary variations in the risk, incident to the ordinary use of the property, are presupposed by the contracting parties to be likely to occur.[7] In a case before the United States supreme court the condition against increase of risk and alteration occurring in the same clause are held, nevertheless, distinct. Thus it is declared that if a policy stipulates that it shall be void in case "mechanics are employed in building, altering, or repairing the premises" without notice to or permission of the insurer, it is not necessary to show that the alterations and repairs increased the risk, but the fact that they are made without insurer's consent avoids the policy, even though the policy also provides against increase of risk, such condition being an independent stipulation.[8] But it is also held that the completion of alterations before loss will not preclude avoiding the policy where such alterations materially increase the risk and are a breach of a condition voiding the policy therefor.[9] In Massachusetts, if a policy of insurance is conditioned to be void in case of any increase of risk, and the risk is increased in violation of such condition, it is held that the policy is avoided though the increase may be only temporary.[10] In this case the court said: "An increase of risk which is substantial and which is continued for a considerable period of time is a direct and certain injury to the insurer and changes the basis upon which the contract of insurance rests; and since there is a provision that in case of an increase of risk which is consented to or known by the assured and not disclosed and the assent of the assurer obtained, the policy shall be void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the continuance of such increase of risk." In New York it has been held that such a use will avoid the policy.[11]

[7] Seimers v. Meeme Mutual Home Protection Ins. Co. 143 Wis. 114, 139 Am. St. Rep. 1083, 126 N. W. 669.

[8] Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. 379.

[9] Hill v. Middlesex Mutual Fire Ins. Co. 174 Mass. 542, 55 N. E. 319, 29 Ins. L. J. 185.

[10] Kyte v. Commercial Ins. Co. 149 Mass. 116, 3 L.R.A. 508, 21 N. E. 361; Lyman v. State Ins. Co. 14 Allen (96 Mass.) 329. (These two cases are *explained* in Harris v. North American Ins. Co. 190 Mass. 361, 371, 4 L.R.A.(N.S.) 1137, 77 N. E. 493); Jennings v. Chenango County Mutual Ins. Co. 2 Denio (N. Y.) 75; Mead v. Northwestern Ins. Co. 7 N. Y. 530. See § 2372 herein.

[11] Mead v. North Western Ins. Co. 3 Seld. (N. Y.) 530, overruling Gates v. Madison County Mutual Ins. Co. 5 N. Y. 469, 55 Am. Dec. 360.

In this case Welles, J., said: "It is settled by numerous decisions that if the warranty is violated it avoids the policy, and that it is immaterial whether the breach affects the risk or is connected with the loss or not. It would seem in theory that it was equally immaterial whether the act or thing to which the warranty related continued up to the time of the loss or had ceased or had been discontinued before . . . I incline to the opinion . . . that the only safe rule is to hold the contract of insurance at an end the moment the warranty is broken, and that it cannot be revived again without the consent of both parties, unless the insurer has by some act waived the breach of the warranty."[12] So in Minnesota, a policy of fire insurance provided that if the insured buildings should be "altered, added to, or enlarged" due notice must be given and consent indorsed on the policy. A by-law, made part of the contract, provided that whenever a building should be "altered, enlarged, or appropriated to any other purposes than those mentioned, or the risk be otherwise increased," without the consent of the insurer first obtained, the policy should be void. Under these provisions in the policy, notice to the insurer and consent to a material enlargement of the building are required, although the risk be not in fact thereby increased. A written permission in such policy "to make necessary alterations and repairs" does not authorize a material enlargement of the building by an addition twelve feet wide and two hundred feet long.[13] Other cases bearing upon this point may be found throughout this chapter. We have not noted cases of deviation herein in marine risks, for they do not rest upon the principle of increase of risk, as appears from what has elsewhere been said. Such cases, therefore, are inapplicable.[14]

[12] See also State Ins. Co. v. Hughes, 10 Lea (78 Tenn.) 461; Gaty v. Phœnix Ins. Co. 30 Mo. 56; Glen v. Lewis, 8 Exch. 607, 22 L. J. Ex. 228, 17 Jur. 842.

[13] Frost's Detroit Lumber Wooden Ware Works Co. v. Millers' Mutual Ins. Co. 37 Minn. 300, 5 Am. St. Rep. 846, 34 N. W. 35.

[14] See §§ 2365 et seq. herein.

# CHAPTER LXIV.

## ALIENATION.

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**§ 2246. Alienation: generally.**—Although a policy of fire insurance contains a provision avoiding it in case of alienation of the insured property, nevertheless it may be avoided, in the absence of any such clause, where at the time of loss the original insured

has no interest in the subject matter of the insurance. The contract of fire insurance is a personal one, and does not run with the land. It is a contract to indemnify the person named in the policy against loss upon property in which he has an insurable interest, existing both at the time of the issuance of the policy and at the time of loss.[15] If assured parts with his insurable interest in the property, the contract is at an end. Where the policy forbids an alienation, it may be suspended or avoided in the absence of any consent, waiver or estoppel. Therefore, an absolute assignment or sale of insured property after the insurance is made devests the insurable interest of the vendor, and creates a bar to the right of action on the policy, unless by some means its existence has been preserved for the benefit of the assignee.[16] If the policy contains no provision against alienation, the transfer of the entire interest in the property covered will not render the contract void, but simply inoperative during the period of suspension, and subject to a revival upon the insurable interest being again vested in the person named in the policy as insured.[17] The fact that a transfer or sale of the property insured is merely voidable will not aid the insured where it has not been set aside prior to the loss. Such a sale is held to be an alienation or sale within the meaning of the clause, and to avoid the policy.[18] A voluntary conveyance and change of title, without assurer's consent, avoids the contract when so stipulated.[19]

**§ 2246a. Conditions as to alienation, change of title, etc., valid.**—Conditions forfeiting the policy in case of alienation, change of interest, title, or possession, and the like, without assurer's consent may be lawfully inserted in the policy and are reasonable, valid and enforceable and are within the rule that parties may insert in the policy such conditions as they choose and will be bound thereby provided such conditions are not contrary to law or public

[15] Wilson v. Hill, 3 Met. (44 Mass.) 66; Lane v. Maine Mutual Fire Ins. Co. 12 Me. 44, 45, 28 Am. Dec. 150; Cummings v. Cheshire Mutual Fire Ins. Co. 55 N. H. 457; Lucena v. Crawford, 2 Bos. & P. N. R. 269, 300, 3 Bos. & P. 101, 6 R. R. 623, 13 Eng. Rul. Cas. 151.

[16] Morrison v. Tennessee Marine & Fire Ins. Co. 18 Mo. 262, 59 Am. Dec. 299.

[17] Home Mutual Fire Ins. Co. v. Hauslein, 60 Ill. 521, 1 Ins. L. J. 818; Mount Vernon Manufacturing Co. v. Summit County Mutual Fire Ins. Co. 10 Ohio St. 347. See also § 903 herein.

On effect of sale of insured property in case of reconveyance before loss, see note in 10 L.R.A.(N.S.) 738.

[18] Worthington v. Bearse, 12 Allen (94 Mass.) 382, 90 Am. Dec. 152. See also Lane v. Maine Mutual Fire Ins. Co. 12 Me. 44, 28 Am. Dec. 150; Hooper v. Hudson River Fire Ins. Co. 17 N. Y. 424.

[19] Ritchie County Bank v. Firemen's Ins. Co. 55 W. Va. 261, 47 S. E. 294.

policy.[20] So conditions prohibiting encumbrances and liens upon insured property, without the consent of the insurer inserted in the policy and declaring it to be void in case of a breach thereof, are not only legal and conformable to public policy, but also reasonable and proper.[1]

**§ 2247. Conditions as to alienation: construction of.**—Conditions as to alienation and the like are not in most policies absolute, but are qualified in this, that the assurer's consent is required in case of alienation, etc. Where such qualifying clause is inserted, however, it is held that the effect is not to render the policy absolutely void, but only voidable at the option of the company.[2]

A merely nominal change of interest will not, it is held, avoid a policy containing a provision against any sale, transfer, or change of title in the property insured; but a transfer which increases the temptation on the part of the insured to defraud the underwriter or lessen assured's interest in preventing a destruction of the property will avoid the contract. The insured must be divested of all insurable interest in the property by the transfer.[3]

If the policy enumerates changes of title which will render it void, only such changes as are enumerated will invalidate it,

[20] *Alabama.*—Bozeman v. Sun Ins. Co. 170 Ala. 373, 54 So. 178; Liverpool & London & Globe Ins. Co. v. Lavine, 5 Ala. App. 392, 59 So. 336, 41 Ins. L. J. 1621.

*District of Columbia.*—Dumas v. Northwestern Mutual Ins. Co. 12 App. D. C. 245, 40 L.R.A. 358.

*Florida.* — J. I. Kelly Co. v. St. Paul Fire & Marine Ins. Co. 56 Fla. 456, 47 So. 472, 38 Ins. L. J. 215, 229.

*Michigan.*—Jaspulski v. Citizens' Mutual Fire Ins. Co. 131 Mich. 603, 92 N. W. 98, 32 Ins. L. J. 244 (condition was: "transfer, incumbering . . . increased hazard without notice," etc.); Olney v. German Ins. Co. 88 Mich. 94, 26 Am. St. Rep. 281, 13 L.R.A. 684, 50 N. W. 100 (chattel mortgage).

*Missouri.* — Cummins v. Mutual Fire Ins. Co. 8 Mo. App. 291 (condition reasonable, valid and enforceable which prohibits change of title except by inheritance).

*Nebraska.*—Farmers' & Merchants' Ins. Co. v. Jansen, 56 Neb. 284, 44 L.R.A. 861, 76 N. W. 577, 58 Neb. 522, 78 N. W. 1054.

*Texas.*—Hartford Fire Ins. Co. v. Clayton, 17 Tex. Civ. App. 644, 43 S. W. 910.

*Vermont.*—Findlay v. Union Mutual Fire Ins. Co. 74 Vt. 211, 93 Am. St. Rep. 885, 52 Atl. 429, 31 Ins. L. J. 986 (commencement of foreclosure proceedings).

See § 2190 herein.

[1] Dover Glass Works v. American Fire Ins. Co. 1 Marv. (Del.) 32, 65 Am. St. Rep. 264, 29 Atl. 1039.

[2] Grant v. Elliot & Kittery Mutual Fire Ins. Co. 75 Me. 196.

[3] Ayres v. Hartford Ins. Co. 17 Iowa, 176, 85 Am. Dec. 553. In this case the court said: "If the real ownership remains the same, if there is no change in the fact of title, but only in the evidence of it, and if this latter change is merely nominal and not of a nature calculated to increase the motive to burn, or diminish the motive to guard, the property from loss by fire, the policy is not vitiated."

provided the insured does not alienate his entire interest in the property insured, and if the alienation is not a change specified in the policy, and is not entire, the insured may recover for such interest as he suffers damage for in case of loss.[4]

A stipulation avoiding the policy, if any change takes place in the title, interest, location, or possession of the property without consent of the company indorsed on the policy, applies only to such changes as arise after the delivery of the policy in the ownership of the property, and not to an existing state or condition of the property at the time the policy was issued, except as material facts were misstated or concealed.[5] In other words, conditions as to alienation, change of title or possession, of the class here under consideration, refer to alienation, changes, etc., subsequent to the execution and issuance of the policy and not to those made prior thereto nor to those made after the loss.[6] A change or transfer of the interest of the insured which will avoid a policy, under a condition therein declaring it shall become void if such a change takes place without the consent of the insurer, must be of such a character as is calculated to make him less watchful in caring for and preserving the property insured; but if the real ownership remains the same, though there is a change in the evidence of title, such change being merely nominal, and not of a nature calculated to diminish the motives of the assured to guard it from loss, the policy is not violated.[7] Under a condition in a fire insurance policy that it shall be void if any change other than by death of the insured takes place in the "interest, title, or possession of the subject of the insurance," the word "interest" has the same meaning as in the legal phrase "right, title and interest," and means a proprietary or insurable interest, and not a mere sentimental interest. Such condition is not broken so long as the insured continues to be the sole owner of the property insured.[8] A policy

[4] Judge v. Connecticut Fire Ins. Co. 132 Mass. 521.

[5] Hoose v. Prescott Ins. Co. 87 Mich. 309, 11 L.R.A. 340, 32 Cent. L. J. 226, 47 N. W. 587. See Hall v. Niagara Fire Ins. Co. 93 Mich. 184, 32 Am. St. Rep. 407, 18 L.R.A. 135, 53 N. W. 727.

[6] *Alabama.*—Cowart v. Capital City Ins. Co. 114 Ala. 356, 62 So. 574, 27 Ins. L. J. 246.

*Illinois.*—Allemania Fire Ins. Co. v. Peck, 113 Ill. 220, 23 Am. St. Rep. 610, 24 N. E. 538.

*South Carolina.* — Steinmeyer v. Steinmeyer, 64 S. Car. 413, 59 L.R.A. 319, 42 S. E. 184.

*Virginia.*—Morotock Ins. Co. v. Rodefer, 92 Va. 747, 53 Am. St. Rep. 846, 24 S. E. 393.

*Washington.*—Pioneer Savings & Loan Co. v. Providence-Washington Ins. Co. 17 Wash. 175, 38 L.R.A. 397, 49 Pac. 231, 27 Ins. L. J. 144.

[7] Georgia Home Ins. Co. v. Bartlett, 91 Va. 305, 50 Am. St. Rep. 832, 21 S. E. 476.

[8] Stenzel v. Philadelphia Fire Ins. Co. 110 La. 1019, 98 Am. St. Rep. 481, 35 So. 271.

conditioned to be void in case of change of title is not avoided by the payment of the mortgage and the assignment of the policy to the owner with the company's consent indorsed thereon.[9] A clause forbidding "change of title or possession" is held to refer to the right of possession, and not to the occupancy of the insured property.[10] The word "occupants" in the provision of a policy making it void for change of interest, title, or possession, "except change of occupants without increase of hazard," is not limited to real property, but applies to personal property also.[11] So it is held that the letting of an insured house to tenants is not a change of possession within the meaning of the clause.[12]

Conditions against alienations, clearly expressed, in policies of insurance, must, however, be strictly construed, the court having in view the object of the insurance company in inserting them.[13] Many forms of these clauses in regard to alienation are inserted in policies. Though they may be in substance the same, yet there is much difference in the particular wording of these conditions. Many of the policies enumerate changes in title which will avoid them, while others contain stipulations against change of title framed in general terms of prohibition.[14] In all cases where the policy contains a condition as to alienation, the exact language of such condition must be carefully examined in order to ascertain the intent of the parties and their rights under the contract.[15]

**§ 2248. Consent to transfer or sale and assignment: notice to company.**[16]—If the property has been conveyed without assurer's required consent in the manner and form specified in the policy, the right of recovery is precluded.[17] This general rule is, however,

[9] Kimball v. Monarch Ins. Co. 70 Iowa, 513, 30 N. W. 862.

[10] Poor v. Hudson Ins. Co. 2 Fed. 432, 9 Ins. L. J. 428.

[11] Herman v. Katz, 101 Tenn. 118, 41 L.R.A. 700, 47 S. W. 86.

[12] Rumsey v. Phœnix Ins. Co. 17 Blatchf. (U. S. C. C.) 527, 1 Fed. 396.

[13] Commercial Union Assurance Co. v. Scammon, 126 Ill. 355, 9 Am. St. Rep. 607, 18 N. E. 562. See §§ 220 et seq. herein.

[14] The clause in the New York Standard fire policy provides that it shall be void "if the subject of the insurance be personal property, and be or become encumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise." Laws 1886, c. 488, am'd 1887, c. 429; L. 1901, c. 513; L. 1903, c. 106; L. 1909, c. 240; L. 1910, chaps. 168, 638, 668; L. 1913, c. 181.

[15] See §§ 209 et seq. herein.

[16] That part of this section in the first edition which included *waiver* is transferred to § 2191a herein.

[17] East v. New Orleans Ins. Assoc.

subject to such stipulations as protect the mortgagee against the acts of the mortgagor or owner.[18] And under conditions in a policy of fire insurance prohibiting encumbrances and levies on the insured property without the consent of the insurer, and declaring the policy to be void in case of a breach thereof, the act of the insured in giving mortgages, confessing judgments, and suffering levies of execution against the insured property without the consent or waiver of the insurer, constitutes a breach of such conditions and avoids the policy at the election of the insurer.[19] But if the insurer consents to the transfer or the sale of the property and the assignment of the policy, this will constitute a valid confirmation, so that the vendee may recover upon the policy. It is not necessary that the consent be given before the sale of the property, as a recognition of the policy by the insurer as a valid instrument, after knowledge of a breach of a condition in the policy as to a sale or transfer of the insured premises, binds the insurer and renders the policy valid and operative.[20] Where a policy contains a condition that it shall become void if the property "shall be sold or conveyed," and it is taken upon mortgaged property, after which it is assigned to, and the property delivered to, the mortgagee with the consent of the company, such transfer of the possession and control of the property is not of itself such sale and conveyance as will invalidate the policy.[1] If a company has given its consent to a sale of insured property, it has been held by such act to have also assented to the terms of the sale.[2] But although consent of insurer is given for one transfer of the property, subse-

76 Miss. 697, 26 So. 691; Bates v. Equitable Fire & Marine Ins. Co. 10 Wall. (77 U. S.) 33, 19 L. ed. 882, *cited* in Smith v. Union Ins. Co. 120 Mass. 90, 91. See also cases throughout this chapter.

On effect of variance between assignment or transfer of property and insurer's consent thereto, see note in 42 L.R.A.(N.S.) 173.

[18] Flint v. Westchester Fire Ins. Co. 207 Mass. 337, 92 N. E. 646, 40 Ins. L. J. 508. See also §§ 2248a, 2795 herein.

[19] Dover Glass Works Ins. Co. v. American Fire Ins. Co. 1 Marv. (Del.) 32, 65 Am. St. Rep. 264, 29 Atl. 1039.

[20] *Illinois.*—Illinois Fire Ins. Co. v. Stanton, 57 Ill. 354.

*Iowa.*—Clifton Coal Co. v. Scottish Union Fraternal Ins. Co. 102 Iowa, 300, 71 N. W. 433, 26 Ins. L. J. 1007.

*Maine.*—Grant v. Eliott & Kittery Mutual Fire Ins. Co. 75 Me. 196.

*New Hampshire.* — Sanders v. Hillsborough Ins. Co. 44 N. H. 238.

*New York.* — Buchanan v. Exchange Fire Ins. Co. 61 N. Y. 26.

*Rhode Island.*—Gilliat v. Pawtucket Ins. Co. 8 R. I. 282, 91 Am. Dec. 229.

But see Davis v. German-American Ins. Co. 135 Mass. 251.

[1] Washington Ins. Co. v. Hayes, 17 Ohio St. 432, 93 Am. Dec. 628. See §§ 2264 et seq. herein.

[2] Farmers' Ins. Co. v. Ashton, 31 Ohio St. 477.

quent sales without consent avoid the contract.[3] And a clause in a policy, directing payment to a certain person "as his interest may appear," does not amount to an assent by the insurer to a subsequent encumbrance given by the insured to the same person.[4] Nor is insurer charged with notice by the registration of a chattel mortgage, and in the absence of facts, sufficient to put said insurer on inquiry, there must be actual notice.[5] But notice of the advertisement of a sale by the sheriff is held unnecessary where insurer has had notice of the entry of a judgment and that an execution has been issued thereon.[6] Again, the words "payable in case of loss to" a certain designated person indorsed on the policy by the insured, where it provided that a sale of the premises without the consent of the insurer indorsed on the policy should avoid it, are not notice of a sale of the property to the insurer, to whom the insured forwarded the policy after making their indorsement thereon, and in such a case the words written under the foregoing by the insurer, "consent is hereby given to the above indorsement," is not a consent to the sale of the property, since this indorsement does not imply that the insurer had any knowledge of the sale or intended to consent to it. It is a mere transfer of the right to collect the amount, which may be done under the policy in case of loss.[7]

[3] Queen of Arkansas Ins. Co. v. Pendola, 94 Ark. 594, 128 S. W. 559. See also Pennsylvania Fire Ins. Co. v. Faires, 13 Tex. Civ. App. 111, 35 S. W. 55. *Examine* Hartford Fire Ins. Co. v. Liddell, 130 Ga. 8, 14 L.R.A.(N.S.) 168, 60 S. E. 104.

[4] Hartford Fire Ins. Co. v. Liddell, Co. 130 Ga. 8, 14 L.R.A.(N.S.) 168, 60 S. E. 104. *Examine* Atlas Reduction Co. v. New Zealand Ins. Co. 138 Fed. 497, 71 C. C. A. 21, 9 L.R.A. (N.S.) 433; Fenton v. Cascade Mutual Fire Assoc. of Wash. 60 Wash. 389, 111 Pac. 343, 39 Ins. L. J. 1699.

[5] United States Ins. Co. v. Moriarty, — Tex. Civ. App. —, 36 S. W. 943.

[6] Ulysses Elgin Butter Co. v. Hartford Fire Ins. Co. 20 Pa. Super. Ct. 384.

[7] Bates v. Equitable Fire & Marine Ins. Co. 10 Wall. (77 U. S.) 33, 19 L. ed. 882. *Cited* in:

*United States.* — Atlas Reduction Co. v. New Zealand Ins. Co. 121 Fed. 929, 931; Delaware Ins. Co. v. Greer, 120 Fed. 916, 919, 57 C. C. A. 188, 191, 61 L.R.A. 137, 139; Friemansdorf v. Watertown Ins. Co. 1 Fed. 68, 70, 9 Biss. (U. S. C. C.) 169.

*Colorado.* — Scania Ins. Co. v. Johnson, 22 Colo. 476, 478, 45 Pac. 431.

*Maine.*—Brunswick Savings Institution v. Commercial Union Ins. Co. 68 Me. 313, 315, 28 Am. Rep. 56.

*Massachusetts.*—Bullman v. North British & Mercantile Ins. Co. 159 Mass. 118, 122, 34 N. E. 169.

*Michigan.*—Guiterman v. German American Ins. Co. 111 Mich. 626, 627, 70 N. W. 135; Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Manufacturing Co. 31 Mich. 346, 356.

*Missouri.* — Kempf v. Farmers' Mutual Fire Ins. Co. 41 Mo. App. 27, 34.

*New Hampshire.* — Baldwin v. Phoenix Ins. Co. 60 N. H. 164, 166.

Where pending litigation had been terminated in insured's favor for some time prior to the fire and had not contributed in any way to the loss, the failure to give notice to insurer of such pending action or suit does not avoid the contract.[8]

Where a company which had issued a policy reinsured in another company, and the policy of reinsurance provided that in case of a change of title the policy should be void, but further provided, by a rider attached to a policy, that the reinsurance was subject to such risks, conditions and assignment as might be assumed by the reinsured, it was held that a consent to a transfer given by the company originally insuring was binding upon the reinsurers.[9]

§ 2248a. **Notice continued: sale, transfer or mortgage: mortgage clause.**—The failure of a mortgagee to notify insurer of a conveyance of the property, as required by the policy, will not preclude recovery in the absence of any provision voiding the policy for that reason.[10] And the rule supported by the better authority is that the contract of insurance with a mortgagee is separate and distinct from that of the owner of the premises and it is contemplated that a change of title may occur and that a mortgagee or a third person may become owner and, therefore, it is declared that the ordinary stipulation as to notice to insurer of a change of title is not so far a substantive part of the contract that a forfeiture will lie for its violation but that it constitutes merely a subsequent breach of the contract for which insurer if injured has an action in damages.[11] So a provision in a mortgage clause under which the mortgagee's interest is not invalidated by any acts of the mortgagor or owner, provided said mortgagee or trustee shall notify insurer of any change of ownership, or increase of hazard which shall come to his knowledge, and also that permission be given for such change or increase indorsed on the policy is directory only, where there is no provision that the failure to give such notice shall avoid the policy and the failure to give the

*New Jersey.*—Milliken v. Woodward, 64 N. J. L. 444, 450, 45 Atl. 796.

*Examine* Bachelor v. People's Fire Ins. Co. 40 Conn. 56.

[8] Sprigg v. American Central Ins. Co. 101 Ky. 185, 19 Ky. L. Rep. 363, 40 S. W. 575. See §§ 2239, 2240 herein.

[9] Manufacturers' Fire & Marine Ins. Co. v. Western Assurance Co. 145 Mass. 419, 14 N. E. 632. *Examine* Flint v. Westchester Fire Ins. Co. 207 Mass. 337, 92 N. E. 646, 40 Ins. L. J. 508.

[10] Phenix Ins. Co. v. Omaha Loan & Trust Co. 41 Neb. 834, 25 L.R.A. 679, 60 N. W. 133.

[11] Pioneer Savings & Loan Co. v. Providence-Washington Ins. Co. 17 Wash. 175, 38 L.R.A. 397, 49 Pac. 231, 27 Ins. L. J. 144. In this case it was provided that the acts of the mortgagor or owner should not invalidate the mortgagee's interest. See §§ 2270b, 2273, 2295 herein.

notice is material only where it increases the risk or hazard, and especially is there no forfeiture in such case where notice of change of title is given to one who had been agent of insurer and who was still believed to be such agent.[12] And although the owner does not occupy when completed an insured house under construction, the policy is not avoided as to the mortgagee, under the union mortgage clause, by failure to notify assurer of such non-occupation. In the case so deciding, the payee and mortgagee under the policy was the owner, but the person named as insured had an insurable interest and it was also held that upon reformation of the policy said interest passed out of the latter so that the named mortgagee under the reformed policy was not obligated to report under the clause requiring notice by the mortgagee to assurer of any change of ownership or occupancy.[13] If foreclosure proceedings are commenced and thereafter the mortgagee insures the premises, and during the pendency of such suit, said policy was issued, and the mortgagor deeded the property to the mortgagee with the agreement that title should pass only on condition of approval thereof by the mortgagee attorneys and upon the condition also that the foreclosure proceedings be dismissed and the mortgage debt discharged, and the proceedings had not been dismissed at the time of loss, such transfer is not absolute but only conditional, so that the policy is not avoided by a failure to notify assurer of a change of ownership, the policy also providing that no acts of the mortgagor owner should affect the mortgagee's interest.[14] It is also held that under the clause protecting the mortgagee, the provision requiring the mortgagee to notify insurer of any change of ownership which should come to his knowledge, has reference to a transfer to a third person of the title or possession, to changes resulting from the acts of the mortgagor or owner, and not to a transfer from the mortgagor to the mortgagee through a foreclosure.[15] If a policy is payable to a mortgagee "as interest may appear" and a second mortgage is made to the

[12] Whitney v. American Ins. Co. 16 Cal. Unrep. 220, 56 Pac. 50, 28 Ins. L. J. 254, aff'd 127 Cal. 464, 59 Pac. 897.

[13] Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co. — Tex. Civ. App. —, 167 S. W. 816.

[14] Pioneer Savings' & Loan Co. v. Providence-Washington Ins. Co. 17 Wash. 175, 38 L.R.A. 397, 49 Pac. 231, 27 Ins. L. J. 144.

[15] Pioneer Savings & Loan Co. v. St. Paul Fire & Marine Ins. Co. 68 Minn. 170, 70 N. W. 979, 26 Ins. L. J. 826; Washburn Mill Co. v. Fire Association of Philadelphia, 60 Minn. 68, 72, 51 Am. St. Rep. 500, 61 N. W. 828.

On acquisition by mortgagee of title to property covered by policy protecting mortgagee's interest, as breach of condition against sale or transfer of title, see note in 23 L.R.A. (N.S.) 1147.

same mortgagee but without insurer's consent the insurance is not avoided under a requirement of notice to insurer since the words "as interest may appear" refer to the mortgagee's interest at the time of loss, even though except for such modification the giving of a second mortgage without notice to insurer as required by the policy would forfeit the insurance.[16]

It is decided, however, that if the mortgagee, under the usual mortgage clause has knowledge of an absolute conveyance by insured and fails to notify insurer as required by said clause, the policy is avoided where it is so conditioned, even though the legal title had, prior to effecting insurance, been transferred by deed as security to a creditor.[17] So where the mortgagor died and the administrator, under order of court, sold the land, and the widow executed a quit-claim deed to the purchaser, who redeemed from a foreclosure sale and took an assignment of the mortgagee's interest in the policy, which had been made payable to him "as his interest may appear," it was held that there was such an alienation or transfer as avoided the policy no notice having been given assurer of the sale and there being no clause protecting the mortgagee against acts of the mortgagor or owner.[18] Again, where the policy required that insured give insurers notice of any mortgage made on the property, it was held that insured was bound to give actual notice, and the sending of notice by mail was insufficient, unless it was actually received by the company.[19]

Consent to one chattel mortgage does not authorize a second one and constitute notice thereof.[20]

**§ 2248b. Alienation: encumbrances: statutes.**—Where the state statute provides that an alienation of property insured and a transfer of the policy, without the consent of the insurer, voids the insurance, but the hypothecation or creation of a lien thereon does not void, it is held that a deed to a creditor to secure a debt, with

[16] Fenton v. Cascade Mutual Fire Assoc. of Wash. 60 Wash. 389, 111 Pac. 343, 39 Ins. L. J. 1699. *Examine* Hartford Fire Ins. Co. v. Liddell Co. 130 Ga. 8, 14 L.R.A.(N.S.) 168, 60 S. E. 104; Atlas Reduction Co. v. New Zealand Ins. Co. 138 Fed. 497, 71 C. C. A. 21, 9 L.R.A. (N.S.) 433.

[17] Continental Ins. Co. v. Anderson, 107 Ga. 541, 33 S. E. 887, 28 Ins. L. J. 936.

[18] Jaspulski v. Citizens' Mutual Fire Ins. Co. 131 Mich. 603, 92 N. W. 48, 32 Ins. L. J. 244.

When mortgagee's insurance not affected by mortgagor's acts, see § 2795 herein.

[19] Plath v. Minnesota Farmers' Mutual Ins. Co. 23 Minn. 479, 23 Am. Rep. 697. But see §§ 1163, 1279, 1335, 1336, and § 3300.

[20] Pennsylvania Fire Ins. Co. v. Faires, 13 Tex. Civ. App. 111, 35 S. W. 55. See Queen of Arkansas Ins. Co. v. Pendola, 94 Ark. 594, 128 S. W. 559.

reservation of balance, and the right to redeem the pledge by payment, is not such alienation.[1] Though a policy provides that if an incumbrance shall be placed on the property without notice to or consent by, the insurer, the policy shall become void, no recovery can be had if the condition is violated, though such violation does not increase the risk, and though a statute of the state requires every insurer before issuing a policy to examine the building or structure insured and the insurable value thereof, and that in the absence of any change increasing the risk without the consent of the insurer, and also of intentional fraud, in case of total loss, the whole amount mentioned in the policy shall be recovered.[2]

§ 2249. **Void sale: deed of insured property.**—A void sale of the insured property will not avoid the policy, although it contains a clause forbidding alienation or change of title. Such sale does not operate as a change or transfer of title in any way, and is in no way an alienation of the property. The insured stands in the same position, in respect to his rights against the insurer, as before the sale.[3] So where a husband alone executes a deed of property, which is void because without the wife's signature, it is held that no rights are forfeited under the policy.[4] And where a deed of trust was given, which was void, and consequently rendered a subsequent sale and deed of the property by the trustee thereunder void, it was held that there was no transfer of the interest of the insured, and that the policy was not vitiated.[5] Nor under such clause is the policy avoided by the insured's giving a deed of the property which is invalid owing to the fact that the grantor is incompetent to make such a deed.[6] And if a sale, with change of possession, is made, but it is invalid for want of power in the grantor or vendor to make the same, there is no such change of occupation as to avoid the contract, especially where the jury so finds.[7] And where a deed fails to designate the grantee there is no such change of ownership as to justify a forfeiture.[8] In Kansas,

[1] Nussbaum v. Northern Ins. Co. 37 Fed. 524, 1 L.R.A. 704.

[2] Webster v. Dwelling-House Ins. Co. 53 Ohio St. 558, 30 L.R.A. 719, 53 Am. St. Rep. 658, 42 N. E. 546.

[3] Jackson v. Ætna Ins. Co. 16 B. Mon. (Ky.) 242; Copeland v. Mercantile Ins. Co. 6 Pick. (23 Mass.) 198; School District v. Ætna Ins. Co. 62 Me. 330; Pitney v. Glens Falls Ins. Co. 65 N. Y. 6.

[4] German Ins. Co. v. York, 48 Kan. 488, 30 Am. St. Rep. 313, 29 Pac. 586. See also Commercial Ins. Co. v. Spanknable, 52 Ill. 53, 4 Am. Rep. 582.

[5] Commercial Union Ins. Co. v. Scammon, 133 Ill. 627, 12 N. E. Rep. 324, 6 Ill. App. 551.

[6] Gerling v. Agricultural Ins. Co. 39 W. Va. 689, 20 S. E. 691, 24 Ins. L. J. 385.

[7] Seaman v. Anchor Fire Ins. Co. 149 Iowa, 583, 128 N. W. 934, 40 Ins. L. J. 370.

[8] Westchester Fire Ins. Co. v. Jennings, 70 Ill. App. 539.

the conveyance of a homestead made by a husband alone, and which is therefore void, cannot affect the policy.[9] And since a valid conveyance is contemplated a deed void for usury does not preclude recovery even though no agreement permitting such transfer is endorsed on or added to the policy as stipulated therein.[10] Nor does a deed to secure a creditor invalidate the policy where said deed is void.[11] And where an executor holds under the will all the real and personal property insured, in trust, subject to his life estate therein, and he has no power or authority whatsoever to sell or dispose of any of the property, an attempted contract of sale made by him before the will is even probated does not invalidate the policy.[12] Again, a decree setting aside an illegal sale under a power in a mortgage which was involuntary as to mortgagor, avoids the sale from the beginning, so as to enable the mortgagor to enforce his insurance policies notwithstanding provisions against change of title, even as to losses which occurred before the rendition of the decree.[13]

§ 2250. **Voidable and set-aside sale no alienation.**—Where one clause of a condition in a policy on premises provides that "if the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance . . . in every such case this policy shall be void," and another clause provides that "when property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on said property shall immediately terminate," the latter clause will be held to have been intended to explain and qualify the meaning of the words of the former, and the sale or disposition of the property intended will be construed to be such as caused all interest of the assured in or control over the property to cease. And in such case a sale of the property insured which is voidable and is afterward set aside is not such an alienation as will avoid the policy.[14] There is no change of title

[9] German Ins. Co. v. York, 48 Kan. 488, 30 Am. St. Rep. 313.

[10] Phœnix Ins. Co. v. Asbury, 102 Ga. 565, 27 S. E. 667 (held contra in s. c. 95 Ga. 792, but at subsequent trial usury was shown) followed in Athens Mutual Ins. Co. v. Evans, 136 Ga. 584, 71 S. E. 892.

[11] Athens Mutual Ins. Co. v. Evans, 136 Ga. 584, 71 S. E. 892. See § 2259 herein.

[12] Seaman v. Anchor Fire Ins. Co. 149 Iowa, 583, 128 N. W. 934, 40 Ins. L. J. 370.

[13] Niagara Fire Ins. Co. v. Scammon, 144 Ill. 490, 19 L.R.A. 114, 28 N. E. 919, 32 N. E. 914.

[14] In this case a trust deed was made of property to secure a debt. Afterward, the maker of the deed effected insurance upon the same property under the clauses above noted, and the trustee, without his consent and against his protest, sold

within the meaning of an insurance policy which is to be forfeited if the title is changed, by reason of a sale under a power in a mortgage, which is voidable because the mortgagee was indirectly the purchaser, where the mortgagor has repudiated the sale and remains in possession claiming ownership. And a voidable sale of real estate under a power in a mortgage, although treated as a transaction to which the mortgagor is a party, will become void from the time he notifies the purchaser of a refusal to recognize the latter's title, so as to entitle the mortgagor to enforce his insurance policies notwithstanding provisions against alienation of title, as to losses which subsequently occur, if he remains in possession and promptly institutes proceedings to have the sale set aside.[15]

§ 2251. **Sale of part of subject of insurance where policy contains no condition as to alienation.**—If the policy contains no condition avoiding it in case of the alienation of the insured property, it has generally been held that an alienation which does not divest the insured of his entire interest in the property will not render the policy void as to the interest retained by him. The assured must have parted with his entire interest in the policy in order to render it inoperative. If he retains any interest thereunder, of which he is possessed at the time of loss, he may recover to the extent of that interest.[16]

§ 2252. **Sale of part of property insured where policy stipulates against alienation or transfer of subject of insurance.**—If the policy in express terms prohibits an alienation or transfer in any way, either in whole or in part, of the interest of the insured in the prop-

the property to the cestui que trust, the maker of the trust deed being in possession and so remaining until after the sale, and until the property was destroyed by fire, denying the validity of the sale and asserting his right to possession and ownership, and within a reasonable time instituted proceedings to set the sale aside. The relief asked was granted. Commercial Union Assur. Co. v. Scammon, 126 Ill. 355, 9 Am. St. Rep. 607, 18 N. E. 562.

[15] Niagara Fire Ins. Co. v. Scammon, 144 Ill. 490, 19 L.R.A. 114, 28 N. E. 919, 32 N. E. 914. *Examine* Seaman v. Anchor Fire Ins. Co. 149 Iowa, 583, 128 N. W. 934, 40 Ins. L. J. 370.

[16] *Iowa.*—Ayres v. Home Ins. Co. 21 Iowa, 185, 193.

*Massachusetts.*—Jackson v. Massachusetts Mutual Fire Ins. Co. 23 Pick. (40 Mass.) 418, 34 Am. Dec. 69; Lazarus v. Commonwealth Ins. Co. 5 Pick. (22 Mass.) 76.

*New Hampshire.*—Folsom v. Belknap County Mutual Fire Ins. Co. 30 N. H. 231.

*New York.*—Masters v. Madison County Mutual Ins. Co. 11 Barb. (N. Y.) 624.

*Pennsylvania.*—Norcross v. Franklin Fire Ins. Co. 17 Pa. St. 429, 55 Am. Dec. 571.

*England.*—Sparkes v. Marshall, 2 Bing. (N. C.) 761, 3 Scott, 172; Rice v. Provincial Ins. Co. 7 U. C. C. P. 548.

erty, such condition will prevent an alienation of a part of the insured's interest thereunder. But the policy may stipulate only that it shall be void in case of the "alienation or transfer of the property insured." Under a clause of this nature it is held that an alienation of a part of the property insured will not invalidate the policy so long as the insured retains an interest in the property, and in such a case he may recover to the extent of the interest remaining in him.[17] So where the policy provided that if the insured should make any other insurance on the property, or any part thereof, or if the property should be sold or transferred, or any change should take place in the title or possession thereof without the company's consent, the policy should be void, and that when the property had been sold or otherwise disposed of, so that all the interest on the part of the insured had ceased, the insurance on such property should terminate, it was held that the insurance on the entire property was not by these provisions forfeited by a sale of a portion of the property.[18] Under a provision in a fire policy on a barn and its contents, that it shall be void if the risk is increased in any manner, or the property sold or any change made in the title, or if the property be encumbered or used for other purposes without consent, a change of title or encumbrance by a sale of parts of the tract upon which the insured building is situate and the purchase of other land will not avoid the policy unless it increases the risk or decreases the security.[19] And if a policy insuring a house and barn against loss by fire, provides that it shall be void if the property is sold without the consent of the insurer, a sale of the barn does not affect the right to recover for the loss of the house. The condition applies only upon the sale

[17] *United States.*—Scanlon v. Union Fire Ins. Co. 4 Biss. (U. S. C. C.) 511, Fed. Cas. No. 12,436.

*Illinois.*—Commercial Ins. Co. v. Spanknable, 52 Ill. 53, 4 Am. Rep. 582.

*Iowa.*—Cowan v. State Ins. Co. 40 Iowa, 551, 20 Am. Rep. 583; Ayres v. Home Ins. Co. 21 Iowa, 185, 193.

*Louisiana.*—McCarty v. Connecticut Ins. Co. 17 La. 365.

*Maryland.*—Citizens' Fire Ins. Security & Land Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360.

*Massachusetts.*—Lazarus v. Commercial Ins. Co. 5 Pick. (22 Mass.) 76; Stetson v. Massachusetts Ins. Co. 4 Mass. 330, 3 Am. Dec. 217.

*New York.*—Manley v. Insurance Co. of North America, 1 Lans. (N. Y.) 20; Courtney v. New York Ins. Co. 28 Barb. (N. Y.) 116; Tyler v. Ætna Ins. Co. 12 Wend. (N. Y.) 507.

*Ohio.*—Blackwell v. Miami Valley Ins. Co. 48 Ohio St. 533, 29 Am. St. Rep. 574, 14 L.R.A. 431, 29 N. E. 278.

*Pennsylvania.*—West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573.

[18] Quarrier v. Peabody Ins. Co. 10 W. Va. 507, 27 Am. Rep. 582.

[19] Russell v. Cedar Rapids Ins. Co. 78 Iowa, 216, 4 L.R.A. 538, 42 N. W. 654.

of the entire property, though, after the sale of the barn, its former owner cannot recover for its subsequent destruction because of his want of insurable interest at that time.[20] So a policy insuring both real and personal property, and providing that if "the property" shall thereafter become mortgaged the policy shall become void, must be regarded as treating the property insured as a whole, since it does not provide a forfeiture for mortgaging "any of the property," and consequently mortgaging the personal property does not forfeit or avoid the policy.[1] In another case however, where a part of the property had been sold, it was held that such a sale would avoid the policy, unless it could be said as a matter of law that the remaining risk was not thereby increased.[2]

**§ 2252a. Sale or deed with reservation of interest: reversion of title.**—A deed of insured premises, reserving a life estate in a house, is not such a sale of the house as will defeat the insurance on the grantor's life interest, under a clause in the policy making the insurance void "if the said property be sold," as a complete transfer of the entire interest of the insured is necessary to defeat the insurance thereon.[3] But a sale and conveyance in fee, without insurer's consent, of an undivided half interest in the land on which the insured building is located with a reservation of first title to said building with the right to remove the same without let or hindrance from the grantee, constitutes such a change in interest and title as avoids the policy.[4] If a marriage contract vests title in the wife, it constitutes a breach of the condition against change of title, even though it provides for a reversion of the title in case she should not survive the grantor, or prove unfaithful to him, and the fact that her husband divorced her after the loss does not aid a recovery on the policy.[5]

**§ 2253. Alienation of part where contract severable.**—Where a policy covers different classes of property, describing each class separately or different items of the same class, and specifying a distinct and separate sum on each, the policy is generally held, in case of an alienation of a part of the property insured, to be only inoperative as to that part.[6] So an alienation of one of two houses

[20] Clinton v. Norfolk Fire Ins. Co. 176 Mass. 486, 50 L.R.A. 833, 79 Am. St. Rep. 325, 57 N. E. 998.

[1] Born v. Home Ins. Co. 110 Iowa, 379, 80 Am. St. Rep. 300, 81 N. W. 676.

[2] Baldwin v. Hartford Fire Ins. Co. 60 N. H. 422, 49 Am. Rep. 324 (one judge dissenting).

[3] Clinton v. Norfolk Mutual Fire Ins. Co. 176 Mass. 486, 50 L.R.A. 833, 79 Am. St. Rep. 325, 57 N. E. 998.

[4] Watts v. Phœnix Ins. Co. 134 Ga. 717, 68 S. E. 479.

[5] Cummins v. National Fire Ins. Co. 81 Mo. App. 291.

[6] Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115; Commercial Ins. Co. v. Spanknable, 52

insured in the same policy, but valued and insured separately, avoids the policy only as to the house so alienated, where the charter of the company provides that "the alienation of any property" shall avoid the "policy thereon."[7] A policy upon personal property, though the items are not specifically named, may also come within the same rule. So where a policy was issued upon all the personal property of the insured without specifically naming it, an alienation or transfer of a part thereof was held not to avoid the whole contract, but only to affect the particular property alienated.[8]

§ 2254. **Alienation of part: whether contract entire or severable.**—There is another class of cases in addition to the foregoing in which it is held that if the contract is entire, then an alienation as to part of the property insured will invalidate the policy. In some of these cases the question as to whether the contract is entire or not has been held dependent upon the manner in which the premium has been paid, and that if the premium is single and entire, then the policy will be avoided by a sale of a part of the property, notwithstanding the insurance is distributed among several items in the policy.[9] But it would seem that other facts are to be considered, in determining the entirety of the contract, in addition to the premium.[10] In Loomis v. Rockford Insurance Company,[11]

Ill. 53, 4 Am. Rep. 582; German Ins. Co. v. Fairbank, 32 Neb. 750, 29 Am. St. Rep. 459, 49 N. W. 711; State Ins. Co. v. Schreck, 27 Neb. 527, 6 L.R.A. 524, 43 N. W. 340; Bodle v. Chenango Mutual Ins. Co. 2 Comst. (N. Y.) 53.

[7] Clark v. New England Mutual Fire Ins. Co. 6 Cush. (60 Mass.) 342, 53 Am. Dec. 44.

[8] State Ins. Co. v. Schreck, 27 Neb. 527, 6 L.R.A. 524, 43 N. W. 340.

[9] Plath v. Minnesota Farmers' Mutual Fire Ins. Co. 23 Minn. 479, 23 Am. Rep. 697. See also Barnes v. Union Mutual Fire Ins. Co. 51 Me. 110, 81 Am. Dec. 562; Lovejoy v. Augusta Ins. Co. 45 Me. 472; Brown v. People's Mutual Ins. Co. 11 Cush. (Mass.) 280; Kimball v. Howard Fire Ins. Co. 8 Gray (65 Mass.) 33; Gottsman v. Pennsylvania Ins. Co. 56 Pa. St. 210. See § 1931 herein.

[10] In McGowan v. People's Mutual Fire Ins. Co. 54 Vt. 211, 41 Am. Rep. 843, the court said: "This is a question of great importance, as a large proportion of insurance contracts embrace more than one item of property insured. The decisions are apparently conflicting, but we think are easily reconciled by referring to the plain principles which should govern them. The general rule, 'void in part, void in toto,' should apply to all cases where the contract is affected by some all-pervading vice, such as fraud or some unlawful act condemned by public policy or the common law; cases where the contract is entire and not divisible, and all those cases where the matter that renders the policy void in part, and the result of its being so rendered void, affects the risk of the insurer upon the other items in the contract . . . a recovery should be had in all those cases where the contract is divisible to different properties insured for separate sums, and the risk unaffected by the cause that renders the policy void in part."

three houses and their contents, situate on different farms, were insured, each for a separate amount, by a policy stating the premium as a gross sum, and the contract was held divisible, and that if there was a breach of condition as to one of the houses, by its conveyance without the assent of the insurer, the policy was not thereby avoided as to the other houses, and it was declared that a recovery should be had in all those cases where the contract is divisible and the different properties are insured for separate sums, and the risk upon some of the property is not affected by the clause which renders the policy void in part; that although insurance is distributed to the different items of insured property, the contract is indivisible if its breach as to one item of the property affects, or may reasonably be supposed to affect, the other items, by increasing the risk thereon. If a part of insured's personal property is mortgaged, a recovery is not precluded for that part which is not so encumbered, where the insurance is for a gross amount, and each class has a separate valuation with a maximum limit for recovery in case of loss in that class, as in such case the risk is divisible.[12]

§ 2255. **Conclusion: alienation of part of subject of insurance.**—From a consideration of the cases upon this subject, as in all other cases of contract, the intent of the parties must control. In order, therefore, to deduce any definite rule the exact conditions of the contract as to alienation must be carefully examined in connection with the entire contract to ascertain whether there exists an intent that the contract should be entire, and if it is obvious that it was intended that an alienation of a part of the property insured should avoid the entire contract, then such intention will prevail. If, however, no such intention can be gathered from the terms of the contract, coupled with such surrounding circumstances as the rules of evidence permit to be shown, then it would seem that though a part of the subject of insurance has been alienated, the contract will still be operative as to that part remaining where by such alienation the insurer has suffered no damage, and the risk which he has assumed has been in no way increased thereby.[13]

[11] 77 Wis. 87, 20 Am. St. Rep. 96, 8 L.R.A. 834, 45 N. W. 813.

[12] Tompkins v. Hartford Fire Ins. Co. 49 N. Y. Supp. 184, 22 App. Div. 380.

[13] Merrill v. Agriculture Ins. Co. 73 N. Y. 452, 29 Am. Rep. 184.

See also the following cases:

*Illinois.*—Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164; Howard Fire & Marine Ins. Co. v. Cornick, 24 Ill. 455.

*Kentucky.*—Phœnix Ins. Co. v. Lawrence, 4 Met. (Ky.) 9.

*Massachusetts.*—Clark v. New England Mutual Fire Ins. Co. 6 Cush. (60 Mass.) 342, 53 Am. Dec. 44.

**§ 2255a. Alienation: where title or possession does not pass, or is not intended to pass.**—If in negotiating an exchange of property, a deed is made by assured to one whom the real estate agents represented was a purchaser, but who was in fact only one with whom said agents hoped to effect a sale, there is no change of title, possession, or interest unless the title passed by the deed out of assured.[14] And the execution of a mortgage between father and son for the purpose of evading creditors without intent that it should be enforced until recorded which was done after the loss does not invalidate the insurance.[15] But the intent not to pass title is sufficient to prevent a forfeiture, even though the deed is recorded, as where a deed was made to a wife by her husband for the purpose of avoiding creditor's claim.[16]

**§ 2256. Changes by encumbrances on property.**—A condition in a policy that it shall be void, unless consent in writing is indorsed thereon by the company, if the assured is not the sole and unconditional owner of the property, relates only to changes arising after the execution and acceptance of the policy, and does not apply to an existing state or condition of the property at the time of the issuance of the policy.[17] A covenant avoiding the policy if the property insured shall become encumbered by mortgage, judgment, or otherwise without the company's consent, is broken, when an encumbrance falls upon the property, whether with or without the actual knowledge of the insured.[18] A condition against increase of encumbrances on the insured property without notice thereof to the company is not violated by a change, which is not an increase, of encumbrances known to the company at the time the insurance was effected.[19] So when the insured, when applying for the insurance, informs the insurer of the amount of encum-

*Wisconsin.*—Schumitsch v. American Ins. Co. 48 Wis. 26, 3 N. W. 59, 9 Ins. L. J. 56.

*England.*—Date v. Gore District Mutual Fire Ins. Co. 14 U. C. C. P. 549. Under the code of California it is provided that a change of interest in one or more several distinct things, separately insured by one policy, does not avoid the insurance as to the others: Deering's Annot. Civ. Code Cal. sec. 2555.

[14] Camden Fire Ins. Assoc. v. Bomar, — Tex. Civ. App. —, 176 S. W. 156.

[15] Western Assur. Co. v. Kilpatrick-Koch Dry Goods Co. 54 Neb. 241, 74 N. W. 592.

[16] Hogodone v. Grange Mutual Fire Ins. Co. 133 Mich. 339, 10 Det. L. News, 171, 94 N. W. 1045.

[17] Hall v. Niagara Fire Ins. Co. 93 Mich. 184, 32 Am. St. Rep. 497, 18 L.R.A. 135, 53 N. W. 727. See § 2247 herein.

[18] Hench v. Agricultural Ins. Co. 122 Pa. St. 128, 9 Am. St. Rep. 74, 15 Atl. 671.

On mortgage as affecting change of title or interest in insured property, see note in 38 L.R.A. 562.

[19] Kister v. Lebanon Mutual Ins.

brances then existing upon the property, and the latter issues the policy with knowledge of such encumbrances, the conditions against encumbrances is not violated if their amount never subsequently exceeds the amount stated.[20] And where there is a known encumbrance on the property a change merely in the form thereof without adding thereto, will not avoid the policy.[1]

§ 2257. **Meaning of clause "encumbrance in any way:" liens created by operation of law.**—Many policies stipulate that in case of an "encumbrance in any way" upon the insured property the policy shall be void. In the absence of any further provision it has been held that liens, whether by judgment or otherwise, when created by operation of the law are not within the meaning of this condition, since the plain intent of the parties is only to prevent voluntary encumbrances. To construe it as extending to and including encumbrances created by operation of the law and in invitum, would defeat the contract of insurance in many cases where it would be contrary to the intention of the parties.[2] Where a policy stipulates that "if the property shall hereafter become mortgaged or encumbered this policy shall become null and void," such provision will be regarded as relating only to liens voluntarily placed upon the property by the assured, and not as applying to judgments or other liens created by law.[3] In an Iowa case, however, the contract stipulated that "when the property insured shall become alienated the policy thereon shall become void unless assigned by the consent of the president and secretary to the alienee;" the property was sold under a decree of foreclosure, and a decree was had to correct a mistake in the description in the mortgage. The time of redemption had also expired. The defense of a breach of the above condition was set up, it being averred that the property was alienated by operation of law, and that there was no assignment to the alienee, and it was held that the policy was avoided.[4]

§ 2258. **Lease of insured property.**—The giving of a lease of insured property is not an alienation or transfer, and will not avoid

Co. 128 Pa. St. 553, 15 Am. St. Rep. 696, 5 L.R.A. 646, 18 Atl. 447.

[20] Gould v. Dwelling-House Ins. Co. 134 Pa. St. 570, 19 Am. St. Rep. 717, 19 Atl. 793. See Houdeck v. Merchants' & Bankers' Ins. Co. 102 Iowa, 303, 71 N. W. 354.

[1] Farmers' & Merchants' Ins. Co. v. Newman, 58 Neb. 504, 78 N. W. 933; Koshland v. Home Mutual Ins. Co. 31 Ore. 321, 50 Pac. 567, 27 Ins. L. J. 304, s. c. 49 Pac. 864, 26 Ins. L. J. 940, s. c. 31 Oreg. 362, 49 Pac. 865, 26 Ins. L. J. 943.

On effect of condition against encumbrances upon renewal, substitution or alteration of encumbrance upon insured property, see note in 20 L.R.A. 400.

[2] Baley (Bailey) v. Homestead Fire Ins. Co. 80 N. Y. 21, 36 Am. Rep. 570, aff'g 16 Hun (N. Y.) 503.

[3] Phœnix Ins. Co. v. Pickel, 119 Ind. 155, 12 Am. St. Rep. 393, 21 N. E. 546.

[4] McKissick v. Mill Owners' Mutual Fire Ins. Co. 50 Iowa, 116.

the policy, unless it is prohibited by the terms thereof.[5] The fact that a lessee is in possession of property under a contract of purchase will not avoid a policy of insurance thereon which provides that "if the property be sold or transferred, or any change take place in title or possession, whether by legal process, judicial decree, voluntary transfer, or conveyance," the policy shall be void. The clause in regard to possession is construed as meaning not the occupancy of the property, but the possessory right. In such a case the possession of the lessee is considered as that of the insured.[6] So where insured property was leased for five years, the lessee having the privilege of buying the property for a specified sum at any time during said term, it was held that this would not avoid the policy, as the owner had not parted with his interest in the property, since the lessees had not purchased it.[7] Where the policy is upon an unfinished building issued with knowledge that it is to be occupied by a tenant, letting a tenant into possession of property under an agreement to rent the same for five years, and then to buy it, is not, prior to the expiration of the five years, a violation of the condition of an insurance policy thereon, making the policy void in case of a transfer of title or possession of the property, where provision is made in the application for occupancy by a tenant, although insurer had no notice of the agreement to purchase.[8] If the wife of the insured, after his death, leases the property without the insurer's consent, and surrenders possession to the tenant, this is such a change of possession as avoids the policy, conditioned that it shall be void in case of change in possession or occupancy of the property without the consent of the insurer.[9]

**§ 2259. Conveyance by deed of property as collateral.**—Under a condition in the policy that in case of any sale, transfer, or change of title in the property insured such insurance shall be void and cease, it has been held that a merely nominal transfer as collateral security for debts which are liens on the property will not avoid the policy.[10] In a case in the Federal courts, where the condition

[5] Lane v. Marine & Fire Ins. Co. 12 Me. 44, 28 Am. Dec. 150.

[6] Rumsey v. Phœnix Ins. Co. 1 Fed. 396, 2 Fed. 429. See also Smith v. Phœnix Ins. Co. 91 Cal. 323, 25 Am. St. Rep. 191, 13 L.R.A. 475, 27 Pac. 738, 33 Cent. L. J. 397, rev'g 3 Cal. Unrep. Cases, 244, 23 Pac. 383. But see Fire Assoc. of Philadelphia v. Flournoy, 84 Tex. 632, 31 Am. St. Rep. 89, 19 S. W. 793.

[7] Planters' Mutual Ins. Co. v. Rowland, 66 Md. 236, 7 Atl. 257.

[8] Smith v. Phœnix Ins. Co. 91 Cal. 323, 13 L.R.A. 475, 25 Am. St. Rep. 191, 27 Pac. 738.

[9] Planters' Mutual Ins. Assoc. v. Dewberry, 69 Ark. 295, 86 Am. St. Rep. 195, 62 S. W. 1047.

[10] Ayres v. Hartford Ins. Co. 17 Iowa, 176, 85 Am. Dec. 553; Virginia Fire & Marine Ins. Co. v. Feagin, 62 Ga. 515. But see West-

in the policy was, "If the property be sold or transferred, or any change takes place in title or possession, the policy shall be void," it was held that a deed pledging the property as security for a debt, the debtor retaining possession and control of the property, did not invalidate the policy in the absence of any precise provision forbidding a transaction of that nature.[11] Though the insured may give a deed of the property covered by the policy which is absolute in its terms, it has been held that if given as security for a debt, the insured retaining possession, it will only be considered as a mortgage and no alienation.[12] And such seems to be the rule under the alienation clause of the New York standard fire policies.[13] Under a policy containing a clause prohibiting "any transfer of the interest of the insured, by sale or otherwise," without the consent of the insurer, a deed assigning a constructive possession of the insured goods to certain parties in trust for the benefit of creditors does not terminate the interest of the insured nor avoid the policy.[14] Where the mortgagor, under a policy for one year, conveyed the property as security for a debt, but reacquired the title, and the loss occurred about two years after the reconveyance, all subsequent policies are not thereby avoided.[15]

**§ 2260. Sale of insured property with mortgage back: change of interest or title.**—If the policy stipulates that if the property insured be sold or transferred, or any change takes place in title or possession, without the consent of the insurers, the policy shall be void, a sale or conveyance of the property without the required consent avoids the policy, although simultaneously therewith a mortgage is executed back by the purchaser for a part of the purchase money.[16] And this seems to be the rule in all cases where the policy provides that it shall be void in case of a "change of interest." In the earlier New York cases it was held that such a transfer with mortgage back did not avoid the policy.[17] But the

ern Massachusetts Ins. Co. v. Riker, 10 Mich. 279.

On delivery of deed in escrow as a change of title or interest, see note in 38 L.R.A.(N.S.) 142.

[11] Nussbaum v. Northern Ins. Co. 37 Fed. 524, 1 L.R.A. 704. See also Athens v. Mutual Ins. Co. 136 Ga. 584, 71 S. E. 892.

[12] Holbrook v. American Ins. Co. 1 Curt. (U. S. C. C.) 193, Fed. Cas. No. 6,589.

[13] Barry v. Hamburg-Bremen Fire Ins. Co. 110 N. Y. 1, 17 N. E. 405.

[14] Phœnix Ins. Co. v. Lawrence, 4 Met. (61 Ky.) 9, 81 Am. Dec. 521.

[15] Commonwealth Fire Ins. Co. v. Obenchain, — Tex. Civ. App. —, 151 S. W. 611, 42 Ins. L. J. 271.

[16] Savage v. Howard Ins. Co. 52 N. Y. 502, 11 Am. Rep. 741. See also Home Mutual Fire Ins. Co. v. Hauslein, 60 Ill. 521; Miner v. Judson, 5 Thomp. & C. (N. Y.) 46, 2 Hun (N. Y.) 441; Burger v. Farmers' Mutual Fire Ins. Co. 71 Pa. St. 422.

[17] Kitts v. Massasoit Ins. Co. 56

decision in Savage v. Howard Insurance Company [18] established a different rule.

§ 2261. **Sale and mortgage back where policy prohibits alienation of interest.**—A different rule from that stated under the last section seems to prevail where the policy simply stipulates that an alienation of the interest of the insured shall avoid the policy.[19] The sale and mortgage back in these cases constitute one act, it is said, and although it is a change of title and interest, it is not an alienation, since the insured has an interest in the property. The interest is simply changed from an absolute to a defeasible one.[20]

§ 2261a. **Conveyance and reconveyance.**—A policy is not avoided under the alienation clause by a conveyance to a third person and reconveyance simultaneously executed and delivered, made in order to avoid attachment, and this applies, even though the deeds are not recorded.[1] And where property is sold under contract and upon default in its conditions it is reconveyed to the holder of the legal title, which was the title insured, there is no such change of interest or title as avoids the policy, as such a transfer invests the entire estate, both the legal and equitable interest, in assured, and

Barb. (N. Y.) 177; Hitchcock v. Northwestern Ins. Co. 26 N. Y. 68; Fernandez v. Great Western Ins. Co. 3 Rob. (N. Y.) 457.

[18] 52 N. Y. 502, 11 Am. Rep. 741. Here the court said: "The condition is not capable of two readings, and the courts have no right, under the pretense of interpretation, to nullify a material provision inserted for the reasonable protection of the insurers, and thus exercise a dispensing power in favor of the insured. It cannot be said that a conveyance of the fee and the taking back of a mortgage for the purchase money is not as well a sale or transfer or a change of title. It is sufficient to put an end to the policy that there has been a change of title, and no one can say that a conveyance of the fee and substituting the interest of a mortgagee in the assured is not a substantial change in the title. The fact that, to preserve equities and exclude liens which might otherwise defeat purchase money liens, courts regard a deed of conveyance and purchase money mortgage as simultaneous, and the rights of the parties as if the title to the amount of the mortgage interest had never passed out of the grantor, does not aid in construing this contract, or tend to establish the claim of the respondent that there has been no transfer of the property." The policy in this case contained the following condition: "If the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, without the consent of the company indorsed hereon, the policy shall be void."

[19] Stetson v. Massachusetts Ins. Co. 4 Mass. 330, 336, 3 Am. Dec. 217; Howard Fire Ins. Co. v. Bruner, 23 Pa. St. 50.

[20] Hitchcock v. Northwestern Ins. Co. 26 N. Y. 68. But see Tittemore v. Vermont Mutual Ins. Co. 20 Vt. 546.

[1] Wiley v. London & Lancashire Fire Ins. Co. 89 Conn. 35, 92 Atl. 678.

On effect of sale of insured property in case of reconveyance before loss, see note in 10 L.R.A.(N.S.) 738.

increases assured's interest.[2] But a conveyance by an insured and his wife of the insured property to their son, by warranty deed, and a reconveyance by him of the premises by warranty deed to the wife of the insured, in pursuance of an agreement between the husband and the wife that the latter shall hold the title to the insured property in trust for her husband, is such a change in the title as to terminate the contract, under a provision of the policy that it shall cease to be in force "in case any change shall take place in the title of the assured." [3]

§ 2262. **Deed and reconveyance in trust to secure payment of purchase money.**—An insured who has conveyed insured property retains an insurable interest, and may recover his actual loss, not exceeding the amount insured, when the grantee at the time of the conveyance reconveys the property to a third person, as trustee for the insured, to secure the payment of the purchase money.[4]

§ 2263. **Trustee, purchaser at his own sale under power of sale in mortgage: no alienation.**—A trustee under a mortgage containing a power of sale cannot become purchaser at his own sale, either directly or indirectly, and if he does so become the purchaser, the rights of the mortgagor will remain precisely the same as though no sale had been made, and such a sale will not constitute an alienation within the meaning of a clause against alienation in an insurance policy.[5]

§ 2263a. **Conveyance from mortgagor to mortgagee.**—A conveyance from the mortgagor to the mortgagee prior to the date of the fire, which is not accepted until after that date, will not avoid a policy of insurance on the property for change of title, since the mortgagor may keep his mortgage alive and prevent its merging in the title if it is to his interest to do so.[6] A mortgagee after condition broken has a right of entry and of collecting the rents and if he enters and does not rent he is bound to account to the mort-

[2] Foiles v. Detroit Fire & Marine Ins. Co. 175 Mich. 716, 141 N. W. 879, 42 Ins. L. J. 1143.

[3] Farmers' & Merchants' Ins. Co. v. Jensen, 56 Neb. 284, 44 L.R.A. 861, 76 N. W. 577, 58 Neb. 522, 78 N. W. 1054.

[4] Morrison v. Tennessee Marine & Fire Ins. Co. 18 Mo. 262, 59 Am. Dec. 299.

[5] Commercial Union Assurance Co. v. Scammon, 126 Ill. 355, 9 Am. St. Rep. 607, 18 N. E. 562.

[6] Pioneer Savings & Loan Co. v. Providence Washington Ins. Co. 17 Wash. 175, 38 L.R.A. 397, 49 Pac. 231. As to notice and transfer from mortgagor to mortgagee under foreclosure, see Pioneer Savings & Loan Co. v. St. Paul Fire & Marine Ins. Co. 68 Minn. 170, 70 N. W. 979, 26 Ins. L. J. 826, *considered* under § 2248a herein.

On acquisition by mortgagee of title to property covered by policy protecting mortgagee's interest as breach of condition against sale or transfer of title, see note in 23 L.R.A. (N.S.) 1147.

gagor as legal owner for the rental value and a deed from the mortgagor to the mortgagee and delivery of possession, where said deed is not delivered but left in escrow, does not constitute such a transfer of title as to avoid a policy issued to the mortgagor, as the possession of the mortgagee is not conclusive of title nor inconsistent with his position as mortgagee and until delivery of the deed the policy is valid.[7]

§ 2264. **Mortgage not alienation, sale, or transfer of title.**—A condition imposing a forfeiture is, as we have stated, construed strictly. Therefore, unless the policy by its terms indicates the intention that a mortgage will invalidate the policy, it will not so operate. The word "alienation" is construed as meaning a conveyance of one's entire estate. Consequently, a provision in a policy avoiding it in case of "alienation by sale or otherwise" does not apply to a conveyance by way of mortgage while the mortgagor remains in possession and there has been no entry for foreclosure,[8]

[7] Walton v. Phœnix Ins. Co. 162 Mo. App. 316, 141 S. W. 1138, 41 Ins. L. J. 413.

On delivery of deed in escrow as a change in title or interest, see note in 38 L.R.A.(N.S.) 142.

[8] Jackson v. Massachusetts Mutual Fire Ins. Co. 23 Pick. (39 Mass.) 418, 34 Am. Dec. 69.

See also the following cases:

*United States.* — Holbrook v. American Ins. Co. 1 Curt. (U. S. C. C.) 193, Fed. Cas. No. 6,589; Friezen v. Allemania Fire Ins. Co. 30 Fed. 352.

*Illinois.*—German Ins. Co. v. Gibe, 162 Ill. 251, 44 N. E. 490; Aurora Fire Ins. Co. v. Eddy, 55 Ill. 213.

*Iowa.*—Eddy v. Hawkeye Ins. Co. 70 Iowa, 472, 59 Am. Rep. 444, 39 N. W. 808.

*Maine.*—Pollard v. Somerset Fire Ins. Co. 42 Me. 221.

*Massachusetts.*—Bryan v. Traders' Ins. Co. 145 Mass. 389, 14 N. E. 454; Judge v. Connecticut Fire Ins. Co. 132 Mass. 521.

*New Hampshire.*—Shepherd v. Union Mutual Fire Ins. Co. 38 N. H. 232; Folsom v. Belknap County Mutual Fire Ins. Co. 30 N. H. (Fost.) 231.

*New York.*—Barry v. Hamburg-Bremen Fire Ins. Co. 110 N. Y. 1, 17 N. E. 405; Conover v. Marine Fire Ins. Co. 3 Denio (N. Y.) 254, s. c. 1 Const. (N. Y.) 290; Allen v. Hudson River Mutual Ins. Co. 19 Barb. (N. Y.) 442.

*Ohio.*—Sun Fire Office v. Clark, 53 Ohio St. 414, 42 N. E. 248; Byers v. Farmers' Ins. Co. 35 Ohio St. 606, 35 Am. Rep. 623.

*Oregon.*—Koshland v. Hartford Fire Ins. Co. 31 Oreg. 402, 49 Pac. 866, 26 Ins. L. J. 945.

*Utah.*—Peck v. Girard Fire & Marine Ins. Co. 16 Utah, 121, 67 Am. St. Rep. 600, 51 Pac. 255, 27 Ins. L. J. 265.

*West Virginia.*—Seylen v. British America Ins. Co. 72 W. Va. 120, 77 S. E. 555, 42 Ins. L. J. 739; Nease v. Ætna Ins. Co. 32 W. Va. 283, 9 S. E. 233.

*Wisconsin.*—Wolf v. Theresa Village Mutual Fire Ins. Co. 115 Wis. 402, 91 N. W. 1014, 32 Ins. L. J. 139. But see McCullogh v. Indiana Mutual Fire Ins. Co. 8 Blackf. (Ind.) 50. See § 2264a herein. See note 38 L.R.A. 562.

On mortgage as affecting change of title or interest in insured property, see note in 38 L.R.A. 562.

and a mortgage is not a violation of a clause in the policy against the sale, conveyance, alienation, or transfer of the property.[9] A conveyance of the subject-matter of a policy does not bar recovery by insured to the extent of his actual loss, provided it does not exceed the sum insured, if the conveyance be in the nature of a mortgage, or in trust with a resulting trust to the insured.[10] After effecting insurance the insured cannot escape liability for the premium by executing a mortgage upon the property, notwithstanding the policy is conditioned to be void if the title is transferred without the consent of the company, for giving a mortgage does not change or transfer the title.[11]

**§ 2264a. Same subject: decisions contra.**—Notwithstanding the above rule it is decided in North Carolina that a mortgage given without assurer's consent subsequent to the issue of the policy decreases the interest of assured and increases the hazard to insurer and that it is well settled in that state that such a change in the interest and title forfeits the policy. It is also declared, per *Brown, J.,* that many "cases hold that, in this as well as other states, the common law prevails, and a mortgage deed passes the legal title at once, defeasible by a subsequent performance of its conditions." [12]

**§ 2264b. Same subject: effect of accumulated interest on mortgage.**—The mere accumulation of interest on a mortgage, of which an insurer was notified at the time of issuing the policy on real estate, will not work a forfeiture of the insurance.[13]

[9] Commercial Ins. Co. v. Spanknable, 52 Ill. 53, 4 Am. Rep. 582. See also Quarier v. Peabody Ins. Co. 10 W. Va. 507, 27 Am. Rep. 582.

[10] Morrison v. Tennessee Marine & Fire Ins. Co. 18 Mo. 262, 59 Am. Dec. 299.

[11] Hartford Steam-Boiler Ins. Co. v. Lasher Stocking Co. 46 Vt. 439, 44 Am. St. Rep. 859, 29 Atl. 629.

On mortgage or instrument given as security as breach of condition as to sole and unconditional ownership, see note in L.R.A.1915D, 812.

[12] Watson v. North Carolina Home Ins. Co. 160 N. Car. 11, 75 S. E. 1105, 41 Ins. L. J. 1817. The court cites no cases from other states, but does cite a number of decisions in that state and declares that the first case there so deciding is Sossaman v. Pamlico Banking & Ins. Co. 78 N. Car. 145. The policy sued on in the principal case was in the standard form (under Rev. sec. 4760), containing the usual provision forfeiting the policy in case of a change in interest or title a second mortgage was given. See also McCullough v. Indiana Mutual Fire Ins. Co. 8 Blackf. (Ind.) 50; Olney v. German Ins. Co. 88 Mich. 94, 13 L.R.A. 684, 26 Am. St. Rep. 281, 50 N. W. 100 (chattel mortgage) Firemen's Fund Ins. Co. v. Barker, 6 Colo. App. 535, 41 Pac. 413; Torrup v. Imperial Fire Ins. Co. 34 N. B. 113, 26 Can. C. S. 585. See note 38 L.R.A. 562.

[13] Fitzgibbons v. Merchants' & Bankers' Mutual Fire Ins. Co. 126 Iowa, 52, 70 L.R.A. 243, 101 N. W. 454.

§ 2265. **When mortgage not encumbrance.**—The renewal of mortgages existing on property at the time it is insured does not vitiate the policy, nor cause a breach of its condition against future encumbrances during the term of the policy and before loss without notice to and the consent of the company.[14] A mortgage paid but not discharged is not an encumbrance within the meaning of an insurance contract.[15] A policy of fire insurance containing a provision which reads: "It is stipulated and agreed if the property or any part thereof shall hereafter become mortgaged or encumbered . . . without written consent hereon, then this policy shall be null and void," will not be rendered invalid by a mortgage upon the insured premises, unless it is a valid and subsisting lien upon the property. In such a case, where the insured executed a mortgage for the purpose of securing a promissory note, payable more than a year after date, for rent expected to become due under a lease, where the term does not commence for five months in the future, and the insured property is destroyed by fire before the commencement of the term under the lease, such mortgage will not be an encumbrance within such provision of the policy.[16]

§ 2266. **Mortgage under different conditions in different policies.**—If a policy provides that it shall be void by alienation or sale in whole or in part of the insured property, it has been held that a mortgage is within the prohibition.[17] If there is a stipulation against "alienation or mortgage," a mortgage will avoid the policy.[18] But even though the execution of a mortgage would violate a condition that if the property be sold or transferred or a change takes place in the title or possession, still to avoid the policy it must have been executed subsequently to the writing or execution of the policy.[19] A mortgage is a conveyance of an interest in the property, within the meaning of a clause providing that it shall become void by a change in the interest of the assured, whether by sale, transfer, or conveyance,[20] though where the policy provided that "if the property shall hereafter become mortgaged or encumbered

[14] Kansas Farmers' Fire Ins. Co. v. Saindon, 52 Kan. 486, 39 Am. St. Rep. 356, 35 Pac. 15.

[15] Smith v. Niagara Fire Ins. Co. 60 Vt. 682, 6 Am. St. Rep. 144, 1 L.R.A. 216, 15 Atl. 353.

[16] Rowland v. Home Ins. Co. 82 Kan. 220, 136 Am. St. Rep. 104, 108 Pac. 118.

[17] Abbott v. Hampden Mutual Fire Ins. Co. 30 Me. 414. See §§ 2252 et seq. herein.

[18] Atherton v. Phœnix Ins. Co. 109 Mass. 32.

[19] Cowart v. Capital City Ins. Co. 114 Ala. 356, 62 So. 574, 27 Ins. L. J. 246. See also Pioneer Savings & Loan Co. v. Providence-Washington Ins. Co. 17 Wash. 175, 38 L.R.A. 397n, 49 Pac. 231, 27 Ins. L. J. 144. See § 2247 herein.

[20] East Texas Fire Ins. Co. v. Clarke, 79 Tex. 23, 11 L.R.A. 293, 15 S. W. 166.

this policy shall be null and void," it was held that a mortgage of a part of the property would not defeat the policy, as the words "the property" meant the entire property covered by the policy.[1] If an insurance policy on real and personal property is conditioned to be void if the property shall be mortgaged, and the real estate is mortgaged, the policy is void unless the properties are insured for separate sums, and the risk on the personalty is not affected by the mortgage.[2] A mortgage will also come within the clause rendering the policy void in case of "any encumbrances."[3] Under such a clause it has been held that only voluntary encumbrances are meant, and not such encumbrances as tax liens or judgments.[4] Where the policy contains the provision that an "alienation by mortgage sale or otherwise" will avoid the policy, it has been held that the mortgage will not avoid it until the title has been entirely divested by foreclosure proceedings;[5] and the same is true where the policy stipulates against any change of title by sale, mortgage, or otherwise.[6] If the policy does not contain a clause protecting the mortgagee against acts of the mortgagor or owner, the fact that the mortgagee had not forfeited his rights, does not aid him, where the mortgagor had broken the condition against alienation by a transfer without notice, even though the loss is made payable to said mortgagee as his interest may appear.[7] But the violation by an insured of a provision in the policy that a transfer of the property, without the company's consent will avoid the policy, does not avoid it as to a mortgagee to whom the loss is payable, where there is a further provision that where an interest exists in favor of a mortgagee the conditions of the policy shall apply in the manner expressed in such provisions relating to the interest as shall be written upon, attached, or appended hereto, and there are no such

[1] Phenix Ins. Co. of Brooklyn v. Lorenz, 7 Ind. App. 266, 33 N. E. 444, 34 N. E. 495.

[2] McGowan v. People's Mutual Fire Ins. Co. 54 Vt. 211, 41 Am. Rep. 843. See 38 Am. Rep. 228; 29 Am. Rep. 184; 26 Am. Rep. 373. See also German Ins. Co. v. Fairbank, 32 Neb. 750, 49 N. W. 711.

[3] Edes v. Hamilton Mutual Ins. Co. 3 Allen (85 Mass.) 362; Hankins v. Rockford Ins. Co. 70 Wis. 1, 35 N. W. 34.

[4] Hosford v. Hartford Fire Ins. Co. 127 U. S. 399, 404, 32 L. ed. 196, 8 Sup. Ct. 1199; Baley v. Homestead Fire Ins. Co. 80 N. Y. 21, 36 Am. Rep. 570. But see Hicks v. Farmers' Ins. Co. 71 Iowa, 119, 60 Am. Rep. 781, 32 N. W. 201.

[5] Atherton v. Phœnix Ins. Co. 109 Mass. 32.

[6] Shepherd v. Union Mutual Ins. Co. 38 N. H. 232.

[7] Jaspulski v. Citizens' Mutual Fire Ins. Co. 131 Mich. 603, 92 N. W. 98, 33 Ins. L. J. 244. See § 2248a herein.

On effect of breach of policy of insurance by a mortgagor on rights of mortgagee, see notes in 18 L.R.A. (N.S.) 197; 25 L.R.A.(N.S.) 1226; and L.R.A.1915C, 758.

provisions.[8] Where one holding the legal title to a vessel mortgages her for repairs, and advances upon her, given without knowledge or consent of her equitable owner, and in good faith by the mortgagee, without notice of any limitation of the mortgagor's right and authority, a policy of insurance conditioned to be void in case it or the interest insured by it should be sold, assigned, transferred, or pledged without previous consent of the insurers, it will be held void.[9] The giving of a deed of insured property by the owner to a third person, who gives back a defeasance, has been held to constitute a mortgage, and, as such, is not an alienation.[10] If, however, there has been a failure to record the defeasance, the giving of the deed by the insured will avoid the policy.[11] The fact that a fire policy is made payable to a third person, who is mortgagee, as his or her "interest may appear" does not render such third party the insured, and, therefore, if the mortgagor subsequently sells the property to the mortgagee, without notice to the company or its consent, this will be in violation of the condition forbidding any change in the title or possession of the subject of insurance, and will render the policy void, both as to the mortgagor and mortgagee.[12] A provision in a policy to which is attached a slip, making the loss payable to a mortgagee, that the conditions against alienation and change of possession shall apply "in manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto," does not prevent such provisions being applicable to the mortgagee, although the manner in which they are to be applied is not expressly stated in some writing indorsed upon or attached to the policy, since, in the absence of special agreement indorsed on the policy, all its provisions apply as against a mere appointee of the right of the insurer to the proceeds.[13]

A mortgage given on property by the insured does not effect a change of interest, in violation of a policy which prohibits such change. A "change" of interest or title means a transfer, not an

[8] Oakland Home Ins. Co. v. Bank of Commerce, 47 Neb. 717, 36 L.R.A. 673, 66 N. W. 646. See § 2795 herein.

[9] Atherton v. Phœnix Ins. Co. 109 Mass. 32.

[10] Smith v. Monmouth Mutual Fire Ins. Co. 50 Me. 96.

[11] Smith v. Monmouth Mutual Fire Ins. Co. 50 Me. 96; Tomlinson v. Monmouth Mutual Fire Ins. Co. 47 Me. 232.

[12] Scania Ins. Co. v. Johnson, 22 Colo. 476, 45 Pac. 431.

[13] Brecht v. Law Union & Crown Ins. Co. 160 Fed. 399, 87 C. C. A. 351, 18 L.R.A.(N.S.) 197n. See Oakland Home Fire Ins. Co. v. Bank of Commerce, 47 Neb. 717, 36 L.R.A. 673, 66 N. W. 646.

encumbrance.[14] The risk is not increased as a matter of law so as to avoid the insurance by the execution of a mortgage, but whether there has been an increase of risk or not, from the fact that property has been mortgaged since its insurance, is a question of fact for the jury, to be determined by them from the evidence, upon proper instructions from the court.[15]

A mortgage, although in the form of an absolute deed, does not make any change in the title, interest, or possession, of the property of the insured, within the meaning of a provision in a policy that it shall be void in case of such change.[16]

If a policy provides that it shall become forfeited if the property is thereafter mortgaged without the consent of the company, the fact that the property is so mortgaged does not avoid the policy, provided the mortgage is paid off and satisfied prior to the loss, as such payment operates to restore the property to the protection of the policy.[17]

**§ 2267. Mortgage an "alteration."**—A policy may prohibit any alteration in the title or ownership. Where a clause of this nature is inserted, it has been held that a mortgage will constitute an alteration within the meaning of the clause.[18] So where a policy provided that "all alienations and alterations in the ownership, situation, or state of the property, . . . in any material particular, shall make void the policy," it was held that a mortgage would come within the prohibition, it being an alteration, in that it changed the ownership from a legal title to an equitable one.[19]

**§ 2268. Chattel mortgage under alienation clause.**—The general principles stated in the preceding sections as to mortgages and their effect upon the policy are much the same in the case of a chattel mortgage. The exact language of the conditions must be carefully considered and construed. A chattel mortgage given upon insured personal property will not avoid a policy containing a provision that the policy shall be void "if any change takes place in title or possession,"[20] provided the insured does not part with the

[14] Peck v. Girard Fire & Marine Ins. Co. 16 Utah, 121, 67 Am. St. Rep. 600, 51 Pac. 255.

[15] Collins v. Merchants & Bankers' Ins. Co. 95 Iowa, 500, 58 Am. St. Rep. 438, 64 N. W. 602.

[16] Sun Fire Office v. Clark, 53 Ohio St. 414, 38 L.R.A. 562, 42 N. E. 248; Barry v. Hamburg-Bremen Fire Ins. Co. 110 N. Y. 1, 17 N. E. 405; Peck v. Girard Fire & Marine Ins. Co. 16 Utah, 121, 67 Am. St. Rep. 600, 51 Pac. 255, 27 Ins. L. J. 265; Wolf v. Theresa Village Mutual Fire Ins. Co. 115 Wis. 402, 91 N. W. 1014, 32 Ins. L. J. 139.

[17] Born v. Home Ins. Co. 110 Iowa, 379, 80 Am. St. Rep. 300, 81 N. W. 676. See §§ 2239, 2240 herein.

[18] Hutchins v. Cleveland Mutual Ins. Co. 11 Ohio St. 477.

[19] Edmands v. Mutual Safety Ins. Co. 1 Allen (83 Mass.) 311, 79 Am. Dec. 746.

[20] Taylor v. Merchants and Bankers' Ins. Co. 83 Iowa, 402, 49 N. W.

possession of the property insured.[1] It is held to stand upon the same grounds as the mortgage of the realty, until the insured parts with the possession of the property.[2]

So a condition avoiding the policy if the property insured shall become encumbered by a chattel mortgage is reasonable and valid.[3]

A mortgage on land with all improvements situate thereon, does not constitute a breach of a condition prohibiting an encumbrance by a chattel mortgage of personalty where the insured property is a fixture.[4] So a mortgage upon real estate, machinery and fixtures which are part of the real estate and which is upon its face a real estate mortgage and in the granting part uses the form usually employed in a deed or mortgage of real estate and which is recorded as such under the statute, is not a chattel mortgage within the meaning of that term so as to avoid a policy under a prohibition against so encumbering property.[5] Under the clause that if the property be or become encumbered by a chattel mortgage, a bond or obligation to become effective on the non-payment of rent, is not such a mortgage within the meaning of said provision.[6]

Under a Canada decision, giving a chattel mortgage is a "change of title" avoiding the policy, although it is not a "transfer or change."[7] But a chattel mortgage is also there held to change insured's interest under a condition voiding the policy where interest in property is changed.[8] There is not such joint ownership of insured property as to take a chattel mortgage executed thereon by

994; Hanover Fire Ins. Co. v. Connor, 20 Ill. App. 297; Hennesey v. Manhattan Fire Ins. Co. 28 Hun (N. Y.) 98.

*"Chattel mortgage" and "pledge" defined and distinguished,* see Palmer v. Mutual Life Ins. Co. of N. Y. 114 Minn. 1, 130 N. W. 250.

[1] Nusbaum v. Northern Ins. Co. 37 Fed. 524; Rice v. Tower, 1 Gray (67 Mass.) 426; Tallman v. Atlantic Fire & Marine Ins. Co. 29 How. Pr. (N. Y.) 71, rev'd 3 Keyes (42 N. Y.) 87, 4 Abb. Dec. 345, 33 How. Pr. 400.

[2] Holbrook v. American Ins. Co. 1 Curt. (U. S. C. C.) 193, Fed. Cas. No. 6,589; Phœnix Ins. Co. v. Lawrence, 4 Met. (61 Ky.) 9, 81 Am. Dec. 521; Van Deusen v. Charter Oak Ins. Co. 1 Rob. (55 N. Y.) 55.

[3] Olney v. German Ins. Co. 88 Mich. 94, 26 Am. St. Rep. 281, 13 L.R.A. 684, 50 N. W. 100. See § 2246a herein.

[4] Rawls v. American Central Ins. Co. 97 S. Car. 189, 81 S. E. 505.

[5] Humboldt Fire Ins. Co. v. W. H. Ashley Silk Co. 185 Fed. 54, 107 C. C. A. 274, 40 Ins. L. J. 757. See Morotock Ins. Co. v. Rodefer, 92 Va. 747, 53 Am. St. Rep. 846, 24 S. E. 393.

[6] Ranlet v. Northwestern National Ins. Co. 157 Cal. 213, 107 Pac. 292, 39 Ins. L. J. 742.

[7] Citizens' Ins. Co. v. Salterio, 23 Supr. Ct. Rep. (Can.) 155, 14 Can. L. T. 274. See Salterio v. Citizens' Ins. Co. (N. S. S. C. 1895) 14 Can. L. T. 403; Salterio v. London (N. S. S. C. 1894) 14 Can. L. T. 476, aff'd 14 Can. L. T. (Can. Supr. Ct.) 274.

[8] Torrup v. Imperial Fire Ins. Co. 26 Can. C. S. 585, 34 N. B. 113.

the insured, out of the operation of a covenant in the policy against encumbrances, where the mortgage was given to a creditor from whom part of the insured property was purchased, upon the insured's interest in the rest of the property.[9] Again, a chattel mortgage to secure a debt operates as an increase of risk.[10] So a policy upon articles of personal property by the owner, made payable to purchase-money creditors, who had retained title to the separate articles sold by them, to secure payment of the purchase price, is forfeited under a clause providing therefor if the property became encumbered by chattel mortgage, where the owner executes to one of the creditors a chattel mortgage upon his interest in the property purchased from another.[11]

§ 2269. **Chattel mortgage by partner: change of interest.**—The execution of a chattel mortgage by a partner on the partnership chattels, and insured for the benefit of the firm, is such a "change in the interest" in the subject of insurance as will render it void.[12]

§ 2270. **Commencement of foreclosure proceedings.**—Unless the policy by its terms provides that it shall be void in case of the commencement of foreclosure proceedings, such proceedings will not defeat a recovery thereon if a loss occurs before the actual alienation of the property. The mere fact that foreclosure proceedings have been commenced is not an alienation of the insured's interest, within the meaning of the condition rendering the policy void in case of "change of ownership," [13] or upon a sale or alienation of the insured property.[14] A condition in a policy that it shall be void if, with the knowledge of the insured, foreclosure proceedings be commenced against the subject of insurance, means the institution of suit or judicial proceedings for the enforcement of the mortgage, and waiver of legal delays, or other waiver of a nature to facilitate and expedite legal proceedings when begun does not of itself constitute the institution of judicial proceedings.[15] The phrase "foreclosure proceedings" has been held to refer only to the ordinary proceedings to foreclose a mortgage. Thus, where there was a mechanic's lien filed after the issuance of a policy, and

[9] Hartford Fire Ins. Co. v. Liddell Co. 130 Ga. 8, 14 L.R.A.(N.S.) 168, 60 S. E. 104.

[10] Security Ins. Co. v. Laird, 182 Ala. 121, 62 So. 182.

[11] Hartford Fire Ins. Co. v. Liddell Co. 130 Ga. 8, 14 L.R.A.(N.S.) 168, 60 S. E. 104.

[12] Olney v. German Ins. Co. 88 Mich. 94, 26 Am. St. Rep. 281, 13 L.R.A. 684, 50 N. W. 100. See also East Texas Fire Ins. Co. v. Clarke, 79 Tex. 23, 11 L.R.A. 293, 15 S. W. 166.

[13] Phenix Ins. Co. v. Union Mutual Life Ins. Co. 101 Ind. 392.

[14] Marts v. Cumberland Ins. Co. 44 N. J. L. 478.

[15] Stenzel v. Philadelphia Fire Ins. Co. 110 La. 1019, 98 Am. St. Rep. 481, 35 So. 271.

in an action brought to enforce the same, a judgment was rendered and an execution issued, in pursuance of which the premises were advertised for sale, it was held that this was an exceptional statutory proceeding, and not within the meaning of the phrase.[16]

Where the policy is forfeited under such a provision, the company may, of course, waive the forfeiture. So where the company had notice of such proceedings, and thereafter required the insured to appear and be examined under oath in accordance with the provision of the policy, it was held that this act on the part of the company constituted a waiver of the forfeiture.[17] The policy may, however, expressly provide that the "commencement of foreclosure proceedings" shall avoid the policy, and, when it is so provided, such proceedings will, subject to certain qualifications or exceptions, have that effect.[18]

**§ 2270a. Same subject: validity and construction of clause: "knowledge:" "be commenced."**—The clause voiding the policy, if with assured's knowledge foreclosure proceedings are commenced, or notice be given of sale by virtue of any mortgage, etc., is reasonable, valid, binding and enforceable.[19] So a condition that the policy shall be void if the property is alienated without the consent of the insurer, and that the commencement of foreclosure proceedings shall be deemed an alienation, is not void as against public policy.[20] It is generally conceded that as a rule, in case foreclosure proceedings are commenced because of inability to redeem, the temptation is increased to realize upon the property by destroying it, and from the funds obtained thereby to pay off the encumbrance and, therefore, the moral hazard in such cases has become an important consideration with insurers as it has an appreciable effect upon losses and consequently upon the insurance business, and furnishes an important consideration in determining whether such risks shall be continued.[1]

[16] Colt v. Phœnix Fire Ins. Co. 54 N. Y. 595.

[17] Titus v. Glens Falls Ins. Co. 81 N. Y. 410, 8 Abb. N. C. (N. Y.) 315.

[18] Meadows v. Hawkeye Ins. Co. 62 Iowa, 387, 17 N. W. 600; Quinlan v. Providence-Washington Ins. Co. 61 Hun (N. Y.) 618, 15 N. Y. Supp. 317, 21 Ins. L. J. 650, 39 N. Y. St. Rep. 820, aff'd 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31.

[19] Liverpool & London & Globe Ins. Co. v. Lavine, 5 Ala. App. 392, 59 So. 336, 41 Ins. L. J. 1621. See § 2246a herein.

[20] Findlay v. Union Mutual Fire Ins. Co. 74 Vt. 211, 93 Am. St. Rep. 885, 52 Atl. 429.

[1] Liverpool & London & Globe Ins. Co. v. Lavine, 5 Ala. App. 392, 59 So. 336, 41 Ins. L. J. 1621, 1623; J. I. Kelly Co. v. St. Paul Fire & Marine Ins. Co. 56 Fla. 456, 47 So. 472, 38 Ins. L. J. 215, 229; Hartford Fire Ins. Co. v. Hollis, 58 Fla. 268, 50 So. 985, 39 Ins. L. J. 381, 389; Findlay v. Union Mutual Fire Ins. Co. 74 Vt. 211, 93 Am. St. Rep. 885, 52 Atl. 429, 31 Ins. L. J. 986.

The words "knowledge" and "notice," in the clause avoiding the policy if with the knowledge of assured foreclosure proceedings be commenced or notice given of sale of the property by virtue of any lien or encumbrance, qualify said condition, and are construed against insurer and mean actual knowledge and actual notice, and the words are not synonymous.[2] So where assured has neither actual nor constructive knowledge of the foreclosure proceedings in question, the policy is not avoided.[3] And a condition that a policy shall be void "unless otherwise provided by agreement indorsed thereon or added thereto, if, with the knowledge of insured, foreclosure proceedings be commenced, or notice given of any property covered by this policy, by virtue of any mortgage or trust deed," has reference to the acquisition of knowledge by assured that foreclosure proceedings have been commenced and not to the time when such knowledge may be obtained, if acquired before the loss occurs; and whenever he acquired knowledge of the proceeding, and not before, the policy is avoided if he fails to obtain assurer's consent thereto in accordance with the contract stipulations.[4] Nor is this condition limited to foreclosure proceedings of which the insured had notice at the time or before they were commenced, but covers all such proceedings of the commencement of which he acquired knowledge at any time before the loss occurred.[5] Said condition has, however, reference only to the future, and the insurance is not forfeited where such proceedings were pending when the policy was issued.[6] And where at the time of the application no such proceeding had been commenced, but between the time thereof and the date of the issuance of the policy proceedings of this nature were instituted, it was held that they did not come within the provision of the policy as to foreclosure proceedings, as they were not commenced after the issuance of the policy.[7]

Again, knowledge of such proceedings need not antedate or coexist with their commencement, but is required only when the papers are served, and the forfeiture takes effect at that time.[8] So where the code provides that an action is commenced by the service

[2] Funk v. Anchor Fire Ins. Co. 171 Iowa, 331, 153 N. W. 1048.

[3] Foiles v. Detroit Fire & Marine Ins. Co. 176 Mich. 79, 141 N. W. 879, 42 Ins. L. J. 1143.

[4] Schroeder v. Imperial Ins. Co. 132 Cal. 18, 84 Am. St. Rep. 17, 63 Pac. 1074, J. I. Kelly Co. v. St. Paul Fire & Marine Ins. Co. 56 Fla. 456, 47 So. 742, 38 Ins. L. J. 215, 230.

[5] Delaware Ins. Co. v. Greer, 120 Fed. 916, 57 C. C. A. 188, 61 L.R.A. 137.

[6] Orient Ins. Co. v. Burrus, 23 Ky. L. Rep. 656, 63 S. W. 453.

[7] Day v. Hawkeye Ins. Co. 72 Iowa, 597, 34 N. W. 435.

[8] Norris v. Hartford Fire Ins. Co. 55 S. Car. 450, 74 Am. St. Rep. 765, 33 S. E. 566.

of summons, then, in so far as knowledge or notice of such action is concerned, it is commenced by service on defendant, and is within a condition voiding the policy if foreclosure proceedings are begun with assured's knowledge, and this is so even though the code also provides that an attempt to commence an action is equivalent to the commencement thereof when the summons is delivered to the sheriff with the intent that it shall be actually served.[9] A suit in foreclosure is commenced when a petition is served on the insurer, within the meaning of a condition in a policy making it void on the commencement of such suit;[10] and the service of the petition, and not the entry of the suit in court, constitutes commencement of foreclosure proceedings.[11]

**§ 2270b. Same subject: advertisement for sale: "proceedings on sale:" notice of sale.**—Insurer is liable for a loss, although the property insured is advertised for sale under a trust deed before the fire and loss, provided the insured has no notice or knowledge of such advertised sale, except such as is obtained from reading the advertisement before the fire, which advertisement the agent of the insurer has also seen, and the policy has not been canceled nor any part of the unearned premium returned to the insured prior to the fire.[12] But it is also held that where the property is advertised for sale under the mortgage soon after the insurance, the policy is terminated.[13] And if a policy upon mortgaged property expressly provides that it shall become absolutely void upon the commencement of proceedings for the foreclosure of the mortgage, without the written consent of the insurance company, and the mortgage, by its terms, is subject to foreclosure if the taxes on the mortgaged property are permitted to become delinquent, the policy becomes void when the property is advertised for sale on account of such default, unless the breach is waived.[14] In the case deciding as above, the court, per Burgess, J., considers a Michigan decision,[15] and says: "In that case, as in the case at bar, the only step taken towards foreclosure of the mortgage was to advertise the property for sale in accordance with its provisions; and the supreme

[9] Norris v. Hartford Fire Ins. Co. 55 S. Car. 450, 33 S. E. 566, 28 Ins. L. J. 757.

[10] Findlay v. Union Mutual Fire Ins. Co. 74 Vt. 211, 93 Am. St. Rep. 885, 52 Atl. 429.

[11] Findlay v. Union Mutual Fire Ins. Co. 74 Vt. 211, 52 Atl. 429, 93 Am. St. Rep. 885, 31 Ins. L. J. 986.

[12] Horton v. Home Ins. Co. 122 N. Car. 498, 65 Am. St. Rep. 717, 29 S. E. 944.

[13] Hayes v. United States Fire Ins. Co. 132 N. Car. 702, 44 S. E. 404, 32 Ins. L. J. 764.

[14] Springfield Steam Laundry Co. v. Traders' Ins. Co. 151 Mo. 90, 74 Am. St. Rep. 521, 52 S. W. 238.

[15] Michigan State Ins. Co. v. Lewis, 30 Mich. 41.

court, in its opinion, in passing upon the question as to whether or not the advertisement of the property for sale was a 'proceeding for sale' within the meaning of the policy said: 'The words seem to us to be satisfied by confining them to the actual offer of the premises for sale at the time specified in the notice. In strictness, it may be said that such an offer is the first proceeding for a sale. The previous notice is only a step which is to put it in the power of the mortgagee to make a sale at the time fixed upon if payment shall not sooner be made. The notice, in a certain sense, is undoubtedly a proceeding for a sale, and so would be a commencement of a suit in equity. Either proceeding may possibly result in a sale; but while either method of foreclosure is in progress, and before the right to make a sale has been reached, it is, in substance, rather a proceeding for the collection of the mortgage moneys than a proceeding for a sale; and it can never be known, until the day fixed in the notice shall arrive without actual payment being made, that a sale can take place at all.' " The court, however, while it approves said rule, distinguishes that case from the one before it. So the service upon insured before loss of a notice of sale under a deed of trust, avoids the policy under a condition so providing.[16] But a condition in a policy that it shall be void if, with the knowledge of the insured, notice of sale of any of the insured property shall be given by virtue of any mortgage or trust deed, has reference to extrajudicial enforcement of a mortgage by means of notice to the mortgagor, and is inoperative in a state where such mode of enforcing mortgages is not known to its law.[17]

**§ 2270c. Same subject: when policy avoided, when not: instances.** —The institution of foreclosure proceedings against the real estate only, will not work a forfeiture of an insurance policy covering real and personal property, which provides that it shall be forfeited by the institution of foreclosure proceedings against the "property insured." [18] And the mere fact of the commencement of foreclosure proceedings does not, as a matter of law, constitute such a substantial increase of risk that the contract will be avoided under a clause having reference generally to any increase of risk; [19] nor does an action to foreclose, brought without insured's consent, breach a condition as to involving the property in litigation without notice

[16] Medley v. German Alliance Ins. Co. 55 W. Va. 342, 47 S. E. 101.

[17] Stenzel v. Philadelphia Fire Ins. Co. 110 La. 1019, 98 Am. St. Rep. 481, 35 So. 271.

[18] Fitzgibbons v. Merchants' & Bankers' Mutual Fire Ins. Co. 126 Iowa, 52, 70 L.R.A. 243, 101 N. W. 454.

[19] Liverpool & London & Globe Ins. Co. v. Lavine, 5 Ala. App. 392, 59 So. 336, 41 Ins. L. J. 1621.

to or consent of assurer.[20] And neither the existence of a vendor's lien on insured property, nor the institution of proceedings to foreclose it, avoids the policy under a clause making it void if the interest of the insured be other than unconditional or sole ownership, or if foreclosure proceedings be commenced with notice of sale by virtue of any mortgage or trust deed.[1] And where the property is mortgaged with assurer's consent, the commencement of foreclosure proceedings only confirms the lien so consented to, creates no new lien and does not avoid the policy.[2] Where insurance is taken on mortgaged property with knowledge that the mortgage is overdue, and through an accidental omission on the part of the agent the insurance is not made payable to the mortgagee, the insured being ignorant of the English language and relying upon the agent, the mere commencement of foreclosure proceedings will not avoid the policy, notwithstanding it provides that it shall become void if any proceedings are taken to foreclose a lien upon the property.[3] And the policy is not voided in the hands of the mortgagee by commencement of foreclosure proceedings under a mortgage clause, providing that the policy will not be avoided by any act or neglect of the mortgagor or owner of the property.[4] So where the loss is payable to the mortgagee under a policy to the mortgagor and it is stipulated that the former's interest is protected against acts of the latter or the owner, a liberal construction will be given to such mortgage clause so that a breach of terms relating especially to the risk between mortgagor and insurer will not invalidate the policy in a suit by the mortgagee, unless the condition violated is consistent with said clause, and the commencement of a suit to foreclose and the appointment of a receiver does not avoid the policy as the forfeiture clause is inapplicable to the risks as between insurer and mortgagee whose interest is not impaired by such proceedings.[5] And no duty is imposed upon the mortgagee in so far

[20] Farmers' & Merchants' Ins. Co. v. Newman, 58 Neb. 504, 78 N. W. 533.

[1] Southern Ins. Co. v. Estes, 106 Tenn. 472, 52 L.R.A. 915, 62 S. W. 149.

[2] Funk v. Anchor Fire Ins. Co. 171 Iowa, 331, 153 N. W. 1048.

[3] Butz v. Ohio Farmers' Ins. Co. 76 Mich. 263, 15 Am. St. Rep. 316, 42 N. W. 1119.

[4] Jones v. Phœnix Ins. Co. 94 Kan. 235, 46 Pac. 354. See § 2795 herein.

[5] Lancashire Ins. Co. v. Boardman, 58 Kan. 339, 49 Pac. 92, 27 Ins. L. J. 470. "Insurer must have known when attaching the mortgage clause that it must become necessary for the mortgagee, in order to protect his interest under the mortgage, to commence foreclosure proceedings; but this would not have a tendency to diminish the interest of the mortgagee in the property, but rather to increase it. It is settled that an increase of the interest of the assured is no ground of forfeiture of the policy." Id.—Allen, J. See also § 2248a herein.

as the mortgagor and his policy is concerned to obtain assurer's consent to foreclose.[6]

Where a mortgage clause is attached to a policy, making the loss payable to the mortgagee, as his interest may appear, and providing that, as to his interest, the policy shall not be invalidated by any act or neglect of the mortgagor, and the policy also contains a condition that, upon commencement of proceedings to foreclose, or upon a sale under a deed of trust, or if any change takes place in the title or possession, whether by legal process, judicial decree, or voluntary transfer, the policy shall be void, such condition is to be construed as operating against the mortgagor only, and not as avoiding the policy as against the mortgagee on the commencement of a suit by him to foreclose his mortgage, nor by the appointment of a receiver in such suit to take possession of the mortgaged premises.[7] If a policy of insurance declares that if an interest shall exist under it in favor of a mortgagee, the conditions thereof shall apply in the manner expressed in such provision of the insurance relating to such interest as shall be written upon, or attached, or appended thereto, and such policy is by an indorsement made payable to the mortgagee as his interest may appear, his right to recover is not affected by a condition in the policy that it shall be void, if, with knowledge of the assured, foreclosure proceedings shall be commenced.[8] Again, a mortgage clause that the loss, if any, shall be payable to the mortgagee as his interest may appear, "subject to the terms and conditions of the policy," does not relieve the insurer from liability upon a policy containing a condition that it shall be avoided by proceedings to foreclose any mortgage on the property; the insuring of a mortgage lien being sufficient indication that the company must have contemplated a possible or probable foreclosure. When an insurance contract prepared by the insurer contains ambiguous or inconsistent provisions, it will be construed so as to uphold rather than defeat the indemnity.[9] If the policy is assigned to the mortgagee to whom the loss is payable, to whom the policy conditions apply, and he commences foreclosure proceedings, the insurance is forfeited.[10] And the commencement of foreclosure proceedings defeats the interest of a mortgagee in a policy of insurance on the mortgaged property, containing a mortgage clause making

[6] Findlay v. Longe, 81 Vt. 523, 71 Atl. 829.

[7] Lancaster Ins. Co. v. Boardman, 58 Kan. 339, 62 Am. St. Rep. 621, 49 Pac. 92.

[8] Christenson v. Fidelity Ins. Co. 117 Iowa, 77, 94 Am. St. Rep. 286, 90 N. W. 583.

[9] Citizens' State Bank of Chautauqua v. Shawnee Fire Ins. Co. 91 Kan. 18, 49 L.R.A.(N.S.) 972n, 137 Pac. 78.

[10] Algase Co. v. Corporation of Royal Exchange Assur. of London, England, 68 Wash. 173, 122 Pac. 986.

the loss, if any, payable to the mortgagee as his interest might appear, but providing that the entire policy should be void if, with the knowledge of the insured, foreclosure proceedings should be commenced, although another clause provided that if, with the consent of the company, an interest under the policy should exist in favor of a mortgagee, the conditions thereinbefore contained should apply in the manner expressed in such provisions relating to such interest as should be written upon or attached to the policy, and there was no stipulation attached which declared that the insurance in favor of the mortgagee was subject to the same terms and conditions as that of the mortgagor.[11] And, where an insured mortgagor endeavored to make arrangements to postpone the institution of proceedings to foreclose the mortgage upon the insured property, and was notified of the commencement of the foreclosure proceedings the day they were commenced, a failure to procure from insurer an agreement to be indorsed on or added to the policy giving insurer's consent to a continuation of the risk notwithstanding the foreclosure proceedings renders the policy void in the absence of a waiver.[12]

**§ 2271. "Entry of a foreclosure of a mortgage:" advertisement and sale: construction.**—The clause that "entry of a foreclosure of a mortgage" will avoid the policy is held not to import a consummated foreclosure or transaction. So where a policy of fire insurance on personal property contained a proviso that "if the title of the property is transferred or changed . . . this policy shall be void, and the entry of a foreclosure of a mortgage . . . shall be deemed an alienation of the property, and this company shall not be holden for loss and damage thereafter," it was held that notice of foreclosure having been duly served, certified, and recorded when the fire occurred, the policy was avoided.[13]

[11] Delaware Ins. Co. v. Greer, 120 Fed. 916, 57 C. C. A. 188, 61 L.R.A. 137. See § 2795 herein.

[12] J. I. Kelly Co. v. St. Paul Fire & Marine Ins. Co. 56 Fla. 456, 47 So. 742, 38 Ins. L. J. 215.

[13] MacIntyre v. Norwich Ins. Co. 102 Mass. 230, 3 Am. Rep. 458. In this case the court said: "The parties in their contract have taken pains to avoid saying simply that 'the foreclosure of a mortgage' shall be deemed an alienation. There would be no occasion for them to say that, inasmuch as the law would plainly have said it for them. The meaning of the policy, in our judgment, is that something short of an actual and complete foreclosure shall be considered for the purposes of their contract as a transfer or change of title, and that an entry for foreclosure, or an act which of itself and without any further formality or process on the part of the mortgagee will deprive the insured of all right and title in the property unless he pay the debt, shall be deemed sufficient to terminate the risk." *Compare* Stainer v. Royal Ins. Co. of Liverpool, 13 Pa. Super. Ct. 25.

If the risk is stipulated to be avoided by the entry of a decree of foreclosure, the advertisement and sale, under a power contained in the mortgage, is not a violation of the contract, where a decree must be ratified by the court to pass title. The sale contemplated is a consummated transaction, by which the interest of the assured is devested.[14]

§ 2272. **Decree of foreclosure: sale thereunder.**—A mortgagee's interest in property insured by him is increased, instead of diminished, by foreclosure, and hence the foreclosure is not a breach of the condition in the policy that it is forfeited by a change in title to the property insured.[15] Where a policy conditioned to be void in case of alienation of the property declared that "a judgment in foreclosure proceedings" should be deemed an alienation, it was held that a decree in a foreclosure suit without further proceedings was not an alienation.[16] The mere rendition of a judgment against a property owner, does not change his interest in the property, within the meaning of an insurance policy which is to become void if any change takes place in the interest, title, or possession of the subject of insurance, although the judgment is entered in a foreclosure proceeding.[17] If it is stipulated that if the property be sold or transferred, or if any change of title or possession takes place, either by legal process, judicial decree, or voluntary transfer, the policy shall be void, it is held that the subsequent execution and statutory foreclosure of a mortgage will not defeat a recovery upon the policy for a loss which occurs before the time for redemption has expired.[18] The general rule seems to be, under such a clause as this, that until the actual delivery of the deed or the expiration of the period for redemption by which the foreclosure proceedings became absolute, the policy is not avoided. So long as the mortgagor retains the equity of redemption, there is no sale, transfer, or alienation of the property, and he may recover under the policy.[19] By the delivery of the deed, however, the policy is avoided.[20] Where

[14] Hanover Fire Ins. Co. v. Brown, 77 Md. 64, 39 Am. St. Rep. 386, 27 Atl. 314, 29 Atl. 989.

[15] Esch v. Home Ins. Co. 78 Iowa, 334, 16 Am. St. Rep. 443, 43 N. W. 229.

[16] Kane v. Hibernia Mutual Ins. Co. 38 N. J. Law, 441, 20 Am. Rep. 409.

[17] Kelley (use of Chisholm) v. People's National Fire Ins. Co. 262 Ill. 158, 50 L.R.A.(N.S.) 1164, 104 N. E. 188.

On judgment as change of interest or title, see note in 50 L.R.A.(N.S.) 1164.

[18] Loy v. Home Ins. Co. 24 Minn. 315, 31 Am. Rep. 346.

[19] McKissick v. Mill Owner's Fire Ins. Co. 50 Iowa, 116; Strong v. Manufacturers Ins. Co. 10 Pick. (27 Mass.) 40, 20 Am. Dec. 507; Sussex County Mutual Ins. Co. v. Woodruff, 26 N. J. L. 541; Marts v. Cumberland Ins. Co. 44 N. J. Law, 478; Haight v. Continental Ins. Co. 92 N. Y. 51.

[20] Bishop v. Clay Fire Ins. Co. 45

the policy is issued to the mortgagee, it is held that a foreclosure by him and the vesting of the entire title in him will not affect his rights under the policy;[1] but where the policy was to the mortgagor, and assigned by him, with the consent of the company, to the mortgagee, it was held that foreclosure proceedings by the mortgagee would avoid the policy.[2] A mortgage clause that the loss, if any, shall be payable to the mortgagee as his interest may appear, "subject to the terms and conditions of the policy," does not relieve the insurer from liability, upon a policy containing a condition that it shall be avoided by proceedings to foreclose any mortgage on the property, although the mortgagee foreclosed and caused the property to be sold and was holding a certificate of purchase, the period of redemption having expired since the fire, the issuing of a mortgage lien being sufficient indication that the company must have contemplated a possible or probable foreclosure.[3] Where the mortgage contained a power to sell upon breach of condition and it is foreclosed and the mortgagee becomes the purchaser at the sale, the policy is avoided, although the policy is payable to the mortgagee as his interest may appear.[4]

§ 2273. **Notice may operate as consent to mortgage.**—The sale of the property insured, and the assent of the insurer thereto, together with notice to the local agent, of a purchase money mortgage, is sufficient to operate as an assent on the part of the insurer to the giving of the mortgage, though the policy of insurance contains a provision that if the property shall be thereafter mortgaged without the consent of the company being indorsed thereon, it shall become null and void, and that no agent shall have power to alter

Conn. 430; Commercial Ins. Co. v. Scammon, 102 Ill. 46.

[1] Bailey v. American Central Ins. Co. 4 McCrary (U. S. C. C.) 221, 13 Fed. 250; Humphrey v. Hartford Fire Ins. Co. 15 Blatchf. (U. S. C. C.) 504, Fed. Cas. No. 6875; Esch v. Home Ins. Co. 78 Iowa, 334, 16 Am. St. Rep. 443, 43 N. W. 229; Bragg v. New England Fire Ins. Co. 25 N. H. 289; Heaton v. Manhattan Fire Ins. Co. 7 R. I. 502.

[2] Brunswick Saving Inst. v. Commercial Ins. Co. 68 Me. 313, 28 Am. Rep. 56. See also Gaskin v. Phœnix Ins. Co. 6 Allen (11 N. B.) 429.

[3] Citizens' State Bank v. Shawnee Fire Ins. Co. 91 Kan. 18, 49 L.R.A. (N.S.) 972, 137 Pac. 78.

[4] Boston Co-operative Bank v. American Central Ins. Co. 201 Mass. 350, 23 L.R.A.(N.S.) 1147n, 87 N. E. 594, 38 Ins. L. J. 599.

As to notice to insurer and conveyance from mortgagor to mortgagee under foreclosure, see Pioneer Savings & Loan Co. v. St. Paul Fire & Marine Ins. Co. 68 Minn. 170, 70 N. W. 979, 26 Ins. L. J. 826, *considered* under § 2248a herein.

On acquisition by a mortgage of title to property covered by a policy protecting mortgagee's interest as breach of condition against sale or transfer of title, see note in 23 L.R.A. (N.S.) 1147.

or change the terms of the policy, or make any indorsement thereon.[5]

**§ 2274. Judgment generally: mechanic's lien: judgment lien.**—The policy may provide that if any judgment is obtained against the insured the policy shall be void, unless the consent of the company is given to the continuance of the policy. Such a provision will be binding upon the insured,[6] and the mere entry of judgment will avoid the policy, though in fact no execution could be issued upon such judgment,[7] and though the entry was made without the actual knowledge of the insured.[8] If, however, there is no provision in the policy against liens or judgments, it has been held that no lien placed upon the property will avoid the policy.[9] The entry of a judgment setting aside, in favor of creditors, a voluntary deed, does not change the ownership of the grantee from sole and unconditional, within the meaning of a policy of insurance in favor of the grantee, which is to be void in case the assured has not such ownership.[10] Conditions in a fire policy prohibiting encumbrances and levies without the consent of the insurer, and declaring the policy to be void in case of a breach thereof, apply only to voluntary liens and levies, and not to involuntary encumbrances, such as tax liens and judgments procured in invitum. The violation of such conditions does not render the policy absolutely void, but voidable only at the election of the insurer.[11] Judgment liens against the property at the time the insurance is effected are not within the meaning of the provision avoiding the policy, "if there be a mortgage, bill of sale, or other lien" on the property insured, without the fact being indorsed on the policy.[12] So where the insured property is of such a character, as where it constitutes part of a homestead, that judgment liens will not attach, the insurance is not forfeited by judgments against insured.[13] The filing of a

[5] German Ins. Co. v. York, 48 Kan. 488, 30 Am. St. Rep. 313, 29 Pac. 586. *Examine* Pennsylvania Fire Ins. Co. v. Faires, 13 Tex. Civ. App. 111, 35 S. W. 55.

[6] Egan v. Mutual Ins. Co. 5 Denio (N. Y.) 326.

On judgment as change of interest or title, see note in 50 L.R.A.(N.S.) 1164.

[7] Seybert v. Pennsylvania Mutual Fire Ins. Co. 103 Pa. St. 282.

[8] Pennsylvania Mutual Fire Ins. Co. v. Schmidt, 119 Pa. 449, 13 Atl. 317, 21 W. N. C. 258, 45 L. J. 362, 5 Lanc. Rev. 315, 5 Pa. (L. ed.) 557, 11 Cent. Rep. 845.

[9] Hosford v. Hartford Fire Ins. Co. 127 U. S. 404, 32 L. ed. 198, 8 Sup. Ct. 1202.

[10] Steinmeyer v. Steinmeyer, 64 S. Car. 413, 59 L.R.A. 319, 42 S. E. 184.

[11] Dover Glass Works Co. v. American Fire Ins. Co. 1 Marv. (Del.) 32, 65 Am. St. Rep. 264, 29 Atl. 1039.

[12] Georgia Home Ins. Co. v. Schild, 73 Miss. 128, 19 So. 94.

[13] Smith v. Continental Ins. Co. 108 Iowa, 382, 79 N. W. 126, 28 Ins. L. J. 534.

mechanic's lien will not avoid a policy conditioned to be void in case of "encumbrances."[14] Changes in the form of an existing lien, do not, as a matter of law, amount to an increase of hazard.[15] Where the policy provided that in case the property should be "levied on or taken into possession or custody under any proceeding in law or equity" it should be void, it was held that the filing of a mechanic's lien, the rendering of a judgment thereon, the issuing of the execution, and the advertising of the property for sale were not acts avoiding the policy, within the meaning of the conditions, and that the insured could recover for a loss occurring subsequent to such acts but before the day of sale.[16] If property against which mechanics' liens have been filed is insured, the policy forbidding "a change in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured, or otherwise," a foreclosure of the liens, a sale of the property under execution, and the issuance of a certificate of purchase to the judgment creditor, before the loss, do not change the interest of the insured, nor show any increase of hazard where the period of redemption had not expired at the time of the fire.[17]

§ 2275. **Sale of equity of redemption: where policy assigned to mortgagee.**—If an owner of insured property, after executing a mortgage thereon and assigning the policy to the mortgagee with the consent of the company, subsequently sells the equity of redemption, such sale will avoid a policy which is conditioned to be void in case of "an alienation or a sale" of the insured property,[18] unless the mortgagee has become liable for the assessments.[19]

§ 2275a. **Expiration of time limit for redemption not an alienation.**—If property is insured for the benefit of the mortgagee, as his interest may appear, after the mortgage on the property has been duly foreclosed, and before the time for redemption has expired and the premium is paid by the mortgagee, the expiration of the time in which redemption may be made from the mortgage sale does not work an alienation of the premises so as to avoid the policy, although the policy provides that the mortgagee shall notify the

[14] Green v. Homestead Ins. Co. 17 Hun (N. Y.) 467. But see Redmon v. Phœnix Ins. Co. 51 Wis. 292, 37 Am. Rep. 830, 8 N. W. 226.

[15] Greenlee v. North British Ins. Co. 102 Iowa, 427, 63 Am. St. Rep. 455, 71 N. W. 534, 26 Ins. L. J. 801.

[16] Manufacturers' & Merchants' Ins. Co. v. O'Maley, 82 Pa. St. 400, 22 Am. Rep. 769.

[17] Greenlee v. North British Ins. Co. 102 Iowa, 427, 63 Am. St. Rep. 455, 32 N. E. 1063, 26 Ins. L. J. 801.

[18] Lawrence v. Holyoke Ins. Co. 11 Allen (93 Mass.) 387; Smith v. Union Ins. Co. 120 Mass. 90; Hoxsie v. Providence Ins. Co. 6 R. I. 517.

[19] Francis v. Butler Mutual Fire Ins. Co. 7 R. I. 159.

insurer of any change of ownership of the insured property, and that such change shall be noted on the policy.[20]

§ 2275b. **Transfer of equitable title.**—A transfer of the equitable title to property will avoid a policy of insurance thereon, which provides that it shall become void if any change takes place in the title or possession of the property, in a state where the beneficial interest passes with the equitable title.[1]

§ 2276. **Writ of attachment: "process."**—A condition against change of possession by legal "process" is broken when an officer takes exclusive possession of the property by virtue of a writ of attachment issued according to law, even though it afterward appears that there was no ground for issuing such a writ and the attachment was dissolved after loss. Such a condition includes an involuntary as well as a voluntary change of possession by writ or process.[2]

But the levy of attachments and subsequent executions on property without increasing the hazard does not avoid an insurance policy, which provides that it shall be void for change of interest, title, or possession, except change of occupants without increase of hazard.[3] Nor does the levy of an attachment upon land without change of possession, the buildings appurtenant thereto being insured, constitute such a change of interest, title or possession as to avoid the insurance.[4] The exception of change of occupants without increase of hazard, in a clause voiding the policy if any change other than by death of assured take place in the interest, title or possession, applies to insurance of personalty as well as realty so that a levy of attachment and possession of the officer thereunder followed by subordinate constructive levy of an execution and by appointment of a receiver under the attachment proceedings, who never obtained possession is not in the absence of proof or inference that the hazard was increased such a change as avoids the policy.[5]

§ 2277. **"Levied on:" "taken into possession or custody:" construction.**—The phrases "levied on" and "taken into possession or

[20] Washburn Mill Co. v. Fire Association of Philadelphia, 60 Minn. 68, 51 Am. St. Rep. 500, 61 N. W. 828.

[1] Cottingham v. Firemen's Fund Ins. Co. 90 Ky. 439, 9 L.R.A. 627, 14 S. W. 417.

[2] Carey v. German-American Ins. Co. 84 Wis. 80, 36 Am. St. Rep. 907, 20 L.R.A. 267, 54 N. W. 18.

[3] Herman v. Katz, 101 Tenn. 118, 41 L.R.A. 700, 47 S. W. 86.

[4] O'Toole v. Ohio German Fire Ins. Co. 159 Mich. 187, 24 L.R.A. (N.S.) 802n, 123 N. W. 795.

On levy of execution, attachment, or other process upon insured property as change in interest, title, or possession, see note in 24 L.R.A. (N.S.) 803.

[5] Herman Bros. v. Katz Bros. 101 Tenn. 118, 41 L.R.A. 700, 47 S. W. 86.

custody" have the same meaning in the clause of an insurance policy conditioned that the insurance shall cease at the time the "property shall be levied on or taken into possession or custody," and mean an actual levy and change of possession. Mere notice of levy without taking possession of goods will not defeat the policy.[6] "Levied on" does not ordinarily refer to the proceedings commenced by a company for a sale of property. It has more than a technical meaning. It is held to refer to an actual seizure and change of possession.[7] So the mere levying of an attachment on land, without change of possession, does not effect such a change of interest or title as to avoid a policy of insurance on the buildings located thereon.[8] So in Kentucky, it has been held that it must be such a levy as devests the insured of his title.[9] And the issuing of an execution and its levy upon personal property do not constitute such a change in the interest, title, or possession of the assured as avoids the policy under a condition declaring that it shall be void if any change other than by the death of the assured takes place in the interest, title, or possession of the subject of the insurance, whether by legal process or judgment, or by voluntary act of insured or otherwise.[10] If an officer seizes and possesses himself of chattels under a writ of attachment, in such a manner as to enable him to maintain trespass or replevin against a wrongful taker, he takes exclusive possession and effects a change of possession by legal process within a forfeiture clause of the policy if any change takes place in the title or possession by sale, legal process, or judicial decree.[11] If the levy is a wrongful one, being made upon the property as that of another person, it will not avoid the policy upon such property.[12] The word "attached" in a forfeiture clause of an insurance policy on a dwelling-house and barn, providing that the insurance shall cease "if the property hereby insured shall be mortgaged, levied on, attached, or taken into possession or custody under any proceeding at law or equity, or change takes place in title or possession;" has special reference to personal property,

[6] Commonwealth Ins. Co. v. Berger, 42 Pa. St. 285, 82 Am. Dec. 504.

[7] Manufacturers' & Merchants' Ins. Co. v. O'Maley, 82 Pa. St. 400, 22 Am. Rep. 769; Rice v. Tower, 1 Gray (67 Mass.) 426.

[8] O'Toole v. Ohio German Fire Ins. Co. 159 Mich. 187, 24 L.R.A.(N.S.) 802n, 123 N. W. 795.

[9] Pennebaker v. Tomlinson, 1 Tenn. Ch. 598.

[10] Walradt v. Phœnix Ins. Co. 136 N. Y. 375, 32 Am. St. Rep. 752, 32 N. E. 1063.

[11] Carey v. German American Ins. Co. 84 Wis. 80, 20 L.R.A. 267, 54 N. W. 18.

[12] Philadelphia Fire & Life Ins. Co. v. Mills, 44 Pa. St. 241, 84 Am. Dec. 437.

and the insurance on the house and barn, though attachments have been levied on the property, does not cease until title to the land has been devested by a sale on execution prior to a loss.[13] Where the policy provided that it should be void in case of "the issuing or levy of an execution without actual possession against any kind of property insured," it was held that real estate was not intended by the prohibition.[14]

§ 2278. **Levy of execution: sale on execution.**—A levy of execution on insured property is not an alienation avoiding the insurance, under a provision in a charter against alienation, where a right of redemption still remains to the insured.[15] So the constructive possession of insured goods by the sheriff under an execution is not such a change of possession as avoids the policy.[16] So levy upon and sale by the sheriff under execution of a stock of goods in a store is not such a change of ownership as avoids the policy, where the stock is not removed, but is repurchased by insured on the day after the sale, who thereafter continued business in the same building and in the same way as prior to said levy.[17] And the sale of real estate on execution, the owner having a term for redemption, is not a change in the title or possession, within the meaning of the insurance policy, where the loss occurs during that term,[18] but if the loss occurs after the expiration of the term, there can be no recovery as from the date of expiration; there is then an alienation.[19] Where the policy upon the mortgagor's interest provided that in case the estate was alienated or encumbered by sale, assignment, or otherwise it should be void, it was held that the seizure of the equity of redemption and a sale on a writ of execution was an encumbrance within the meaning of the policy.[20] Under a statutory or code provision that a judg-

[13] Tefft v. Providence Washington Ins. Co. 19 R. I. 185, 61 Am. St. Rep. 761, 32 Atl. 914.

[14] Shafer v. Phœnix Ins. Co. 53 Wis. 361, 10 N. W. 381. See also Colt v. Phœnix Ins. Co. 54 N. Y. 595; Manufacturers' & Merchants' Ins. Co. v. O'Maley, 82 Pa. St. 400, 22 Am. Rep. 769.

[15] Clark v. New England Mutual Fire Ins. Co. 6 Cush. (60 Mass.) 342, 53 Am. Dec. 44.

[16] Phœnix Ins. Co. v. Lawrence, 4 Met. (61 Ky.) 9, 81 Am. Dec. 521. See also Franklin Fire Ins. Co. v. Findlay, 6 Whart. (Pa.) 483, 37 Am. Dec. 430.

[17] Weisberger v. Western Reserve Ins. Co. 250 Pa. 155, 95 Atl. 402, 46 Ins. L. J. 721; Hooker v. Hudson River Fire Ins. Co. 15 Barb. (N. Y.) 413.

On sale of insured property by judicial proceeding as change in title, interest, or possession, see note in 24 L.R.A.(N.S.) 807.

[18] Hammel v. Queen's Ins. Co. 54 Wis. 72, 41 Am. Rep. 1, 11 N. W. 349.

[19] Campbell v. Hamilton Mutual Ins. Co. 51 Me. 69.

[20] Campbell v. Hamilton Mutual Ins. Co. 51 Me. 69.

ment debtor is not devested of his title to real property by a sale thereof under execution until the expiration of the period of redemption, such a sale will not render void a policy of insurance conditioned to be void in case the interest of the insured be other than that of unconditional and sole owner, or in case any change takes place in the interest, title, or possession of the subject of insurance by legal process or judgment, unless the period for the redemption of the property has expired.[1]

§ 2279. **Waiver of forfeiture: sheriff's sale.**—It is competent for an insurance company to waive forfeiture of a policy caused by a sheriff's sale of the property insured, and it is an express waiver in writing of such forfeiture where the company, having notice of such sale, issues a new policy as an extension of the previous one forfeited.[2]

§ 2280. **Effect of dissolution of partnership: receiver.**—A voluntary dissolution of the partnership and division of the property avoids the policy in Missouri.[3] In New York, it is held that, in an action to dissolve a partnership, the appointment of one of the copartners as a receiver pendente lite is not such a sale or transfer of the property, or change in title or possession as will avoid the policy.[4] If a policy of fire insurance, issued upon a partnership's property, is conditioned to be void if there be a sale or transfer of the property or any change in title or possession whether voluntary or involuntary, the appointment of a receiver during the pendency of the action does not avoid the policy.[5] But upon the entering of a decree that the firm shall be dissolved and the property sold it is held that the insurer is then discharged.[6]

§ 2281. **Accident insurance on lives of partners: dissolution.**—Where a member of a copartnership was insured against accident as such member, the amount being payable to the surviving representative of the firm, subject to the stipulation that the insurance should cease as to the person of a member leaving the firm, and the insured ceased to be a partner before his death by drowning and the dissolution was duly registered, but the jury found that he retained "a continued and active interest in the business," it was held that upon said dissolution the insurance ceased as to

[1] Wood v. American Fire Ins. Co. 149 N. Y. 382, 385, 52 Am. St. Rep. 733, 44 N. E. 80 (N. Y. C. A. 1896), 44 N. E. 80, aff'g 29 N. Y. Supp. 250.

[2] Elliott v. Ashland Mutual Fire Ins. Co. 117 Pa. St. 548, 2 Am. St. Rep. 703, 12 Atl. 676.

[3] Dreher v. Ætna Ins. Co. 18 Mo. 128. See §§ 2293 et seq. herein.

[4] Keeney v. Home Ins. Co. 71 N. Y. 396, 27 Am. Rep. 60.

[5] Keeney v. Home Ins. Co. 71 N. Y. 396, 27 Am. Rep. 60.

[6] Keeney v. Home Ins. Co. 71 N. Y. 396, 27 Am. Rep. 60.

insured, and that no action could be sustained by the surviving partners notwithstanding insured's continued interest in the concern.[7]

§ 2282. **Sale between tenants in common: cotenants.**—In Connecticut it has been held that a transfer from one tenant in common to another is not within the meaning of a clause in the policy rendering it void in case of an alienation by sale or otherwise.[8] And in Pennsylvania a contrary rule has been held.[9] And a verbal agreement whereby owners of an undivided half interest undertake to convey such interest to their other co-owners on repayment by the latter to the former of certain sums paid by the former to their vendors conveys no title legal or equitable, said conditional agreement never having been executed beyond the mere condition of the co-owners to use and occupy the property.[10]

§ 2283. **Partition of insured property: effect of.**—A partition of insured property in pursuance of an order of court, has been held to constitute a change of title. So where a policy was conditioned to be void "when the title of any property insured shall be changed by sale, mortgage, or otherwise," it was held that a partition of the premises, made pursuant to a judgment on the petition of the cotenant would be within the prohibition; though the partition of the property was not an alienation, it was construed as a material change in the title.[11] But it is also held that a legal sale in partition followed by another sale constitutes a change in title and

[7] McLachlan v. Accident Ins. Co. of North America (Montr. L. Rep.) 4 Sup. Ct. Rep. 365. Upon appeal, however (35 L. C. Jur. [Q. B.] 43, 6 Q. B. 39) a new trial was ordered upon the ground that the real question whether insured had quitted the firm was not passed upon by the jury. See §§ 2293 et seq. herein.

[8] Lockwood v. Middlesex Mutual Assurance Co. 47 Conn. 553. Here Carpenter, J., said: "The alienation contemplated in the clause in the policy is a sale to a party not insured. Any transfer of interest between the parties insured by the policy is not an alienation within the meaning of the charter. If a party parts with his entire interest, the insurance as to him ceases, and the purchaser, if a stranger to the policy, is not insured; but if formerly a party to the policy, the insurance inures to his benefit." From this opinion, however, Pardee and Loomis, JJ., dissented. See Royal Ins. Co. v. Sockman, 15 Ohio C. C. 105.

[9] Buckley v. Garrett, 47 Pa. St. 204.

On provisions against alienation or change in interest, title, or possession as applying to interest of cotenant, see note in L.R.A.1917A, 32.

[10] Liverpool & London & Globe Ins. Co. v. Cochran, 77 Miss. 348, 26 So. 932, 29 Ins. L. J. 374, although the principle applies here, the case was one of misrepresentation as to sale and unconditional ownership.

[11] Barnes v. Union Mutual Fire Ins. Co. 51 Me. 110, 81 Am. Dec. 562. See also Plath v. Minnesota Fire Ins. Co. 23 Minn. 479, 23 Am. Rep. 697; Hoffmann v. Ætna Ins. Co. 1 Rob. (N. Y.) 501.

therefore avoids the policy.[12] A change in the title of property resulting from its partition among its co-owners avoids a policy of insurance thereon containing a condition that it shall become void if any other change than death takes place in the interest, title, or possession of the subject of the insurance, whether by legal possession or judgment or by voluntary act of the assured or otherwise.[13] But where the parties insured applied for a partition of the property, and in pursuance of an order to that effect the property was sold, it was held that there was no alienation until the sale was confirmed.[14]

§ 2284. **Executory contract of sale: conditional sale.**—The fact that the insured has made a contract to sell the insured property does not of itself constitute an alienation within the meaning of the policy; the sale must be actually consummated and there must be such a transfer as to devest the insured of his title. A mere change of possession under such a contract will not invalidate the policy unless it so provides.[15] The acceptance of a proposition to buy real property, which is definite in nothing except the amount to be paid, does not defeat insurance thereon under a policy pro-

[12] Hartford Fire Ins. Co. v. Ransom, — Tex. Civ. App. —, 61 S. W. 144.

[13] Trabue v. Dwelling-House Ins. Co. 121 Mo. 75, 42 Am. St. Rep. 523, 23 L.R.A. 719, 25 S. W. 848.

[14] Gates v. Smith, 4 Edw. Ch. (N. Y.) 702.

[15] *Iowa.*—McCoy v. Iowa State Ins. Co. 107 Iowa, 80, 77 N. W. 529, 28 Ins. L. J. 162; Erb v. German-American Ins. Co. 98 Iowa, 606, 40 L.R.A. 845, 67 N. W. 583; Kempton v. State Ins. Co. 62 Iowa, 83, 17 N. W. 194.

*Maryland.*—Washington Fire Ins. Co. v. Kelly, 32 Md. 421, 3 Am. Rep. 149.

*Massachusetts.* — Worthington v. Bearse, 12 Allen (94 Mass.) 382, 90 Am. Dec. 152; Boston & Salem Ice Co. v. Royal Ins. Co. 12 Allen (94 Mass.) 381, 90 Am. Dec. 151; Davis v. Quincy Mutual Fire Ins. Co. 10 Allen (92 Mass.) 113.

*Michigan.* — Wyandotte Brewing Co. v. Hartford Fire Ins. Co. 144 Mich. 440, 6 L.R.A.(N.S.) 852, 115 Am. St. Rep. 458, 108 N. W. 393, 35 Ins. L. J. 804.

*New Jersey.*—Nelson v. Bound Brook Mutual Fire Ins. Co. 43 N. J. Eq. 256, 5 Am. St. Rep. 308, 11 Atl. 681, 10 Cent. Rep. 219.

*New York.*—Browning v. Home Ins. Co. 71 N. Y. 508, 27 Am. Rep. 86; Clinton v. Hope Ins. Co. 45 N. Y. 454; Gilbert v. North American Ins. Co. 23 Wend. (N. Y.) 42, 43, 35 Am. Dec. 543; Masters v. Madison County Mutual Ins. Co. 11 Barb. (N. Y.) 624.

*Ohio.*—Trumbull v. Portage Mutual Fire Ins. Co. 12 Ohio, 305.

*Pennsylvania.* — Farmers' Mutual Ins. Co. v. Graybill, 74 Pa. St. 17, 23; Perry County Ins. Co. v. Stewart, 19 Pa. St. 45.

*Virginia.*—Fire & Marine Ins. Co. v. Morrison, 11 Leigh (Va.) 354, 36 Am. Dec. 385.

On contract to convey as breach of condition against change in title or interest, see note in 3 L.R.A.(N.S.) 107.

On outstanding contract for sale of property as defeating sole and unconditional ownership by vendor, see note in 52 L.R.A.(N.S.) 670.

viding that it shall be void if the interest of the assured becomes other than "the entire, unconditional, unencumbered, and sole ownership."[16] And no change has taken place in the interest, title, or possession of the holder of a fire insurance policy where, at the time of the loss, the insured owns the title of the subject of the insurance, although he has made an executory contract to convey the property, and the consideration has been fully paid, when no transfer, either of the title or possession, has been actually made.[17] An insurance upon goods will not be discharged by an executory contract for sale thereof, though there has been a receipt for a portion of the purchase money, if the title to the goods at the time of the loss remains in the person insured, and his right to recover will not be limited to the balance of purchase money remaining due.[18] If the owner of insured premises makes an executory agreement to convey the premises and the vendee under such agreement takes possession and pays a part of the purchase money, this is a breach of the condition avoiding the policy in case any change take place in the interest of the insured.[19] A mere contract to sell insured wool does not avoid the policy, as there must be in addition to this some act done which passes the property and devests the insured of his title.[20] So under the provisions of a fire insurance policy that it should be void, "if the interest of the assured became other than the entire, unconditional unencumbered, and sole ownership," the policy is not avoided because the insured entered into an executory contract in writing to sell, where no deed passed and no possession was given.[1] Where the policy is conditioned to be void in case of any sale, transfer, or change of possession, a mere executory contract of sale, there being no change of possession, will not avoid it.[2] And where present possession of the buildings is retained by the vendor but a contract of sale is made giving possession of part of the realty but nothing has been paid on the purchase price at the time of loss

[16] Arkansas Fire Ins. Co. v. Wilson, 67 Ark. 553, 48 L.R.A. 510, 77 Am. St. Rep. 129, 55 S. W. 933.

[17] Garner v. Milwaukee Mechanics' Ins. Co. 73 Kan. 127, 4 L.R.A.(N.S.) 654, 84 Pac. 717.

[18] Boston & Salem Ice Co. v. Royal Ins. Co. 12 Allen (94 Mass.) 381, 90 Am. Dec. 151. See also Haley v. Manufacturers' Fire Ins. Co. 120 Mass. 292; Hill v. Cumberland Valley Protection Ins. Co. 59 Pa. St. 474.

[19] Gibb v. Fire Ins. Co. 59 Minn. 267, 50 Am. St. Rep. 405, 61 N. W. 137.

On vendee under executory contract as owner, where vendor holds legal title, see note in 20 L.R.A. (N.S.) 775.

[20] Pitney v. Glens Falls Ins. Co. 61 Barb. (N. Y.) 335.

[1] Arkansas Fire Ins. Co. v. Wilson, 67 Ark. 553, 48 L.R.A. 510, 77 Am. St. Rep. 129, 55 S. W. 933.

[2] Browning v. Home Ins. Co. 71 N. Y. 508, 27 Am. Rep. 86.

and the vendor might have avoided his obligation to convey upon satisfying the stipulated damages, there is no breach of the condition as to change of title, etc.[3] So where a guardian of infant heirs agreed to sell certain property as soon as he had obtained the proper authority, and in pursuance of the contract gave the vendee possession of the property as tenant, it was held that there was no sale within the meaning of the clause, "to be void if the property insured shall be sold or assigned."[4] But a written agreement to sell and convey in fee insured premises to a tenant in possession, upon payment of the stipulated price, a portion of which is paid, causes a change in the interest, title, and possession of the subject of the insurance, sufficient to avoid the policy under a condition that: "If any change, other than by the death of an insured, takes place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process, or judgment, or by voluntary act of the insured, or otherwise, the entire policy shall be void."[5] If property is sold under contract and payments are defaulted and the property reconveyed thereby transferring to the original vendor all the purchaser's equitable interest under said contract and the insurance is placed upon the property with full knowledge on the part of insurer of such interest and it had indorsed its agreement to that effect there is no forfeiture as such transfer increased insured's interest in the property by giving her both the legal and equitable interest.[6] A contract for sale of land completed by paying the unpaid balance of the purchase price, after the fire, and thereupon receiving a deed, does not avoid the policy.[7] The owner of land on which there is a building insured against loss by fire is not deprived of the right to recover on the policy by the fact that, before loss, he agreed to transfer the premises, which agreement was consummated subsequent to the destruction of the building; since the doctrine of relation will not operate to carry the transfer of real property back to the agreement to which it is referable, for the benefit of strangers to the transaction.[8] Again, where a vendor, who has placed his deed in escrow awaiting performance of conditions precedent to the de-

[3] Pringle v. Des Moines Ins. Co. 107 Iowa, 742, 77 N. W. 521, 28 Ins. L. J. 138.

[4] Clinton v. Hope Ins. Co. 45 N. Y. 454, s. c. 51 Barb. (N. Y.) 647.

[5] Grunauer v. Westchester Fire Ins. Co. 72 N. J. Law, 289, 3 L.R.A. (N.S.) 107n, 62 Atl. 418.

[6] Foiles v. Detroit Fire & Marine Ins. Co. 175 Mich. 716, 141 N. W. 879, 42 Ins. L. J. 1143.

[7] O'Neil v. Franklin Fire Ins. Co. 145 N. Y. Supp. 432, 159 App. Div. 313, 43 Ins. L. J. 388.

[8] Evans v. Crawford County Farmers' Mutual Fire Ins. Co. 130 Wis. 189, 9 L.R.A.(N.S.) 485, 100 N. W. 952.

livery, and has let the vendee into possession, has a fire insurance policy on a house situated on the premises, and the house is destroyed by fire while so occupied, and before the conditions of the escrow are performed, the hazard from fire not being increased, the right to recover on the contract of insurance is not forfeited.[9] Where one who owns the title of property procures a policy of insurance thereon which provides that it shall be void "if any change takes place in the interest, title, or possession of the subject of insurance," a forfeiture does not result from his making a contract to convey the property, under which he receives the consideration but does not actually transfer the title or the possession.[10] Such a contract to sell is not of itself a change of title" that will avoid the policy within the meaning of a provision forbidding such a change.[11] Nor has any change taken place in the interest, title, or possession of the holder of a fire insurance policy where, at the time of the loss, the insured owns the title of the subject of the insurance, although he has made an executory contract to convey the property, and the consideration has been fully paid, when no transfer, either of the title or possession, has been actually made.[12] So where, under an executory contract of sale, the title is not to pass unless the vendee makes certain deferred payments, the condition as to change of title is not avoided,[13] though there may be a part of the purchase money paid.[14] The giving of a bond for the conveyance of land upon a certain condition being complied with at a certain specified time does not constitute an encumbrance upon insured premises.[15]

In Iowa it has been held that a contract for the purchase and sale of real estate, under which the purchaser has taken possession, and upon which nothing remains to be done but making the deed and paying a balance due on the price, constitutes a breach of a condition in an insurance policy against selling, conveying, or encumbering, notwithstanding the contract is to become void upon default in making payments at the times agreed, and the abandon-

[9] Pomeroy v. Ætna Ins. Co. 86 Kan. 214, 38 L.R.A.(N.S.) 142, 120 Pac. 344.

On delivery of deed in escrow as a change of title or interest, see note in 38 L.R.A.(N.S.) 142.

[10] Garner v. Milwaukee Mechanics' Ins. Co. 73 Kan. 127, 4 L.R.A.(N.S.) 654, 117 Am. St. Rep. 460, 84 Pac. 717.

[11] Browning v. Home Ins. Co. 71 N. Y. 508, 27 Am. Rep. 86.

[12] Garner v. Milwaukee Mechanics' Ins. Co. 73 Kan. 127, 4 L.R.A. (N.S.) 654, 117 Am. St. Rep. 460, 84 Pac. 717.

[13] Home Ins. Co. of New York v. Bethel, 142 Ill. 537, 32 N. E. 510, s. c. 42 Ill. App. 475.

[14] Grable v. German Ins. Co. 32 Neb. 645, 49 N. W. 713.

[15] Newhall v. Union Ins. Co. 52 Me. 180; Trumbull v. Portage Mutual Fire Ins. Co. 12 Ohio, 305.

On effect of bond for title to defeat unconditional and sole ownership, see note in 2 L.R.A.(N.S.) 512.

ment of the contract will not save a forfeiture of the policy.[16] We think this case is not in harmony with other decisions governed by analogous principles. It would seem that so long as the insured had not actually parted with his title to the property and a part of the purchase money remains unpaid, that he has an insurable interest and may recover to the extent of the balance due him from the vendee. The dissenting opinion [17] is more in line with what the true rule should be in such cases. A conditional sale of insured property is not an alienation, but merely suspends the risk during the existence of the condition, and the reversion of the property to the vendor upon the failure of the condition revives the risk and entitles the vendor to all the rights possessed by him before the property was transferred.[18] Under a Maryland decision by a contract for the sale of insured property, the policy is avoided when it provides that it shall be void if any change, other than by death, takes place in the interest, title, or possession of the subject of the insurance.[19] And where there is a conditional sale of the

[16] Davidson v. Hawkeye Ins. Co. 71 Iowa, 532, 60 Am. Rep. 818, 32 N. W. 514.

On vendor's lien as affecting sole and unconditional ownership, see note in 7 L.R.A.(N.S.) 627.

[17] "The contract between plaintiff and Luit was an executory agreement for the sale and conveyance of the property. Plaintiff was bound upon the performance of his undertaking by Luit to convey the land. But a failure of the latter to pay any instalment at the stipulated time would work a forfeiture of all interest in the land and of all sums paid under the contract; and the agreement provided that upon such failure the vendee would surrender possession of the premises. What was the extent of right or interest acquired by Luit under this contract? He did not acquire the ownership of the property, but the right to be invested with the ownership when he had performed his undertaking in the contract. Until that was done both the title and ownership remained in the plaintiff, for by the terms of the agreement Luit would be entitled to the property only after a strict performance of its condition. In Kempton v. State Ins. Co. 62 Iowa, 83, 17 N. W. 194, it was held that the policy, which contained a provision similar to that in question, was not defeated by a contract for the sale of the property. It is not material that the difference between that case and this was that there the purchaser was not entitled to possession until certain payments had been made, and in this case the purchaser was in possession when the fire occurred. The ground of the holding in that case is, that the insured was not devested of the ownership of the property by the contract, and that is the case here."

[18] Power v. Ocean Ins. Co. 19 La. 28, 36 Am. Dec. 665. See also Gordon v. Massachusetts Ins. Co. 2 Pick. (19 Mass.) 249; Jackson v. Massachusetts Ins. Co. 23 Pick. (40 Mass.) 418, 34 Am. Dec. 69; Tittemore v. Vermont Mutual Fire Ins. Co. 20 Vt. 546; Wyandotte Brewing Co. v. Hartford Fire Ins. Co. 144 Mich. 440, 6 L.R.A.(N.S.) 852, 115 Am. St. Rep. 458, 108 N. W. 393.

[19] Skinner & Sons Ship-Building & Dry-Dock Co. of Baltimore City v. Houghton, 92 Md. 68, 84 Am. St. Rep. 485, 48 Atl. 85. See Excelsior

property and the vendee was carrying out his part of the agreement at the time of the fire and which sale was then so far completed that the agreement therefor could not have been arbitrarily canceled by the assured as seller there is such a change other than by the death of insured in the interest, title, and possession of the insured property as to avoid the policy under a condition voiding the policy in case of such change in the interest and title.[20] And although the title is not to pass until the vendee of goods who has given notes for the purchase price has paid the same, and although the vendee who is placed in possession with authority to sell said goods at retail sale still he is obligated to make certain periodical statements as to the amount of sales there is such a change of interest as to avoid the policy.[1] A contract for sale, conveying an equitable title, under which the purchaser enters into possession, avoids the policy, even though the right of reentry on default of payments is reserved with an option to retain the amounts paid as and for use and occupation or to foreclose the vendee's interest.[2] So where a policy provided that it should be void if the property "shall be sold or conveyed, or the interest of the parties therein changed," it was held that a contract under seal for the sale of the insured premises and a receipt of part of the purchase money avoided it.[3]

Where personal property is sold, the title to remain in the vendor as security for payment, and a policy thereon is also retained, and thereafter the seller receives a mortgage of the vendee's land and his note for the purchase price of said personalty, there is an absolute sale with a reservation of title and the policy is avoided by a change of title under a statute making such reservations of title a chattel mortgage.[4] So where the insured holds the property under a conditional sale, he cannot on its destruction by fire, recover for the full value of the property, but only the sum which he has paid under the contract of sale, if it stipulates that the title shall remain in the vendor until full payment has been made, and there is nothing to show that the purchaser has suffered any damage other than the loss of his payments.[5]

Foundry Co. v. Western Assur. Co. 135 Mich. 467, 98 N. W. 9; Gorsch v. Niagara Fire Ins. Co. of N. Y. 68 Misc. 344, 123 N. Y. Supp. 877, 39 Ins. L. J. 1320.

[20] Fire Association of Phila. v. Perry, — Tex. Civ. App. —, 185 S. W. 374.

[1] Phenix Ins. Co. v. Quinette, 36 Okla. 384, 128 Pac. 722.

[2] Brickell v. Atlas Assurance Co. Ltd. 10 Cal. App. 17, 101 Pac. 16.

[3] Germond v. Home Ins. Co. 5 Thomp. & C. (N. Y.) 120, 2 Hun (N. Y.) 540.

[4] Hamilton v. Firemen's Fund Ins. Co. — Tex. Civ. App. —, 177 S. W. 173 (case of sale of automobile). Rev. Stat. art. 5654.

[5] Tabbut v. American Ins. Co. 185

§ 2284a. **Option contract.**—A contract in the nature of an option, where nothing has been done thereunder at the time of the fire, does not avoid the policy.[6] An agreement for the sale and purchase of real property amounting only to an option to purchase, and under which the insured remains entitled to free access to the property and its management in every respect as though all work done thereunder by the option-holder were being done by the assured, and that if the purchase money is not paid within a time specified, all payments made on the purchase price shall be forfeited, does not constitute a breach of condition against a change of interest or possession of the insured premises.[7] An option contract for sale on which a part of the purchase money is paid, to be forfeited if the sale is not consummated, and under which nothing was decided at the time of the fire, does not pass any title and is not a breach of a condition against change of title.[8]

§ 2284b. **Contract to exchange property.**—An agreement by the insured to exchange the insured property for land, the exchange to take place not later than a given date, is not, where the agreement is never executed, within the meaning of a provision avoiding the policy "if any change take place in the interest, title, or possession of the subject of insurance."[9] Where there is an agreement to exchange property, but there is no actual transfer of land, the deeds, mortgages and assignments being signed, placed in escrow until the conditions were performed, although the occupancy had been changed by both parties, but under such conditions that each could have recovered back the occupancy of his own property, and the insured house is destroyed by fire before the conditions of the escrow are performed, the hazard from fire is not increased, and the right to recover is not precluded.[10] If assured in negotiating an exchange of property makes out a deed to another to whom real estate agents hope to effect a sale, and also assigns the policy with the knowledge and consent of assurer's agents to the same party, there is no change of title, interest, or

Mass. 419, 102 Am. St. Rep. 353, 70 N. E. 430.

[6] House v. Security Fire Ins. Co. 145 Iowa, 462, 121 N. W. 509, 38 Ins. L. J. 875.

[7] Mackintosh v. Agricultural Fire Ins. Co. 150 Cal. 440, 119 Am. St. Rep. 234, 89 Pac. 102.

[8] House v. Security Fire Ins. Co. 145 Iowa, 875, 121 N. W. 509, 38 Ins. L. J. 875.

[9] Erb v. German-American Ins. Co. 98 Iowa, 606, 40 L.R.A. 845, 67 N. W. 583.

[10] Pomeroy v. Aetna Ins. Co. 86 Kan. 214, 38 L.R.A.(N.S.) 142 (annotated on delivery of deed in escrow as a change of title or interest), 120 Pac. 344, 41 Ins. L. J. 475.

possession, where the deed did not pass title, nor, even if it did, is there such change because of assurer's consent.[11]

§ 2284c. **Unconsummated sale in satisfaction of mortgage.**—If an agreement, under which a mortgagee is to receive a conveyance of insured premises in satisfaction of the mortgage debt, is not consummated prior to loss under the policy, there is no change in the legal title to the property, so as to constitute a ground for the avoidance of the policy.[12]

§ 2284d. **Bill of sale.**—A mere paper transfer called a bill of sale, without consideration and without delivery of possession of the property, does not constitute a change of title, or an encumbrance within the meaning of an insurance policy containing conditions as to title and encumbrances, even if it was intended to defraud creditors.[13]

§ 2285. **Acts of vendor where person holds under contract of purchase.**—Where a policy issued upon the interest of a person holding under a contract of purchase is conditioned to be void in case of a "change of interest" in the insured property, it is held that a mortgage given by the vendor which creates any obligation upon the vendee for its payment affects the vendee's interest within the meaning of the condition and will avoid the policy.[14]

§ 2286. **Where sale not confirmed as required.**—Where a sale of property of a decedent which is in the hands of the administrator must be confirmed before it is complete, then there is no alienation until such sale has been confirmed. So where property was sold at an orphan's court sale, it was held that the administrator could recover for a loss occurring after the time of the sale and before it was confirmed.[15]

§ 2286a. **Judicial sale confirmed.**—A condition in a policy of insurance declaring that it shall be void if, without consent in writing or printing the property shall be sold, is not violated by a judicial sale of the property and its confirmation, if payment of the purchase price is not made and no bill of sale is executed.[16]

§ 2286b. **Administrator's sale confirmed.**—A confirmed administrator's sale of insured property is within a provision of the policy making it void if any change takes place in the interest, title,

[11] Camden Fire Ins. Assoc. v. Bomar, — Tex. Civ. App. —, 176 S. W. 156.

[12] Magoun v. Firemen's Fund Ins. Co. 86 Minn. 486, 91 Am. St. Rep. 370, 91 N. W. 5.

[13] Forward v. Continental Ins. Co. 142 N. Y. 382, 25 L.R.A. 637, 37 N. E. 615.

[14] Hoose v. Prescott Ins. Co. 84 Mich. 309, 11 L.R.A. 340, 32 Cent. L. J. 226, 47 N. W. 587.

[15] Farmers' Mutual Ins. Co. v. Graybill, 74 Pa. St. 17, 23.

[16] International Wood Co. v. National Assur. Co. 99 Me. 415, 105 Am. St. Rep. 288, 59 Atl. 544.

or possession of the subject of insurance by legal process, voluntary act of the insured, or otherwise, although no deed has been delivered or money paid, since the equitable title passed when the sale was confirmed, where the statute provides that when certain facts are shown to the court it shall make an order confirming the sale and directing conveyances to be executed, and such sale from that time shall be confirmed and valid.[17]

§ 2287. **Where insurance on changing stock of goods.**—A condition in the policy of insurance that it shall be void in case of the alienation or sale of the property insured does not refer to the sale of goods which are kept for sale. The policy is not an insurance upon the identical articles in the store at the time the insurance is effected. The insured may sell and replace his stock as often as is necessary, and the policy will cover such property as may be on hand at the time of the loss.[18] Though the policy may provide that it shall be void if the title is changed in any way it does not apply to such a case.[19] And the rule applies by analogy to a stock of goods in a store which is levied upon and sold under execution and repurchased the day after said sale by insured who continues business in the same building, and in the same way, and in such case there is no such change of ownership as avoids the policy for in such or like cases where the entire stock is sold and the title regained before loss the risk is merely suspended.[20] So where a policy was issued "on a stock of looking-glasses" in a certain store, it was held that the policy covered all looking-glasses, etc., of the insured which should be in his store during the year, and that a sale of the entire stock only suspended the policy.[1]

§ 2288. **Effect of bankruptcy or insolvency.**—The rule seems to be settled that an assignment in bankruptcy or insolvency, whether voluntary or involuntary, devests the insured of his insurable interest in the property, and is such an alienation as will avoid the policy.[2] So an assignment of property under voluntary insolvency

[17] Moller v. Niagara Fire Ins. Co. 54 Wash. 439, 24 L.R.A.(N.S.) 807, 103 Pac. 449, 38 Ins. L. J. 1073, 132 Am. St. Rep. 1115. Under Ballinger's Ann. Codes & Stat. sec. 6274; Pierce's Code sec. 2582.

[18] Wolfe v. Security Ins. Co. 39 N. Y. 49. See also Commercial Ins. Co. v. Spanknable, 52 Ill. 53, 4 Am. Rep. 582; Power v. Ocean Ins. Co. 19 La. 28, 36 Am. Dec. 665; Clark v. New England Ins. Co. 6 Cush. (60 Mass.) 342, 53 Am. Dec. 44; Lane v. Maine Mutual Fire Ins. Co. 12 Me. 44, 28 Am. Dec. 150.

[19] Biggs v. North Carolina Home Ins. Co. 88 N. C. 141.

[20] Weisberger v. Western Reserve Ins. Co. 250 Pa. 155, 95 Atl. 402, 46 Ins. L. J. 721.

[1] Hooper v. Hudson River Fire Ins. Co. 15 Barb. (N. Y.) 413.

[2] *United States.*—Hibbler Machine Supply Co., In re (U. S. D. C.) 192 Fed. 741, 27 Am. B. Rep. 612; Starkweather v. Cleveland Ins. Co. 2

proceedings is an alienation, within a provision of the policy of a mutual insurance company that "when any property insured by this company shall be taken possession of by a mortgagee or in any way be alienated the policy shall be void."[3] And where a policy of fire insurance was conditioned to be void if any change should take place "in the title or possession of the property, whether by legal process or judicial decree or voluntary transfer," and the insured was declared a bankrupt in involuntary proceedings, and his property was assigned by the registrar to the assignee in bankruptcy, and afterward the insured property was destroyed by fire, it was held that the policy had become void under the condition,[4] though by the terms of the policy the loss was made payable to the mortgagee.[5]

An exception to the above rule has been made in Massachusetts, in which state it is held that if the assignment for the benefit of the creditors does not release the assured from all liability for any balance due after the distribution of the assets the policy is not avoided, and he may recover to the full extent of the loss.[6] So under a Louisiana decision filing a petition in voluntary bankruptcy, on which the petitioner was adjudged a bankrupt, does not work such a change in his interest, title or possession as renders void a policy of fire insurance on his stock of merchandise, which was destroyed on the day following the filing of the petition, but before either a receiver or a trustee was appointed, where, in view of the loss of merchandise, the creditors deemed it to their interest to make a com-

Abb. (U. S. C. C.) 67, Fed. Cas. No. 13,308.

*Connecticut.*—Birdsey v. City Fire Ins. Co. 26 Conn. 165.

*Illinois.*—Orr v. National Fire Ins. Co. 158 Ill. 431, 41 N. E. 1009; Orr v. Hanover Fire Ins. Co. 158 Ill. 149, 49 Am. St. Rep. 146, 41 N. E. 854.

*Maine.* — Adams v. Rockingham Mutual Fire Ins. Co. 29 Me. 292.

*Maryland.* — Reynolds v. Mutual Fire Ins. Co. 34 Md. 280, 6 Am. Rep. 337.

*New York.* — Perry v. Lorillard Fire Ins. Co. 61 N. Y. 214, 19 Am. Rep. 272. See Fuller v. Jamieson, 90 N. Y. Supp. 456, 98 App. Div. 53, aff'd 184 N. Y. 605, 77 N. E. 1187; Keeney v. Home Ins. Co. 3 Thomp. & C. (N. Y.) 478.

*Ohio.*—Ohio Farmers Ins. Co. v. Waters, 65 Ohio St. 157, 161, 61 N. E. 711, 31 Ins. L. J. 71.

*Wisconsin.*—Milwaukee Trust Co. v. Lancashire Ins. Co. 95 Wis. 192, 70 N. W. 81.

On effect of bankruptcy or insolvency proceedings or assignment for benefit of creditor on fire insurance, see note in 15 L.R.A.(N.S.) 827.

[3] Young v. Eagle Fire Ins. Co. 14 Gray (80 Mass.) 150, 74 Am. Dec. 673.

[4] Perry v. Lorillard Fire Ins. Co. 61 N. Y. 214, 19 Am. Rep. 272.

[5] Perry v. Lorillard Fire Ins. Co. 61 N. Y. 214, 19 Am. Rep. 272; Hazard v. Franklin Mutual Fire Ins. Co. 7 R. I. 429. But see Appleton Iron Co. v. British-American Ins. Co. 46 Wis. 23, 50 N. W. 1100.

[6] Lazarus v. Commercial Ins. Co. 19 Pick. (36 Mass.) 81. See Fuller v. Jamieson, 90 N. Y. Supp. 456, 98 App. Div. 53, aff'd 184 N. Y. 605, 77 N. E. 1187.

position with the bankrupt, and depend upon his personal obligation to them, and did so.[7] And the destruction of the property after an adjudication in bankruptcy but prior to the vesting of the estate in the trustee does not constitute such a sale or transfer as to void the policy.[8]

§ 2288a. **Same subject: appointment of receiver.**—The appointment of a receiver and the taking of actual possession by him in a suit to take possession and control of certain personal property, prevents recovery of loss sustained under a fire insurance policy on the property, which provides that, if any change take place in the interest, title, of possession of the property, "whether by legal process of judgment, or otherwise," the policy shall be wholly void.[9] It is held, however, that the appointment of a receiver to take charge of property does not constitute such a change of possession as to vitiate the policy since the receiver's possession is taken under order of court as an officer thereof and is for the benefit of those interested.[10] So, under a Virginia decision the appointment of a receiver is not such a change in the title or possession of property as avoids a policy of insurance containing a condition that it shall become void if any change takes place in the title or possession of the property, whether by sale or judicial decree, without notice to the insurer and its consent indorsed thereon.[11] And it is held in Pennsylvania that no change in the interest, title, or possession of insured property is effected within the meaning of a provision in the policy avoiding it in case of such change, by the appointment of a receiver in bankruptcy proceedings, who, without dispossessing the owner, places a watchman upon the property, effects insurance thereon, and advertises the personal property for sale.[12] And where a policy runs to a receiver in a designated suit, a mere change of receiver does not involve a change in title or possession.[13]

[7] Gordon v. Mechanics' & Trust Ins. Co. 120 La. 441, 15 L.R.A.(N.S.) 827n, 45 So. 384, 22 Am. B. R. 649.

[8] Fuller v. New York Fire Ins. Co. 184 Mass. 12, 67 N. E. 879.

[9] Bronson v. New York Fire Ins. Co. 64 W. Va. 494, 19 L.R.A.(N.S.) 643, 63 S. E. 283, 38 Ins. L. J. 201. See also Farmers' Fire Ins. Co. v. Baker, 94 Md. 545, 51 Atl. 184.

On effect of appointment of receiver of insured on fire insurance, see note in 19 L.R.A.(N.S.) 643.

[10] Lancashire Ins. Co. v. Boardman, 58 Kan. 339, 49 Pac. 92, 27 Ins. L. J. 470, *citing* Thompson v. Phenix Ins. Co. 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. 1019.

[11] Georgia Home Ins. Co. v. Bartlett, 91 Va. 305, 50 Am. St. Rep. 832, 21 S. E. 476.

[12] Marcello use of South Side Trust Co. v. Concordia Fire Ins. Co. 234 Pa. 31, 39 L.R.A.(N.S.) 366, 82 Atl. 1090, 41 Ins. L. J. 1163.

[13] Thompson v. Phenix Ins. Co. 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. 1019. *Cited* in Small v. Westchester Fire Ins. Co. 51 Fed. 789, 795; Georgia Home Ins. Co. v. Bartlett, 91 Va. 305, 312, 50 Am. St. Rep. 832, 21 S. E. 476; Gerling v. Agri-

§ 2289. **Death of insured: descent of title to heirs.**—If a policy is conditioned t become void upon alienation by the assured, it is not avoided by his death and the consequent change and control of the property by his administrator or by the descent to his heirs.[14] So a condition voiding the policy in case of any change in title or possession is not broken by death of assured before loss.[15] The death of the insured, and the descent of the property insured to his wife and children, do not work such a change in the title or possession of the property as to avoid the policy of insurance.[16] If, however, a policy is conditioned to be void if the interest of the insured shall be changed in any manner, whether by act of the insured or by operation of the law, it has generally been held that the death of the insured will avoid the policy.[17] So where a fire policy was conditioned to be void "if, without the written consent of the company first had and obtained, the said property shall be sold or conveyed and the interest of the parties therein be changed in any manner, whether by the act of the parties or by operation of law, or the property shall become encumbered by mortgage, judgment, or otherwise," and the insured died intestate as to all his property, it was held that the policy was void by change of interest.[18] Where the policy is conditioned to be void "in case of any sale, transfer, or change of title in the property insured," it is held that the policy ceases to have any force upon the death of the insured, and the vesting of the title in his heirs at law.[19] Under the alienation clause of the New York standard fire policy the death of the insured will not void the policy.[20] In some policies the stipulation as to alienation excepts "succession by reason of the death of the insured."

cultural Ins. Co. 39 W. Va. 689, 700, 20 S. E. 691.

[14] Burbank v. Rockingham Ins. Co. 24 N. H. 550, 57 Am. Dec. 300. See also Pfister v. Gerwig, 122 Ind. 567, 23 N. E. 1041; Westchester Fire Ins. Co. v. Dodge, 44 Mich. 420, 6 N. W. 865; Georgia Home Ins. Co. v. Kinnier, 28 Gratt. (Va.) 88. See Appeal of Nichols, 128 Pa. St. 428, 5 L.R.A. 597, 18 Atl. 333. See Towle v. Dirigo Mutual Fire Ins. Co. 107 Me. 317, 78 Atl. 374.

[15] Forest City Ins. Co. v. Eaton, 86 Ill. App. 463.

[16] Planters' Mutual Ins. Assoc. v. Dewberry, 69 Ark. 295, 86 Am. St. Rep. 195, 62 S. W. 1047.

[17] Richardson's Admr. v. German Ins. Co. 89 Ky. 571, 8 L.R.A. 800, 13 S. W. 1, 12 Ky. L. R. 37; Matter of Hine v. Woolworth, 93 N. Y. 75, 45 Am. Rep. 176; Sherwood v. Agricultural Ins. Co. 73 N. Y. 447, 29 Am. Rep. 180; Hine v. Homestead Fire Ins. Co. 29 Hun (N. Y.) 84; Robinson v. Pacific Fire Ins. Co. 18 Hun (N. Y.) 395; Phelps v. Gebhard Fire Ins. Co. 9 Bosw. (N. Y.) 404.

[18] Sherwood v. Agricultural Ins. Co. 10 Hun (N. Y.) 593, 29 Am. Rep. 180, aff'd 73 N. Y. 447.

[19] Lappin v. Charter Oak Fire & Marine Ins. Co. 58 Barb. (N. Y.) 325.

[20] The policy provides that it shall be void for change of interest "other than by the death of the insured."

Such a clause will also prevent a forfeiture of the policy, at least as to the heirs or administrators.[1]

**§ 2290. What amounts to an alienation, sale, transfer, or change of title: instances.**—A conveyance absolute in form by the insured is a transfer or change in title avoiding the policy, although there is a written defeasance dehors the deed or an equivalent contemporaneous oral agreement.[2] A conveyance of insured premises by a husband to a third person, and by that third person to the wife of the insured, will avoid a policy providing that in case the premises are "sold or conveyed in whole or in part" the policy shall be void, though the conveyances are intended as one transaction, and though the husband retains an interest in the land as tenant by curtesy.[3] So, also, in case of a conveyance to the daughter of the insured and by her to the wife;[4] and where the husband and wife conveyed property to a third person, who executed at the same time a conveyance to the wife which vested the legal title in her, a policy containing the usual clause against the transfer of the property will be avoided, though there was no intention to devest the husband of his interest and control.[5] So a transfer of homestead property from the husband to the wife is a change of title avoiding the policy.[6] If a policy is issued to the mortgagor of the property covered by it and is made payable to the mortgagee, it is held that in such case a subsequent transfer of the entire property to the mortgagee will avoid a policy conditioned to be void if the property "be sold."[7] So, also, where the mortgagor obtained a policy upon the property, and with the consent of the company it was assigned to L., being indorsed, "In case of loss pay the within to L. to secure his mortgage," and he

[1] Quarles v. Clayton, 87 Tenn. 308, 3 L.R.A. 170, 10 S. W. 505. In this case the court said: "The policy contained the stipulation that it should become void 'in case any change shall take place in title or possession, except by succession by reason of death of the assured.' That these provisions are reasonable is obvious, when we consider that the contract is one for the personal indemnity of the assured against a loss affecting his interest in the property covered by the policy. But this policy was not annulled by the change of title which occurred at the death of the insured; it expressly excepts a defeat of the policy where it occurs 'by succession by reason of the death of the assured.' The legal effect of this exception is to continue and extend the policy notwithstanding the change of title by reason of the death of the assured."

[2] Barry v. Hamburg-Bremen Fire Ins. Co. 110 N. Y. 1, 17 N. E. 405.

[3] Oakes v. Manufacturing Ins. Co. 131 Mass. 164; Walton v. Agricultural Ins. Co. 116 N. Y. 317, 5 L.R.A. 677, 22 N. E. 443.

[4] Baldwin v. Phœnix Ins. Co. 60 N. H. 164.

[5] Langdon v. Minnesota Farmers' Mutual Fire Ins. Co. 22 Minn. 193.

[6] Milwaukee Mechanics' Mutual Ins. Co. v. Ketterlin, 24 Bradw. (Ill.) 188.

[7] Dailey v. Westchester Fire Ins. Co. 131 Mass. 173.

subsequently obtained another policy from the same company, which he assigned with the consent of the company to a purchaser of the property, to whom the insured conveyed his entire interest in the property, it was held that the consent of the insurer thus given would not prevent a forfeiture of the first policy, which was conditioned to be void "in case the insured shall convey either in whole or in part; but it might be continued for the benefit of the purchaser with the company's assent, to be evidenced by a certificate of the fact or by indorsement on the policy." [8] A sale of a business conducted under a trade name, avoids the policy where assured has no notice thereof and the policy is not transferred, even though the business is carried on under the same name.[9] A sale to a tenant in possession who continues the same, paying no rent and who makes alterations on the premises, and pays interest on deferred purchase money payments, avoids the policy.[10] A conveyance to secure payment of a debt for construction of the building made without insurer's consent, invalidates the policy.[11] And a conveyance to a purchaser together with a transfer to him of a tenant in possession, constitutes such a change in the title, interest or possession as avoids the policy.[12]

**§ 2291. What does not amount to an alienation, sale, transfer, or change of title: instances.**—Where goods upon which there was a mortgage were insured, and the policy provided that it should be void in case of a sale of the insured property, it was held that a subsequent surrender of the possession of such goods to the mortgagee was not a sale within the meaning of the condition.[13] The mortgagor of a vessel, selling his remaining interest and stipulating with the purchaser that he, the seller, will pay off the mortgage, if he fails to comply with the stipulation so that the bargain is given up and the title reconveyed to him, may recover on a policy of insurance issued to him before his agreement of sale for a loss of the vessel after reconveyance, and this whether the contract be construed to have passed title or not.[14] A mere agreement between the

[8] Loring v. Manufacturing Ins. Co. 8 Gray (74 Mass.) 28.

[9] American-Steam Laundry Co. v. Hamburg-Bremen Fire Ins. Co. 121 Tenn. 13, 21 L.R.A.(N.S.) 442n, 113 S. W. 394.

On formation of partnership or change in personnel of firm as affecting a change of title or ownership, see note in 21 L.R.A.(N.S.) 442.

[10] Sewell v. Home Ins. Co. 115 N. Y. Supp. 345, 131 App. Div. 131.

[11] Athens Mutual Ins. Co. v. Evans, 132 Ga. 703, 64 S. E. 993.

[12] Northern Assurance Co. v. City Savings' Bank, 18 Tex. Civ. App. 721, 45 S. W. 737.

[13] Washington Ins. Co. v. Hayes, 17 Ohio St. 432, 93 Am. Dec. 628.

[14] Worthington v. Bearce, 12 Allen (94 Mass.) 382, 90 Am. Dec. 152.

owner of property insured and another person to represent to the creditors of the owner, in order to prevent attachments, that it had been sold to such other person does not avoid the policy, although the policy is upon condition that the insurance shall be void "in case of any sale, transfer, or change of title." [15] A policy conditioned to be void in case of a change of possession or title is not avoided by the insured leaving an agent in charge of the premises, as this is not a change of possession within the meaning of the provision.[16] If an alienation occurs after a loss, it will not avoid the policy upon the property, though it may appear that neither party had knowledge of the loss when the conveyance was made.[17] So a policy conditioned to be void in case of a sale or transfer of the insured property is not avoided by the execution of a trust deed,[18] or by a sale of the land upon which the insured buildings stand, the buildings being reserved.[19] A transfer of the legal title to property to another for the mere purpose, not however accomplished, of having him negotiate a loan upon it for the grantor, does not show a breach of the condition in an insurance policy against sale, transfer, or change of title.[20] Where there was a series of conveyances for the purpose of vesting the complete title in the insured, it was held that the condition in the policy against a sale of the property was not violated.[1] In this case the wife of the insured held a tax title upon the property, and conveyances were made by the wife of the insured and the insured to a third person, who immediately reconveyed the entire estate to the insured. The word "interest" includes both legal and equitable right, and therefore what might be a change of interest might not be a change of title.[2] And there is no such change of interest, title or possession nor such an increase of risk as to avoid the policy, where property insured in the building where it is located is there left with one as bailee only, who became the occupant after the property was insured.[3] Appointment of a trustee to take the place of other trustees who held the property in

[15] Orrell v. Hampden Ins. Co. 13 Gray (79 Mass.) 431.

[16] Shearman v. Niagara Fire Ins. Co. 46 N. Y. 526.

[17] Duncan v. Great Western Ins. Co. 3 Keyes (N. Y.) 394, s. c. 1 Abb. Dec. (N. Y.) 562, 5 Bosw. (N. Y.) 378 note, 19 How. Pr. (N. Y.) 312; Farmers' Mutual Ins. Co. v. Graybill, 74 Pa. St. 17, 23.

[18] Nease v. Ætna Ins. Co. 32 W. Va. 283, 9 S. E. 233, 18 Ins. L. J. 541.

[19] Washington Mill Emery Manufacturing Co. v. Connecticut Ins. Co. 135 Mass. 503, 12 Ins. L. J. 181.

[20] New Orleans Ins. Co. v. Gordon, 68 Tex. 144, 3 S. W. 718.

[1] Kyte v. Commercial Union Assur. Co. 144 Mass. 43, 45, 10 N. E. 518.

[2] Gibb v. Fire Ins. Co. 59 Minn. 267, 50 Am. St. Rep. 405, 61 N. W. 137.

[3] Lingelbach v. Theresa Village Mutual Fire Ins. Co. 154 Wis. 595, 143 N. W. 688.

trust when the insurance was effected, is not a change in the title or possession, within the meaning of a condition in a policy making it void if a change takes place in the title or possession without the consent of the insurer.[4] A clause avoiding a policy if the property is sold, or any change takes place in title or possession, has no application where, in addition to insuring the interest of the assured in the whisky, as owner and upon commission, the company also assumed the risk of his interest because of the tax on it; and, the whisky having been burned, liability for the tax attached.[5] Change of title by deed from mortgagor to mortgagee in the interval between the application by the mortgagee for insurance on the property and delivery of the policy, will not render the insurance void for false description of the property as belonging to the mortgagor, if the facts of the existence of the mortgage and the pendency of foreclosure proceedings are stated in the application.[6] And a fire policy, which provides that it shall be void if the risk is increased in any manner; or if the property is sold, or any change takes place in the title; or if the premises are used for any other purpose than is mentioned in the application,—is not avoided by a sale of parts of a 280-acre tract upon which the insured building is situated and the purchase of other lands, nor by any change made in the use of the insured premises, unless the risk is increased, or the insurer's security is decreased, thereby.[7] The execution and delivery of a deed and papers relating to the title to the United States District Attorney in compliance with a contract for sale, does not constitute a transfer or devestment of the title, where such title was not to pass until final acceptance by the government, and where at the time of the fire the required conditions of sale and acceptance had not been complied with and the sale was not consummated until after the fire. In such case the District Attorney was only the agent of the government for the transmission of the papers to the attorney general who alone was authorized to pass upon their sufficiency.[8] A sale by, and resale to, the owner of property insured, all being one transaction and without change of possession, do not violate a condition in the policy, that any change in either the title or possession of the subject matter of the insurance

[4] Georgia Home. Ins. Co. v. Bartlett, 91 Va. 305, 50 Am. St. Rep. 832, 21 S. E. 476.

[5] Germania Fire Ins. Co. v. Thompson, 95 U. S. 547, 24 L. ed. 487.

[6] Pioneer Savings & Loan Co. v. Providence Washington Ins. Co. 17 Wash. 175, 38 L.R.A. 397, 49 Pac. 231.

[7] Russell v. Cedar Rapids Ins. Co. 78 Iowa, 216, 4 L.R.A. 538, 42 N. W. 654.

[8] German Fire Ins. Co. v. Duncan. 140 Ky. 27, 130 S. W. 804, 39 Ins. L. J. 1508.

shall render the policy void.[9] Dealings with insured property not calculated to produce changes in ownership, or supply a motive to destroy or weaken the interest of the insured, will not ordinarily avoid the policy.[10] The fact that insurer is a mutual company and that its constitution provides that whoever sells or exchanges his property leaves the company by such acts and loses his rights does not save it from liability upon a policy issued to a husband on his wife's property, as provisions for forfeiture must be strictly construed against the insurer and the issue and acceptance of such a policy does not conflict with but is consistent with such provision.[11]

**§ 2291a. Alienation, change of title, etc.: waiver.**—If it is stipulated that assent of the company must be indorsed in writing on the policy before transfer of the property is made, or the policy shall be void, a waiver by the company of such provision, in order to be effective, must be an intentional one; a mere notice of the transfer to the company, or a failure by the company to notify the insured of its disapproval, is not a sufficient waiver.[12] In order to recover in such a case, the insured must show some actual waiver of the condition requiring written consent, or else a parol consent.[13] Notice of the sale of property insured, and the assent of the insurer thereto, together with notice to the local agent of a mortgage taken to secure the payment of a portion of the purchase price, is sufficient to operate as an assent on the part of the insurer to the giving of the mortgage, though the policy of insurance contains a provision that if the property shall be thereafter mortgaged without the consent of the company being endorsed thereon, it shall become null and void, and that no agent shall have power to alter or change the terms of the policy, or make any indorsement thereon.[14] And where the evidence clearly shows that before the policy was issued by insurer's agent, who wrote and delivered the same, was informed by assured and knew of the existence of the mortgage in question, there is no violation of the condition against sale or transfer of the property or change in the interest, title, or possession. In addition

[9] Schloss & Kahn v. Westchester Fire Ins. Co. 141 Ala. 566, 109 Am. St. Rep. 58, 37 So. 701.

[10] Schloss & Kahn v. Westchester Fire Ins. Co. 141 Ala. 566, 109 Am. St. Rep. 58, 37 So. 701.

[11] Kludt v. German Mutual Fire Ins. Co. 162 Wis. 637, 45 L.R.A. (N.S). 1131, 140 N. W. 321, 42 Ins. L. J. 725.

[12] Armstrong v. Agricultural Ins. Co. 130 N. Y. 560, 29 N. E. 991, 21 Ins. L. J. 431; Gibbs v. Richmond County Mutual Ins. Co. 9 Daly (N. Y.) 203; Girard Fire & Marine Ins. Co. v. Hebard, 95 Pa. St. 45.

[13] Lett v. Guardian Ins. Co. 125 N. Y. 82, 20 Ins. L. J. 176, 25 N. E. 1088.

[14] German Ins. Co. v. York, 48 Kan. 488, 30 Am. St. Rep. 313, 29 Pac. 586.

such clause has reference only to subsequent violations.[15] A breach of condition as to change of title by chattel mortgage is waived where assurer's agent had knowledge thereof and so steps are taken to avoid or cancel the policy or return the premium.[16] So knowledge of assurer's agent of the facts as to the sale of the property and that the delivery of the deed, in escrow, would be made on payment of the purchase money with a request that he be notified when the transaction was consummated, operates as a waiver of forfeiture.[17] If the approval of the secretary of a mutual company is required to validate a sale or assignment of the policy, and before such approval can be obtained by the purchaser of property insured in said company, a loss by cyclone occurs the contract is terminated although the vendor had assigned the policy to the vendee, and the approval thereof was given after the loss, it being held that such subsequent approval was against public policy and the insurance could not reattach.[18] The statement of insurer's secretary, made after the fire, that this clause as to forfeiture for commencement of foreclosure proceedings would not be relied on, is not such a consent as to constitute a waiver of the right to claim a forfeiture, as the policy was then void and could not be thereby revived.[19] The indorsement upon an insurance policy of a clause, "subject to all the conditions of the policy, loss payable to" a certain person named "as his interest may appear," is not sufficient, although the person named is the mortgagee, to show consent to a chattel mortgage, where, by the terms of the policy, it is to become void if the property becomes encumbered by such mortgage, and no provision of the policy can be waived unless such waiver shall be written upon the policy, while the person named has an interest as mortgagee of the real estate sufficient to support the indorsement.[20] Nor is the forfeiture waived in case of an absolute conveyance and change of title by the acceptance by the agent of insurer of the purchaser's notes in payment of the premium and the collection thereof without assurer's knowledge, consent or ratification.[1]

§ 2292. **Change in possession.**—A condition in a policy of insurance that it shall become void by any change in the possession of

[15] Cowart v. Capital City Ins. Co. 114 Ala. 356, 62 So. 574, 27 Ins. L. J. 246.

[16] Hamilton v. Fireman's Fund Ins. Co. — Tex. Civ. App. —, 177 S. W. 173.

[17] British America Assur. Co. v. Francisco, 58 Tex. Civ. App. 75, 123 S. W. 1144.

[18] Harper v. Michigan Mutual Tornado, Hail & Windstorm Ins. Co. 173 Mich. 459, 139 N. W. 27.

[19] Findlay v. Union Mutual Fire Ins. Co. 74 Vt. 211, 93 Am. St. Rep. 885, 52 Atl. 429, 31 Ins. L. J. 986.

[20] Atlas Reduction Co. v. New Zealand Ins. Co. 138 Fed. 497, 71 C. C. A. 21, 9 L.R.A.(N.S.) 433.

[1] Ritchie County Bank v. Firemen's Ins. Co. 55 W. Va. 261, 47 S. E. 94.

the property insured must be held to refer to some change in the possession during the term of the policy, and not to one made before the application for the policy.[2] Change in the possession of the premises insured will not avoid a policy of insurance made payable to a mortgagee, if he was not aware of such change and the policy provided that it should not affect him unless he should fail to give notice thereof after the change became known to him.[3] Though the policy may provide that in case of the sale of the subject of the insurance written notice must be given to the company and its assent to such sale indorsed on the policy, and if the company cancels the policy, it shall refund a ratable proportion of the premium; yet, if the company having the policy in its possession is orally notified of a sale and orally consents thereto, and does not offer to return the unearned premium, this will operate as a waiver of the conditions as to consent and notice.[4]

§ 2293. **Sales by partner: alienation, assignment, and change of title or possession clauses.**—The question whether a sale by one partner to another of his interest in the partnership property is in violation of the conditions that if the insured property be "alienated by sale or otherwise," or if the "property be sold or conveyed," the policy shall be void has been the subject of frequent consideration by the courts, and is so unsettled that no definite conclusive rule applicable to all the states can be deduced; that is, if the rule stare decisis be adhered to by the several courts. The decisions upon this point, as well as those covering sales by a partner to a third person, or those relating to taking in a new partner, etc., will be considered under the next following sections.

§ 2293a. **Sale by one partner to another: introduction of new partner: Federal decisions.**—Where the policy provided that it should be void "if the property insured be sold or transferred, or any change take place in the title except by succession by reason of the death of the insured, whether by legal or judicial process or voluntary transfer or conveyance," it was held that the sale or transmutation of the various interests of the partners between themselves alone did not avoid the policy, but that the introduction of a new partner with an investiture of interest in him which he did not be-

[2] Allemania Fire Ins. Co. v. Peck, 133 Ill. 220, 23 Am. St. Rep. 610, 24 N. E. 538. See also Cowart v. Capital City Ins. Co. 114 Ala. 356, 22 So. 574, 27 Ins. L. J. 246; Pioneer Savings & Loan Assoc. v. Providence-Washington Ins. Co. 17 Wash. 175, 38 L.R.A. 397, 49 Pac. 231, 27 Ins. L. J. 144.

[3] National Bank v. Union Ins. Co. 88 Cal. 497, 22 Am. St. Rep. 324, 26 Pac. 509.

[4] Moffitt v. Phenix Ins. Co. 11 Ind. App. 233, 38 N. E. 835, 24 Ins. L. J. 154.

fore have would defeat a recovery.[5] But in an earlier case it was held that a condition that the policy should be void if the property "be sold or conveyed" was not broken by the subsequent formation of a co-partnership between insured and third parties, and the placing of the insured property in the copartnership assets. The policy still covered the interest remaining in the assured.[6] And an agreement under which one is merely to participate in the profits of a partnership, does not pass such an interest in the property of the firm as will invalidate a policy of insurance which provides against a transfer or change of title or possession against the real intention of the parties.[7] But where the original policy was issued to the sole owner of the property insured and continued by renewals to a period beyond the time of loss and some time prior thereto a partnership had existed between insured and his sons of which firm he was a silent partner but he had turned over the business to them as active partners and surrendered the custody of the goods in their entirety to them, so that by said change assured ceased to be the sole owner of the goods described in the renewal policy and the firm became the owners of which facts no notice was given assured prior to the loss, it was held that there was such a change as to the goods insured, as to avoid the policy under a provision that the policy should cease to be in force as to any property insured which should pass from insured to any other person except by operation of law unless notice be given assurer.[8]

**§ 2293b. Sale by one partner to another: Alabama.**—In Alabama, if the policy contains a provision that the assignment of the same, or any interest therein or an alienation of the property without the assent of the company indorsed thereon, avoids it, such a sale, and the assignment by the retiring partner to his copartners, who con-

[5] Drennen v. London Assur. Co. 20 Fed. 657, rev'd 113 U. S. 51, 28 L. ed. 919, 5 Sup. Ct. 341, aff'd 116 U. S. 461, 29 L. ed. 688, 6 Sup. Ct. 442.

On effect of transfer by one partner of his interest in insured property to other members of firm as a prohibited change or alienation of interest, see note in 18 L.R.A.(N.S.) 482.

On formation of partnership as affecting a change of title or ownership, see note in 21 L.R.A.(N.S.) 442.

[6] Scanlon v. Union Fire Ins. Co. 4 Biss. (U. S. C. C.) 511, Fed. Cas. No. 12,436.

[7] London Assurance Corp. v. Drennen, 116 U. S. 461, 26 L. ed. 688, 6 Sup. Ct. 442. *Cited* in Paul v. Cullum, 132 U. S. 539, 544, 33 L. ed. 432, 10 Sup. Ct. 151; Duden v. Maloy, 63 Fed. 183, 188, 11 C. C. A. 123, 26 U. S. App. 187; Baker v. Safe Deposit & Trust Co. 90 Md. 744, 759, 78 Am. St. Rep. 463, 45 Atl. 1028; Cannon v. Brush Electric Co. 96 Md. 446, 469, 94 Am. St. Rep. 598, 54 Atl. 121; Heye v. Tilford, 37 N. Y. Supp. 751, 2 App. Div. 350.

[8] Royal Ins. Co. v. Martin, 192 U. S. 149, 164, 48 L. ed. 385, 24 Sup. Ct. 247.

tinue the business, of his interest in the policy, does not avoid it.[9] In another case in this state where a policy was issued on a debtor's life for the benefit of his creditor, a copartnership, and there was a stipulation against assignment except with the insurer's consent, it was held that the transfer without the company's approval by one partner to another of the former's interest did not operate to defeat the right of action of the transferee. It appeared, however, that the transferring partner died before action brought, which was held to vest in the surviving partner the sole right to sue.[10]

§ 2293c. **Sale by partner to third party: California.**—In California, the transfer by one partner to a third party without the stipulated assent of the insured avoids the policy.[11]

§ 2293d. **Sale by one partner to another: Colorado.**—In Colorado, the transfer between partners is not a breach of the condition.[12]

§ 2293e. **Introduction: new partner: Connecticut.**—If a policy upon partnership property provides that it shall be void if there is a change in interest, title, or possession, it is held that the taking in of a new partner will be such a change, within the meaning of the condition, as will avoid the policy.[13]

§ 2293f. **Introduction of new partner: Florida.**—If a policy is issued conditioned to be void if there be a sale or transfer of the insured property, or any change in the title, or possession, the admission of a stranger to the firm, who is simply to have a certain interest in the profits of the business, but no interest in the properties of the firm, is not within the prohibition.[14]

[9] Burnett v. Eufaula Home Insurance Company, 46 Ala. 11, 7 Am. Rep. 581, criticised as carrying the "doctrine farther than was warranted by the cases to which it referred as authority, and farther than the rules of fair construction would permit," etc. 1 Wood on Fire Ins. (2d ed.) p. 739.

[10] Piedmont & Arlington Life Ins. Co. v. Young, 58 Ala. 476, 29 Am. Rep. 770.

[11] Shuggart v. Lycoming Fire Ins. Co. 55 Cal. 408.

[12] Sun Fire Office v. Wich, 6 Colo. App. 103, 39 Pac. 587.

*Citing and following: Louisiana.*—Dermani v. Home Mutual Insurance Co. of New Orleans, 26 La. Ann. 69, 21 Am. Rep. 544.

*Massachusetts.*—Powers v. Guardian Fire & Life Ins. Co. 136 Mass. 108, 49 Am. Rep. 20.

*Mississippi.*—New Orleans Ins. Assoc. v. Hollberg, 64 Miss. 51, 8 So. 175.

*New Hampshire.*—Pierce v. Nashua Fire Ins. Co. 50 N. H. 297, 9 Am. Rep. 235.

*New York.* — Hoffman v. Aetna Fire Ins. Co. 32 N. Y. 405, 407, 88 Am. Dec. 337.

*Ohio.*—West v. Citizens' Ins. Co. 27 Ohio St. 1, 22 Am. Rep. 294.

*Texas.*—Texas Banking & Insurance Co. v. Cohen, 47 Tex. 407.

*Virginia.*—Virginia Fire & Marine Ins. Co. v. Vaughan, 88 Va. 832, 14 S. E. 754.

[13] Malley v. Atlantic Fire & Marine Ins. Co. 51 Conn. 222.

[14] Hanover Fire Ins. Co. v. Lewis,

**§ 2293g. Sale with reservation of interest to partner: mortgage of entire interest: Georgia.**—A mere agreement of sale between partners made during the term of the insurance and before loss does not vitiate a policy taken out by partners in their firm name upon partnership personalty, notwithstanding, that by such contract one of the partners sells his interest in the insured property to the other partner, where there is also a reservation of the title until payment of the purchase price, and it appearing that at the time of loss payment in full had not been made, and that the selling partner still retained a half interest in said property.[15] In the case so deciding the policy was stipulated to be void if there should be a mortgage, bill of sale, or other lien upon the property, or any part of it, either prior or subsequent to the issuance of said policy without the fact being indorsed thereon, or if any change should take place in the title or possession of the property, whether by sale, transfer, conveyance, legal process, or judicial decree, or if the policy before loss be assigned without insurer's consent, or if the insured was not the sole, absolute, and unconditional owner of said property. In another case, one partner, after the policy was issued, gave to another partner a mortgage, not on his undivided interest in the partnership property, but upon the whole of it, that is upon the entire stock of goods insured, including not only the mortgagor's interest, but also that of a third partner, and it was held that said mortgage did not constitute such an encumbrance as to avoid the policy under a stipulation voiding it for encumbering personal property by a chattel mortgage, and it was declared by the court, per Simmons, C.J., that the mortgage contemplated by this clause was a mortgage by the partnership, or perhaps a mortgage by one partner with the consent of the others to a stranger or mortgagee without any interest in the partnership assets. The court also briefly makes a distinction between said clause and one forbidding alienation. It further appeared in the statement of facts, although not discussed as a point in the opinion, that said mortgage was canceled by record, and that the firm dissolved leaving said mortgagor the surviving member to whom the policy was regularly assigned before the loss occurred.[16]

**§ 2293h. Sale to partner or third person: Illinois.**—In Illinois, a condition in a policy of insurance requiring notice to be given to the company of any contract to sell the property insured must be

28 Fla. 209, 10 So. 297, 21 Ins. L. J. 316.

[15] Georgia Home Insurance Company v. Hall, 94 Ga. 630, 21 S. E. 828.

[16] Alston v. Phoenix Ins. Co. 100 Ga. 287, 27 S. E. 981, 27 Ins. L. J. 77.

held to apply only to contracts of sale between insured and third parties, and can have no application to contracts between insured themselves for the sale or transfer of their respective interests as partners or joint owners, so long, at least, as the party selling retains an insurable interest in the property insured.[17] In the case so deciding the court said: "The preponderance of authority in this country is clearly to the effect that such condition is not broken by a sale by one partner to another of his joint interest, at least, so long as the party selling retains an insurable interest. . . . The actual interests of partners in the firm property are necessarily fluctuating, and there seems to be no particular reason why the insurers should wish to keep the ownership unchanged as between them, so long as all retain an insurable interest." This opinion refers to Dix Mercantile Insurance Company,[18] and says: "The court . . . held that the assignment by a partner to his copartners of all his interest in the property insured was a breach of the condition of the policy in that case. It should be observed, however, that said condition provided that the policy should be void in case of 'any transfer or change of title of the property insured, or of any undivided interest therein,' a condition which may well be construed as applying even to a sale, by one partner to the other partners, of his interest in the partnership property." In this last case the condition was, "in case of any transfer or change of title in the property insured by this company, or of any undivided interest therein, such insurance shall be void and cease." There was a transfer of an undivided interest, and in the opinion the court said: "The intention of the company was manifestly as urged, that no stranger should come into the management and care of the property without their consent. Knowing the parties with whom they were contracting, relying upon the fidelity and circumspection of each and every one of them, they were willing to take the risk at the premium stipulated. It was an object of the first importance with them to secure for the property the guardianship and care of faithful and trustworthy men, and for this they were willing, for the premium, to intrust the property to the care of Sinclair, Dicks, and Harris, but not to the care of Dicks and Harris alone. Is it not plain that the insured may be as greatly prejudiced by removing one to whom, with others, they had trusted the guardianship of valuable property, as by the introduction of a stranger? The one removing from the concern may have been

[17] Allemania Fire Insurance Company v. Peck, 133 Ill. 220, 23 Am. Rep. 610, 24 N. E. 538.

[18] 22 Ill. 272.

the very one in whose vigilance, fidelity, and care the greatest share of confidence was reposed, and by his so removing the hazard is increased to the assurer without any corresponding increase of premium."

§ 2293i. **Sale by one partner to another: Indiana.**—In Indiana, where the policy was to be void "in case of any sale, transfer, or change of title of any property insured by this company or of any undivided interest therein," it was held that a sale by one partner to another of his interest in partnership property would avoid the policy.[19]

§ 2293j. **Sale with reservation of interest to partner: sale by one partner to another: division of goods: Iowa.**—If the policy stipulates against any change of possession, it is avoided, and there is a change of possession if not of title, where it is made to a firm which as such owns and has possession of the stock insured, and the firm dissolves, the remaining partner taking possession of the entire stock and giving his notes therefor, doing the business in his name, although the retiring partner reserves the right to see that the stock is kept to its value at the time the change took place, and, if there was a failure to pay on time, said retiring partner's interest to continue until payment was made.[20] Under an early case in this state a transfer of goods by the owner to a firm of which he is one of the partners is not such an alienation as avoids the contract under a condition which voids the policy in case of any transfer or change of title, since a partner by a sale of the partnership property to the firm does not actually part with the interest which he actually holds in such property.[1] This last case is distinguished in a later one in the same state where the condition was "if the title of the property is transferred, encumbered or changed" and it was held that said condition was broken and the contract terminated by the sale and transfer by one partner to another of his interest in the firm property; but here, before the loss occurred the partnership was dissolved and one partner brought the interest of the other and continued to carry on the business. Some stress was also placed by the court upon the word "changed" as used in the above condition,

[19] Hartford Fire Ins. Co. v. Ross, 23 Ind. 179, 180, 85 Am. Dec. 452.

[20] Jones v. Phoenix Ins. Co. 97 Iowa, 275, 66 N. W. 169.

[1] Cowan v. Iowa State Ins. Co. 40 Iowa, 551, 20 Am. Rep. 583. The court per Beck, J., says that in certain cases "doctrines are found inconsistent with the conclusion we have reached, but we do not think the decisions themselves are in conflict therewith. It will readily be seen that by the transfer of the interest of a partner in the joint property of his copartner and his withdrawal from the firm, the parties in interest under the policy are changed. In the case before us they remain the same; the change only affecting the property covered—the extent of the lia-

it being declared that: "We are bound to presume that the parties intended by its use to express some provision or condition which was not otherwise expressed."[2] This last decision is followed in another case in the same state which also approves the distinction made between the two preceding cases. The condition here was: "if the property be sold or transferred or any change takes place in the title or possession," by "voluntary transfer or conveyance," etc.; the property was orally sold and delivered by two of the partners to the other who assumed all the obligations of the partnership and the policy was issued to the partnership in its name as partners and not to them separately.[3] But a division of goods belonging to a partnership, made in contemplation of a dissolution thereof, but not otherwise completed, does not constitute a change of title, interest, or possession, even though, as part of the arrangement, one half the goods are removed the remaining one half being burned while in the sole custody of one of the partners.[4]

**§ 2293k. Sale by one partner to another: Louisiana.**—In a case which arose in Louisiana, the policy contained the following condition: "This policy is not assignable unless by consent of this corporation manifested in writing, and in case of any transfer by sale, or otherwise, without such consent, this policy shall from thenceforth be void and of no effect." The court held that this did not apply to the sale by one partner to his copartner of his interest in the firm, and in this connection said: "Was it the understanding of the parties that the plaintiff could not buy out his partner and continue the business without the consent of the defendants on pain of forfeiting the policy? The prohibitory clause must be construed strictly. And if its application to the case before us be doubtful, the doubt must be construed against the defendants, the obligors in the contract of insurance. It is true the clause expressly prohibits the transfer, by sale or otherwise, of the policy, but it does not expressly prohibit a change of interest among the partners, nor does it expressly prohibit the assignment of the interests of one partner to the other. If the defendants had intended to place such a limitation upon the rights of the assured, the intention should have been expressed in the instrument, and not left to inference, because a prohibitory clause cannot be extended by implication. . . . In the course of business, partners often become dissatisfied and change the firm by one partner transferring

bility of defendant under the policy, in case of a loss and without abridging that liability."

[2] Hathaway v. State Ins. Co. 64 Iowa, 229, 52 Am. Rep. 438, 20 N. W. 164, Reed, J.

[3] Oldham v. Anchor Mutual Fire Ins. Co. 90 Iowa, 225, 57 N. W. 861.

[4] Runkle v. Hartford Ins. Co. 99 Iowa, 414, 68 N. W. 712, 26 Ins. L. J. 320.

his interest to the other, as was done in this case. This occurrence is so common that the parties are presumed to have contracted, knowing it might arise during the period of the insurance; and if it was desirable to put a limitation upon the right of the assured in this respect, a stipulation to that effect should have been inserted in the instrument. By the assignment no new party is introduced into the contract whom the defendants might not be willing to trust.[5]

§ 2293l. **Sale by one partner to another and mortgage back: Massachusetts.**—In Massachusetts, it is held that a sale by one partner to his copartner and a mortgage back of the seller's share of the partnership property will not avoid a policy of insurance issued to the partnership and conditioned to be void, if without the written consent of the insurer "the said property shall be sold," or "the situation or circumstances affecting the risk shall, by or with the advice, agency, or consent of the insured, be so altered as to cause an increase of risk." [6]

§ 2293m. **Introduction of new partner: Michigan.**—If the policy forbids a change of title, the forming of a partnership between the sole owner and a stranger is held to avoid the policy.[7]

§ 2293n. **Sale by one partner to another: Mississippi.**—In Mississippi, it is held that a fire policy, conditioned to be void in case of the sale of insured property, is not avoided by a sale by one partner to the other of his interest in the property insured.[8]

§ 2293o. **Sale by one partner to another: mortgage back: Missouri.**—In a case decided in the Missouri appellate court, S and N were partners. They obtained a policy of insurance upon their property conditioned to be void if the property "be sold or transferred or any change take place in the title or possession," and subsequently admitted K to the partnership, and before loss S sold his partnership interest to N and K and took a chattel mortgage back; it was held there was such a change in title and possession as to avoid the policy.[9] So a dissolution of partnership before loss and a division of the goods, so that each partner owns distinct portions, is held to avoid a policy conditioned to be void in case of "any transfer or change of title in the property insured." [10] Another case indirectly decides that a sale between partners avoids the policy in

[5] Dermani v. Home Mutual Ins. Co. of New Orleans, 26 La. Ann. 69, 21 Am. Rep. 544.

[6] Powers v. Guardian Fire & Life Ins. Co. 136 Mass. 108, 49 Am. Rep. 20.

[7] McEwan v. Western Ins. Co. 1 Mich. N. P. (Brown's) 118.

[8] New Orleans Ins. Assoc. v. Holberg, 64 Miss. 51, 8 So. 175.

[9] Card v. Phoenix Ins. Co. 4 Mo. App. 424.

[10] Dreher v. Aetna Ins. Co. 18 Mo. 128.

this that it is held that there was a waiver by reason of an inquiry being made of insurer's agent, by a partner who was negotiating a sale of his interest, whether such a sale would affect his policy and the agent advised him that it would not.[11]

**§ 2293p. Sale by one partner to another: Nebraska.**—A sale or transfer of insured property and of his interest by one partner to another, is not within the meaning of an inhibition in the policy against a sale transfer, or alienation of the insured property without the consent of the insurer.[12] And a conveyance by one partner to the other of his interest in partnership real estate, is not a conveyance within the meaning of a fire insurance policy making the policy void in case of a conveyance of the property.[13]

**§ 2293q. Sale by one partner to another: New Hampshire.**—In New Hampshire, a sale by one partner to another of his joint interest in the property insured is not such an alienation as will avoid a policy conditioned to be void in case of alienation by sale or otherwise.[14]

**§ 2293r. Sale by one partner to another: introduction of new partner: New York.**—Where policy issued to D and C insuring partnership property, was conditioned to be void "by the sale or transfer of any change in title or possession of the property insured," it was held that the dissolution of the partnership and the transfer of C's interest in the property to D, and the giving of a chattel mortgage by D, did not work such a transfer of interest as to avoid the policy.[15] In another case, where a policy held by partners in common was conditioned that "when the property insured shall be alienated by sale or otherwise the policy shall be void," a conveyance by one partner to the other partners without the company's assent, was held a voidance of the policy so far as the third partner's rights had not intervened.[16] In Hoffman v. Aetna Fire Insurance Company,[17] the question was exhaustively considered and the New York decisions were carefully reviewed. In this case there had been a policy issued to the firm covering partnership goods and goods held in trust or on commission. The policy provided that "if said property be sold or conveyed" the policy should be void. One of the partners retired subsequently to the issuance of the

[11] Millis v. Scottish Union & National Ins. Co. 95 Mo. App. 211, 68 S. W. 1066.

[12] Phenix Ins. Co. v. Holcombe, 57 Neb. 622, 73 Am. St. Rep. 532, 78 N. W. 300, 28 Ins. L. J. 238.

[13] German Mutual Fire Ins. Co. v. Fox, 4 Neb. (Unof.) 833, 63 L.R.A. 334, 96 N. W. 652.

[14] Pierce v. Nashua Fire Ins. Co. 50 N. H. 297, 9 Am. Rep. 235.

[15] Dresser v. United Firemen's Ins. Co. 45 Hun (N. Y.) 298.

[16] Tillou v. Kingston Mutual Ins. Co. 5 N. Y. 405.

[17] 32 N. Y. 405, 88 Am. Dec. 337.

policy and transferred his interest to the remaining members of the firm. After his retirement a loss occurred, and the company refused to pay, alleging a violation of this condition. A verdict was found for the plaintiff in the lower court and was affirmed on appeal. In this case the court said: "The weight of judicial authority in this state is against the doctrine that a policy issued to a firm is forfeited by a transfer of interest as between the parties assured." And again, after reviewing the cases, the court continues: "It is quite apparent, therefore, that in this state there is a decisive preponderance of judicial authority against the recognition of a sale by one to another of the assured as cause for forfeiture within the meaning of the proviso. But if the authorities were in equipoise, and the solution of the question depended on general reasoning and the application of settled and familiar principles of law, our conclusion would be in accordance with that of the court below." Under another decision in the same state it is held that the taking of a partner by the assured, and the transfer to him of an interest in the property, avoids a policy containing a provision against sale, transfer, or any change in title or possession, though the policy states that insurer will make good to insured, his heirs, etc., all immediate loss that results from destruction from the perils insured against.[18] In this case the policy was issued to a sole trader, who subsequently took in a partner and the condition was that the policy should be avoided in case "the property be sold or transferred, or any change takes place in title or possession." The court in this case said: "The right of the insurance company was in no wise invaded when this court held that a sale by one partner to another of his interest, where both were insured, did not avoid the policy. It is only when a stranger is brought into contractual relations with the insurance company that the consent of the latter is essential." In a later case in this state it is held that if a policy is issued to a firm upon partnership property, and provided that it shall be void if the interest of the insured be other than the sole and unconditional ownership, one of the members of the firm may assign his interest therein without affecting the sole and unconditional ownership.[19] And the interest of partners in partnership property continues the same after dissolution of the partnership until such interest is disposed of in some manner, and where there was a change in the firm name in contemplation of dissolution but

[18] Germania Fire Insurance Company v. Home Insurance Co. 114 N. Y. 195, 43 Am. St. Rep. 749, 26 L.R.A. 591, 39 N. E. 77, 24 Ins. L. J. 382.

[19] Wood v. American Fire Ins. Co. 149 N. Y. 382, 385, 52 Am. St. Rep. 733, 44 N. E. 80, aff'g 78 Hun, 109, 29 N. Y. Supp. 250.

the business was continued with reference to past transactions and present assets under assured's management with the same materials or property and the same books until formal dissolution and thereafter there was a partial loss it was held that there was no such change of title as to forfeit the insurance.[20] And under the standard form of policy it is held that the rule is not changed by which prior thereto a policy was not forfeited by a transfer of interest between the assured parties and therefore a policy issued to a firm on partnership property was not avoided by a dissolution and a transfer of all the copartnership assets to one of the partners who thereafter continued the business alone but under the firm name illegally using the word "company" contrary to the statute.[1]

§ 2293s. **Introduction of new partner: North Carolina.**—If the policy stipulates that a sale of the property will avoid it, the admission of a new member is within the condition.[2]

§ 2293t. **Sale by one partner to another: introduction of new partner: Ohio.**—A condition against sale or transfer is not broken by a sale of a part of the interest of the insured therein; as where he takes a partner, and the property becomes vested in the partnership. After such sale the partner insured may maintain an action in his own name, but can recover only to the extent he has been damaged.[3] In the case so deciding the stipulation was: "If . . . said assured should sell or transfer the property thereby insured, that said policy should become null and void." The court said: "It was competent for the policy to provide expressly that a sale for a part of the property or of an interest therein should avoid the policy. . . . It was competent for the parties to provide in unambiguous terms that if the assured received into the business without the consent of the insurer a partner, the policy should become void. This was not done, and we think . . . that the sale and transfer resulting from the reception of a partner did not avoid the policy."[4] It was held under an earlier decision that when the policy provides that the assignment of some or of any interest therein without the consent of the company indorsed thereon avoids it, such a sale and the assignment by the retiring partner to his copartners, who continue the business, of his inter-

[20] Roby v. American Central Ins. Co. 120 N. Y. 510, 24 N. E. 808.

[1] Loeb v. Firemens Ins. Co. 79 N. Y. Supp. 510, 78 App. Div. 113, aff'g 77 N. Y. Supp. 106, 38 Misc. 107.

[2] Biggs v. North Carolina Home Ins. Co. 88 N. Car. 141, 144.

[3] Blackwell v. Miami Valley Ins. Co. 48 Ohio St. 533, 14 L.R.A. 431, 29 Am. St. Rep. 574, 29 N. E. 278.

[4] Blackwell v. Miami Valley Ins. Co. 48 Ohio St. 533, 14 L.R.A. 431, 29 Am. St. Rep. 574, 29 N. E. 278.

est in the policy, does not avoid it.[5] The code, however, allowed the parties in interest to sue in their own names.

**§ 2293u. Sale by one partner to another: Pennsylvania.**—In Pennsylvania, while it was held that a transfer by one tenant in common to a cotenant, or from one partner to another, against a condition to that effect, would avoid the policy, it was also held that if the policy was to run "so long as the yearly payments stipulated are continued," and after an assignment, which was approved by the company, one of the partners insured transferred his interest to his copartner, who thereafter for several years made the yearly payments, but gave no notice to the company of the transfer. It was further held that the policy was not necessarily avoided, but that it was a question for the jury as to the company's knowledge in the matter showing their agreement to the alienation, and thereby a waiver.[6] But a sale upon dissolution of the partnership by one partner to another of his interest in the business constitutes an alienation by "sale or otherwise." [7]

**§ 2293v. Sale by one partner to another: business sold but continued under tradename: Tennessee.**—In Tennessee, it has been held that where two partners take an insurance upon their stock of goods and the policy is conditioned to be void in case of an assignment, "whether of the whole policy or of any interest therein," and during the continuance of the policy one of said partners sells and assigns his interest in said stock of goods to the other, the risk continues as to the interest of the assignee in the goods which he owned at the time of the insurance, and he may recover in an action brought in the name of the firm for his use and loss of his original interest, but not for a loss to the interest of his co-partners so assigned to him; for that has ceased to be covered by the policy.[8] The fact that property is insured in the tradename under which the business is conducted by one procuring the insurance, does not prevent a change in the personnel of the members of the concern from effecting a change in the title or ownership of the property, within the meaning of a clause of the policy avoiding it in case of such change, although the tradename is continued by the new owners of the business. The contract being a personal one the policy is forfeited by such sale.[9]

[5] West v. Citizens' Ins. Co. 27 Ohio St. 1, 22 Am. Rep. 294.

[6] Buckly v. Garrett, 47 Pa. St. 204. And see also opinion of Loomis, J., in Lockwood v. Middlesex Mutual Ins. Co. 47 Conn. 553, 555.

[7] Finley v. Lycoming County Mutual Ins. Co. 30 Pa. St. 311, 72 Am. Dec. 705.

[8] Hobbs v. Memphis Ins. Co. 1 Sneed (33 Tenn.) 444.

[9] American Steam Laundry Co. v.

**§ 2293w. Sale by one partner to another: sale with mortgage back: sale with vendor's lien: Texas.**—In this state, where a policy issued to a partnership of three persons, provided that it was "not assignable unless by consent of this corporation manifested in writing, and, in case of any transfer, by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect," it was held not to be avoided by the sale by one partner to his copartner of his interest in the partnership property.[10] A mortgage taken by a retiring partner who sells the insured property to his remaining copartner who continues in the business and gives him a purchase money mortgage is not within a condition invalidating insurance for a chattel mortgage or prohibiting a change of interest without consent of insured since the principle applies that if assured retains any interest in the property legal or equitable it remains operative to the extent so retained.[11] A sale of an interest in a partnership to the others, accepting part of the purchase money, and putting one of the vendees in charge of a part of the property is such a sale as to constitute a breach of a condition against a change in interest title or possession, even though a vendor's lien for the unpaid portion of the purchase price is retained.[11a]

**§ 2293x. Sale by one partner to another: bequest by partner: Virginia.**—In Virginia, where one partner in insured property transfers his interest therein to the other partner, recovery for loss thereof is not barred by reason of a clause in the policy forbidding any change in the title or interest of insured.[12] And where one of the assured firm was a married woman whose interest therein was managed by her husband and she died bequeathing her property to him, remainder to her son, and by the testators' direction and consent of all parties interested in the business it went on the same as before, it was decided that there was no such change as avoided the policy under a prohibition against any change in title or interest of assured in or to the property in any way without notice.[13]

**§ 2293y. Agreement for partnership not consummated: Washington.**—In this state a mere agreement to form a partnership and the

Hamburg-Bremen Fire Ins. Co. 121 Tenn. 13, 21 L.R.A.(N.S.) 442n, 113 S. W. 394.

[10] Texas Banking & Insurance Co. v. Cohen, 47 Tex. 406, 26 Am. Rep. 298.

[11] Delaware Ins. Co. v. Hill, — Tex. Civ. App. —, 127 S. W. 283.

[11a] Mechanics' & Traders' Ins. Co. v. Davis, — Tex. Civ. App. —, 167 S. W. 175. "The legal title, by reason of the sale, immediately vested in his partners, and they could have enforced the contract against him." Id. 176—Rice, J.

[12] Virginia Fire & Marine Ins. Co. v. Vaughn, 88 Va. 832, 14 S. E. 754; Virginia Fire & Marine Ins. Co. v. Saunders, 84 Va. 215, 4 S. E. 584.

[13] Virginia Fire & Marine Ins. Co. v. Thomas, 90 Va. 658, 19 S. E. 457.

performance of acts consistent with the existence of the partnership agreed upon will not invalidate the policy where the partnership is in fact never entered upon.[14]

§ 2293z. **Sale by one partner to another: Wisconsin.**—In a Wisconsin case, where a policy was originally issued to partners, and provided that if the property insured should be "sold or conveyed without the consent of the company obtained in writing on the policy, it should be void," it was held that a sale by one partner to the other avoided the policy.[15] And where two of the partners bought out a third and the case turned upon the question of waiver by acts of the agent it was held under the facts that there was no waiver of such breach of condition against change of interest, title or possession with consent of assurer.[16]

§ 2294. **Summary of decisions.**—It is only possible to make a general summary of the decisions in the several states, as the particular conditions in each case have necessarily influenced the opinions of the courts. It may, however, be generally stated that a sale between partners avoids the policy in Illinois (where the entire interest is transferred), in Indiana, Iowa, Missouri, Pennsylvania, Texas (even though a vendor's lien is retained), Wisconsin, and in a Federal case. Such sale does not avoid in Alabama, Colorado, Iowa (case distinguished in later cases there) Louisiana, Mississippi, Nebraska, New Hampshire, New York, Ohio, Texas, Virginia, and under one Federal case and this conclusion seems more in accord with governing principles. In Tennessee it avoids as to the interest of an assignee before transfer. A sale between partners with a reservation of interest avoids in Iowa and Missouri, but not in Georgia and Illinois. In Massachusetts, Georgia, New York and Texas a sale between partners with a mortgage back does not avoid. In Iowa a division of goods in view of dissolution does not avoid. The introduction of a new partner avoids in Connecticut, Michigan, New York, North Carolina, and under one Federal case, but not in Florida, and in one Federal case where the new partner had an interest in the profits but not in the property, nor in Ohio, nor under one Federal case; while in Washington an agreement to take a new partner, which is not consummated, does not avoid. A sale to third parties avoids in California, and Illinois; and also in Tennessee although the business is continued under the trade name. The interest of partners continues after non-completed dissolution

[14] Pencil v. Home Ins. Co. 3 Wash. St. 485, 28 Pac. 1031.

[15] Keeler v. Niagara Ins. Co. 16 Wis. 523, 84 Am. Dec. 714; Keith v. Royal Ins. Co. of Liverpool, 117 Wis. 531, 94 N. W. 295, 31 Ins. L. J. 1043 (so conceded).

[16] Keith v. Royal Ins. Co. of Liverpool, 117 Wis. 531, 94 N. W. 295.

of the partnership in New York, but a sale by one partner to another upon dissolution avoids in Pennsylvania. A division of goods in view of dissolution does not avoid in Iowa. A bequest by a deceased partner to a person acting for deceased during her lifetime with direction to continue the business does not avoid in Virginia.[17]

[17] *Opinions of Text-writers.*—Mr. Angell says: "When underwriting for a firm the insurer is presumed to know and to be satisfied with each and every one of its members. He is presumed to know that on the death of either of two partners the survivor, for all purposes, becomes the sole legal, and, on a favorable state of account, the sole equitable, owner of the partnership assets. The insurer, too, knows that on a voluntary dissolution of the firm the other will thereby have been made the sole owner of the assets remaining," and cites a New York case to the effect that a transfer of interest from one partner to another is within the original understanding, and will not prevent a recovery: Angell on Fire and Life Ins. (ed. 1855) p. 666, sec. 200a, *citing* Wilson v. Genesee Mutual Ins. Co. 16 Barb. (N. Y.) 511. Mr. Bates expresses no opinion, merely noting the cases, although he says: "It is to be wished that these distressing complications might be set at rest by the companies themselves, or by appropriate legislation:" 1 Bates on Partnership (ed. 1888) secs. 270 et seq., Mr. May says: "It has also been held that where such a change of property has been made, recovery can be had only for the loss of so much as has not been transferred, i. e., the interests of the remaining parties, but upon principle it seems to be reasonable that the plaintiffs, being owners at the time of the insurance, and thence to the loss, should recover the entire loss, and such seems to be the weight of authority:" 1 May on Ins. (3d ed.) sec. 279. Mr. Ostrander says: "When, however, the policy stipulates only against a change of title or ownership, it has generally been held that any change between the partners does not discharge the insurer; but the rule is otherwise when a stranger is received into the firm," although the head-notes to subsequent sections are, "a sale by one partner to his associate voids the policy. . . . When a partnership is dissolved and the property divided the insurance terminates:" Ostrander on Fire Ins. (ed. 1892) pp. 251, 257, secs. 106, 108, 109. Mr. Parsons says that "the better opinion is that where a partner conveys his interest to a copartner, the policy is not avoided under such a clause. The same reasoning would seem to apply to a conveyance of his interest by a partner to a third person. The partnership alone can transfer a chattel; the partner transfers only his right to account. There is some authority for such a rule, but the prevailing view would seem to be that the policy is avoided by such a transfer:" Parsons on Partnership (4th ed.) p. 235, sec. 180. Mr. Wood says: "As a general rule, it may be said that the tendency of the courts is to hold that unless the language of the policy is such as to clearly prohibit a sale of the interest of one joint owner to another in the joint property, and the policy can fairly be upheld in the face of such a prohibition, or if there is any doubt as to whether it was intended to apply to such a sale, the prohibition will be held not to apply in such cases, but will be restricted to the case of sales to a stranger." He is also of opinion that a decree of dissolution of the firm and division of the property releases the insurer: 1 Wood on Fire Ins. (2d ed.) 744, 745, 748. Mr. Clement, Mr. Cooley, and Mr. Elliott agree substantially upon the point that the sale or transfer by the part-

§ 2295. **Conclusion.**—It is evident from the decisions and opinions above given that the general rule may be deduced, and it is supported by the weight of authority and of reasoning, that a sale between partners is not such a transfer as will avoid the policy; and a question may fairly be raised whether it is within a stipulation against a change of possession. The above rule must, however, be necessarily subject to change in those cases where the policy expressly, in clear terms and not by construction or implication alone, prohibits a transfer or sale between partners. A sale between partners with a reservation of interest ought not to avoid; nor does a sale between partners with a mortgage back avoid the contract, but a sale to third parties or the introduction of a partner avoids the policy. So a voluntary completed dissolution of the partnership and a division of the profits and property would avoid the contract.

ner to another of his interest in the copartnership does not avoid the policy, Mr. Clement and Mr. Cooley also state that the introduction of a new partner avoids the insurance. 2 Clements Fire Ins. (ed. 1905) p. 231; 2 Cooley's Briefs on Ins. (ed. 1906) pp. 1726 et seq.; Elliott on Ins. (ed. 1907) sec. 273, p. 266. Mr. Richards says: "Where the insured are joint owners of the property, or jointly interested in it, as, for example, in the case of partners or trustees, a transfer from one to another without the introduction of any new person, is held, by the weight of authority, to be no violation of the alienation clause." Richard's on Ins. (3d ed.) sec. 266, p. 350.

# CHAPTER LXV.

## ASSIGNMENT AND TRANSFER OF POLICY.

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**§ 2304. Assignment of policies: fire insurance.**—A policy of fire insurance is a personal contract, and in the absence of the consent of insurer, it cannot be assigned so as to permit the assignee to sue thereon in his own name. The contract is that the assured shall sustain no damage to the extent of the amount named in the policy, and though it is an insurance on the property, still it does not pass with the sale thereof, and is considered only as a contract of indemnity to the person named in the policy.[18] The insurer may, however, where the property has been sold, give its consent to an assignment of the policy, and when so given the contract is a new one between the assignee of the original insured and the company.[19] In the absence, however, of any provision in the policy as to assignment, fire policies cannot be assigned without consent of insurer so as to give any rights thereunder against the company to the assignee, as they are not negotiable instruments. So long as the property remains in the original insured, he may recover upon the

[18] See § 23 herein. See also Swaine v. Teutonia Fire Ins. Co. 222 Mass. 108, 109 N. E. 825, 46 Ins. L. J. 709. See American Bonding & Trust Co. v. Baltimore & Ohio Southwestern Ry. Co. 124 Fed. 866, 882, 60 C. C. A. 52, 68.

[19] Donnell v. Donnell, 86 Me. 518, 20 Atl. 67, 24 Ins. L. J. 371; Folsom v. Belknap County Mutual Fire Ins. Co. 30 N. H. 231, 240; Rollins v. Columbian Mutual Fire Ins. Co. 25 N. H. 200, 207. See also § 2308 herein.

policy, but if he parts with the subject matter of the insurance, the policy, being a personal contract between him and the company to cover property owned by him alone, is at an end, as he has no interest in the property insured and the assignee has no rights thereunder, as a fire policy, being a personal contract, cannot be assigned so as to transfer the obligation thereunder to another without the consent of all the parties.[20] The insurance may, however, by agreement of the parties be made to follow the title to the property.[1]

**§ 2305. Assignment of fire policies: "loss if any payable to."**—In addition to the class of assignments which we have mentioned in the preceding section, there is another species, which is similar to that of the assignment of a chose in action. We refer to those cases where the policy is issued to one person, "loss if any payable to" another, or "in case of loss pay the amount to ———." Concerning this class of cases, Shaw, C. J., says:[2] "It is a contingent order or assignment of the money, should the event happen upon which money will become due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because upon notice of assignment the insurer has agreed to pay the assignee instead of the assignor;[3] but the original contract remains; the assignment and assent to it form a new and derivative contract out of the original. But the contract remains as contract of guarantee to the original assured. He must have an insurable interest in the property, and the property must be his at the time of the loss. The assignee has no insurable interest prima facie in the property burnt, and does not recover as the party insured, but as the assignee of a party who has an insurable interest and a right to recover, which right he has transferred to the

[20] *United States.* — Columbia Ins. Co. v. Lawrence, 10 Pet. (35 U. S.) 507, 512, 9 L. ed. 512; Columbian Ins. Co. v. Lawrence, 2 Pet. (27 U. S.) 25, 7 L. ed. 335.

*Iowa.*—Davis v. Bremen County Farmers' Mutual Fire Ins. Assoc. 154 Iowa, 326, 134 N. W. 860; Simeral v. Dubuque Mutual Fire Ins. Co. 18 Iowa, 319.

*Maine.* — Adams v. Rockingham Ins. Co. 29 Me. 292.

*Massachusetts.*—Tate v. Citizens' Ins. Co. 13 Gray (79 Mass.) 79; Loring v. Manufacturers' Ins. Co. 8 Gray (74 Mass.) 28.

*Missouri.*—Jecko v. St. Louis Fire & Marine Ins. Co. 7 Mo. App. 308.

*New Hampshire.*—Rollins v. Columbian Fire Ins. Co. 5 Fost. (25 N. H.) 200, 204.

*Tennessee.* — Mutual Protection Ins. Co. v. Hamilton, 5 Sneed (37 Tenn.) 269.

*England.*—Sadlers Co. v. Badcock, 2 Atk. 556; Lynch v. Dalzell, 4 Brown Parl. C. 431, per Lord Chancellor King.

[1] Carpenter v. Providence Ins. Co. 16 Pet. (41 U. S.) 495, 501, 10 L. ed. 1044.

[2] Fogg v. Middlesex Mutual Fire Ins. Co. 10 Cush. (64 Mass.) 337.

[3] *Citing* Mowry v. Todd, 12 Mass. 281.

assignee with the consent of the insurers."[4] An assignment of a policy results from an indorsement thereon of "loss, if any, payable to" a named person "as interest may appear," and if they are mortgagees of the property insured, they are entitled to recover for a loss not exceeding the amount of their debt.[5] But it is held that where the "loss if any" is made payable to a certain person it constitutes an assignment to him of all beneficial interest under the policy.[6] An insurance policy making loss payable to another than assured must be regarded as having been at its inception assigned to such other person with the consent of the company, and it is not necessary for him to obtain a transfer of the policy from the assured, assented to by the company, as in ordinary cases.[7] A provision that a loss shall be payable to a mortgagee or his assign as his interest may appear, operates only as a conditional appointment to pay so much of the proceeds of the policy as may be equal to the amount of the mortgage at the time of a loss under the policy. Such provision does not amount to an assignment of the policy, so that in case of loss the mortgagee alone may sue and recover for it. The right of action is still in the mortgagor.[8]

**§ 2306. Assignment of fire policies: consent: generally.**—In accordance with what we have stated,[9] an assignment of a fire policy without the knowledge and consent of the company avoids the policy.[10] And under a policy for the mortgagees' benefit a requirement

[4] See also the following cases:

*United States.*—Aldrich v. Equitable Safety Ins. Co. 1 Woodb. & M. (U. S. C. C.) 272, Fed. Cas. No. 155.

*Iowa.*—Mershon v. National Ins. Co. 34 Iowa, 87.

*New York.*—Pratt v. New York Ins. Co. 64 Barb. (N. Y.) 589, aff'd 55 N. Y. 505, 14 Am. Rep. 304.

*Rhode Island.* — Brown v. Roger Williams Ins. Co. 5 R. I. 394.

*Texas.*—German Ins. Co. v. Gibbs Wilson & Co. 42 Tex. Civ. App. 407, 92 S. W. 1068, 96 S. W. 700.

*Wisconsin.* — Keeler v. Niagara Fire Ins. Co. 16 Wis. 523, 84 Am. Dec. 714.

[5] Hanover Fire Ins. Co. v. Brown, 77 Md. 64, 39 Am. St. Rep. 386, 25 Atl. 989, 27 Atl. 314. *Examine* Towle v. Dirigo Mutual Fire Ins. Co. 107 Me. 317, 78 Atl. 374.

[6] American Smelter Co. v. Manchester Fire Assurance Co. 71 Mo. App. 63.

[7] National Fire Ins. Co. v. Crane, 16 Md. 260, 77 Am. Dec. 289.

[8] Williamson v. Michigan Fire & Marine Ins. Co. 86 Wis. 393, 39 Am. St. Rep. 906, 57 N. W. 46. See Franklin Ins. Co. v. Wolff, 23 Ind. App. 549, 54 N. E. 772, see s. e. § 2308 herein. See §§ 2314, 2314b herein.

[9] § 2304 herein.

[10] Carpenter v. Providence Washington Ins. Co. 16 Pet. (41 U. S.) 495, 10 L. ed. 1044 (mortgagor and mortgagee: assignment: rights of assignee and of mortgagor).

*Cited* in: *United States.*—Bates v. Equitable Fire & Marine Ins. Co. 3 Cliff. (U. S. C. C.) 220, Fed. Cas. No. 1,101.

*Indiana.*—Insurance Co. of North America v. Martin, 151 Ind. 209, 51 N. E. 361.

*Massachusetts.*—Stetson v. Massachusetts Mutual Fire Ins. Co. 4 Mass. 330, 339, 3 Am. Dec. 217.

of insurer's consent to an assignment to a grantee of the mortgagor must be complied with.[11] And it constitutes no excuse for not obtaining the required assent of insurer that such consent was difficult to obtain.[12] But the fact that insured has attempted to assign the policy will not render it void, unless he has at the same time parted with his interest in the property insured.[13] And when it is stipulated that an assignment before loss will void the policy, a mere promise to assign or a subsequent statement that the policy has been assigned is insufficient to avoid it where there has been no legal assignment, no actual transfer by actual delivery or in writing. A policy may, however, be assigned by written assignment or by a delivery which vests in the assignee such a title as to enable him to sue thereon.[14]

Where a policy has been assigned under seal, it implies a consideration, against which an unsupported denial of a consideration will be of no avail.[15] And the actual consideration for the assignment may be shown by parol where it is stated to be for value received.[16]

The assignment of a policy covers only such interest as the insured may have in the property at the time of the insurance and of the loss. The rights of the assignee cannot be more extensive than the rights of the assignor.[17] And if the assignment of the policy has been made before the loss, but between the time of making it and the delivery thereof a loss has occurred, it will not

*Pennsylvania.*—Girard Fire & Marine Ins. Co. v. Hebard, 95 Pa. 45, 37 Phila. Leg. Int. 349; Ferree v. Oxford Fire Ins. Co. 28 Phila. Leg. Int. 141, 8 Phila. 512.

*West Virginia.*—Bentley v. Standard Fire Ins. Co. 40 W. Va. 729, 737, 23 S. E. 584.

See also Bartling v. German Mutual Lightning & Tornado Ins. Co. of F. of M. 154 Iowa, 335, 134 N. W. 864, s. c. — Iowa, —, 123 N. W. 63, 39 Ins. L. J. 60; Guerin v. Manchester Fire Ins. Co. 19 Canadian L. T. 1, 29 Can. Sup. Ct. 139.

[11] Insurance Co. of North America v. Martin, 151 Ind. 209, 51 N. E. 361.

[12] Davis v. Bremer County Farmers' Mutual Fire Ins. Assoc. 154 Iowa, 326, 134 N. W. 860.

[13] Smith v. Monmouth Ins. Co. 50 Me. 96.

[14] Manufacturers' Mutual Fire Ins. Co. v. Swaney, 53 Ind. App. 429, 101 N. E. 843, 42 Ins. L. J. 1123.

*Citing* Lazrus v. Commonwealth Ins. Co. 5 Pick. (22 Mass.) 76; Griffey v. New York Central Ins. Co. 100 N. Y. 417, 53 Am. Rep. 202, 3 N. E. 309; Mahr v. Bartlett, 53 Hun, 388, 7 N. Y. Supp. 143.

[15] Mutual Protection Ins. Co. v. Hamilton, 5 Sneed (37 Tenn.) 269.

[16] Rawls v. Central Ins. Co. 97 S. Car. 189, 81 S. E. 805 (assignment of mortgage).

[17] Smith v. Union Ins. Co. 25 R. I. 260, 105 Am. St. Rep. 882, 55 Atl. 715, 32 Ins. L. J. 1000; Towle v. Dirigo Mutual Fire Ins. Co. 107 Me. 317, 78 Atl. 374. See §§ 901 et seq. herein.

defeat a recovery thereon, as the assignment will take effect only from its delivery, and, in such a case, will constitute an assignment after loss.[18] Though the insured is required to set forth the nature of his interest in the property, it is held that this rule does not apply to the assignment of policies in force.[19] Under an early Massachusetts form of policy no one could avail himself of a contract of fire insurance except the parties thereto or their legal representatives, except where the transfer is a valid one, assented to by the insurer.[20] It has been held in Wisconsin that the assignor may, where he is incapacitated by drunkenness at the time of the assignment, maintain an action to recover the policies, or the value of the same, and that he need not first resort to equity in order to have the assignment set aside.[1]

**§ 2306a. Same subject: statutes.**—An assignment of a policy may be made before but not after loss within the intent of a statute permitting the assignment of instruments for the payment of money.[2] Policies may also be assigned the same as any chose in action under a statute permitting an assignment of his interest by the obligee of any written instrument non-negotiable by the law merchant.[3]

**§ 2306b. Distinction between assignment and executory contract: covenant to keep property insured.**—A distinction is made between an assignment of the policy in praesenti and an executory contract, as where it was claimed that the policy was void because of an assignment before loss in violation of a condition providing for a forfeiture in such case. And it appeared that the claimed violation consisted of a covenant in a mortgage by which it was agreed that the mortgagor should keep the property insured for the benefit of the mortgagee and "that this section shall be construed and taken to be an assignment of the said first party's interest in and to any and all insurance policies thereon for the use and benefit of the holders of said bonds in case of loss," the mortgage having been given to secure bonds, and it was held that

[18] Watertown Fire Ins. Co. v. Grover & Baker Sewing Machine Co. 41 Mich. 131, 32 Am. Rep. 146, 1 N. W. 961.

[19] Lycoming Ins. Co. v. Mitchell, 48 Pa. St. 67; Cumberland Valley Mutual Protection Ins. Co. v. Mitchell, 48 Pa. St. 374.

[20] Carroll v. Boston Ins. Co. 8 Mass. 515.

[1] Bursinger v. Watertown Bank, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290.

[2] Davis v. Bremer County Farmers' Mutual Fire Ins. Assoc. 154 Iowa, 326, 134 N. W. 860. Under Code secs. 3044, 3046.

[3] Prentice v. Security Ins. Co. — Tex. Civ. App. —, 153 S. W. 925; Rev. Stat. 1895, art. 308. See also Southern Mutual Life Ins. Co. v. Durdin, 132 Ga. 495, 64 S. E. 264, 131 Am. St. Rep. 210, 38 Ins. L. J. 648. Civ. Code 1895, secs. 2116, 3077.

there was no assignment in contravention of said stipulation as there was no devestment of interest by said so-called assignment clause in the mortgage; that the stipulation was made as collateral security to a mortgagee and creditor and that there was retained not only a possible but real interest in the contract of indemnity. "It was not an out and out assignment such as we must hold was contemplated by the parties in an agreement which involved a forfeiture. Such agreements are always construed against the party in whose favor the forfeiture is claimed." [4]

**§ 2307. Sale of property does not transfer policy to purchaser.**—A policy of fire insurance is, as we have stated, strictly a personal contract, and as such cannot be assigned, so as to introduce a new party into it, without the consent of the insurer; consequently, the policy does not pass to the purchaser of the property insured, so as to substitute him for the originally insured, without the company's consent. It is not an incident of the subject of insurance.[5] Though the property may not be sold until after a loss, this does not vary the rule, in the absence of an assignment of the policy.[6] Though a policy of insurance on partnership property may be one of the choses in action of the firm, still it does not pass with the sale of the property, unless it appears that it was the manifest intention of the parties that it should.[7]

**§ 2307a. Adoption of policy by vendee: "for account of whom it may concern."**—Although a sale by assured of the property insured does not pass the policy to the purchaser of said property, and even though such sale is made without assurer's consent, nevertheless if the policy is taken out "for account of whom it may concern" it is sufficient that insured intended to protect the interest that afterwards passed to the person injured by loss, nor is it essential that assured should have in mind any specific individual, and if such is the intent the policy may be afterwards adopted

[4] Humboldt Fire Ins. Co. v. W. H. Ashley Silk Co. 185 Fed. 54, 107 C. C. A. 274, 40 Ins. L. J. 757. As to similar covenant, see Craig v. Insurance Co. of State of Pennsylvania, 162 Mich. 657, 127 N. W. 757; Grange Mill Co. v. Western Assur. Co. 118 Ill. 396, 9 N. E. 274.

Rule as to Construction, see §§ 220 et seq. herein.

[5] *Iowa.*—Davis v. Bremer County Farmers' Mutual Fire Ins. Assoc. 154 Iowa, 326, 134 N. W. 860.

*Louisiana.* — King v. Preston, 11 La. Ann. 95.

*New Hampshire.*—Lahiff v. Ashuelot Ins. Co. 60 N. H. 75.

*New York.*—Lett v. Guardian Fire Ins. Co. 34 N. Y. St. Rep. 411, 20 Ins. L. J. 176, 125 N. Y. 82, 25 N. E. Rep. 1088.

*England.* — Lynch v. Dalzell, 4 Brown Parl. Cas. 431.

[6] Pierce v. National Ins. Co. 50 N. H. 297, 9 Am. Rep. 235.

[7] Kitts v. Massasoit Ins. Co. 56 Barb. (N. Y.) 177.

by one who subsequently becomes the sole or partial owner of the interest, even though unknown to insured or insurer at the time of effecting insurance, and this is so even though a printed condition is inconsistent with such right, under the rule that the written control the printed clauses, and this applies to one who purchases a part interest in the property and adopts the insurance.[8]

**§ 2308. Assignment: legal effect of assent to, in fire policy.**—An assignment of a policy of fire insurance may be made with the consent of insurer, and such assignment will pass with it everything necessary to carry the purpose of the assignment into effect, though an actual assignment of the original indebtedness is not made.[9]

If the insured property is sold and the policy assigned to the purchaser with insurer's consent, the original parties to the contract have become changed, and it is a new contract and the assignee is recognized as the assured party, or to state the rule in other words; where a fire policy is by consent of insurer assigned and transferred by the original holder a new and independent contract is created equivalent to the original issuance of the policy by insurer to the assignee.[10] So the legal effect of a transfer of a

[8] Hagan v. Scottish Union & National Ins. Co. (U. S. D. C.) 98 Fed. 129, 29 Ins. L. J. 666, aff'd 186 U. S. 423, 46 L. ed. 1229, 22 Sup. Ct. 862. See §§ 619, 1692, 3609 herein.

[9] Stout v. City Fire Ins. Co. of New Haven, 12 Iowa, 371, 79 Am. Dec. 539. See also §§ 560, 561 herein.

As to alienation and consent to transfer or sale and assignment: notice to insurer: mortgage: mortgagee clause, see §§ 2248–2248b, 2795 herein.

[10] *United States.*—Ellis v. Insurance Co. of North America, 32 Fed. 646.

*Georgia.* — Northwestern Mutual Life Ins. Co. v. Montgomery, 116 Ga. 799, 43 S. E. 79, 32 Ins. L. J. 254, 261.

*Illinois.*—City Fire Ins. Co. v. Mark, 45 Ill. 482.

*Indiana.*—Manchester Fire Assur. Co. v. Glenn, 13 Ind. App. 365, 55 Am. St. Rep. 225, 40 N. E. 926, 41 N. E. 847.

*Kentucky.*—Niagara Fire Ins. Co. v. Layne, 162 Ky. 665, 172 S. W. 1090.

*Maine.*—Tremblay v. Aetna Life Ins. Co. 97 Me. 347, 94 Am. St. Rep. 521, 55 Atl. 509; Donnell v. Donnell, 86 Me. 518, 20 Atl. 67; Stimpson v. Monmouth Fire Ins. Co. 47 Me. 379.

*Maryland.*—Hanover Fire Ins. Co. v. Brown, 77 Md. 64, 39 Am. St. Rep. 386, 25 Atl. 989.

*Massachusetts.* — Swaine v. Teutonia Fire Ins. Co. 222 Mass. 108, 109 N. E. 825, 46 Ins. L. J. 709; Fogg v. Middlesex Mutual Fire Ins. Co. 10 Cush. (64 Mass.) 337; Wilson v. Hill, 3 Met. (44 Mass.) 66—Shaw, C. J.; Mowry v. Todd, 12 Mass. 281.

*Michigan.*—Bonenfant v. American Fire Ins. Co. 76 Mich. 653, 43 N. W. 682.

*Missouri.*—Standard Life & Accident Ins. Co. v. Bambrick Bros. Construction Co. 163 Mo. App. 504, 143 S. W. 845.

*New Hampshire.* — Cummings v. Cheshire County Mutual Fire Ins. Co. 55 N. H. 457, 460; Barnes v. Union

fire policy is the same as the direction to pay to another, in the case of loss, and, in the absence of any prohibition in the policy or by-laws, either method may be properly taken to produce the result.[11] Such consent of insurers operates as a reissue of the policy to a substituted party upon the same terms and conditions as when originally issued.[12] It also operates by way of novation to discharge the rights and obligations incident to the original parties.[13] So where the policy has been so assigned, the assignee becomes liable for the premiums and the assignor is discharged from his liability therefor.[14]

The assignee has the same rights thereunder as the original insured, and in an action upon a policy is held to be subject to the same defenses as the assignor would have been.[15] And if insured had no insurable interest by reason of having no valid title to the property, insurer's consent to an assignment of the policy to a mortgagee while validating the transfer does not obligate insurer to the assignee.[16] It is also held that such consent will not, if the policy was originally void, render it a valid one.[17] So the consent of assurer's assistant secretary creates no new rights so as to validate an assignment made after loss by assured, who had parted with all his insurable interest at the time of loss by a sale of the property.[18]

An assignment, however, with assurer's consent to a mortgagee

Ins. Co. 45 N. H. 21; Folsom v. Belknap County Mutual Fire Ins. Co. 30 N. H. 231, 240.

*New York.*—Wolfe v. Security Ins. Co. 39 N. Y. 49; Hooper v. Hudson River Fire Ins. Co. 15 Barb. (N. Y.) 413, s. c. 17 N. Y. 424; Hayes v. Saratoga & Washington Fire Ins. Co. 80 N. Y. Supp. 888, 81 App. Div. 287, aff'd 179 N. Y. 535, 71 N. E. 1131.

*Pennsylvania.* — Buckley v. Garrett, 47 Pa. St. 204.

*Texas.*—National Fire Ins. Co. v. J. W. Caraway & Co. 60 Tex. Civ. App. 566, 130 S. W. 458, 39 Ins. L. J. 1466; Fire Association of Phila. v. Flournoy, 84 Tex. 632, 31 Am. St. Rep. 89, 19 S. W. 793.

[11] Merrill v. Colonial Mutual Fire Ins. Co. 169 Mass. 10, 61 Am. St. Rep. 268, 47 N. E. 439.

[12] Insurance Co. of North America v. Garland, 108 Ill. 220, appealed from 9 Bradw. (Ill.) 571.

[13] Swaine v. Teutonia Fire Ins. Co. 222 Mass. 108, 109 N. E. 825, 46 Ins. L. J. 709.

[14] Cleveland v. Clapp, 5 Mass. 201.

[15] Matthews v. General Ins. Co. 9 La. Ann. 590, 591; Commonwealth v. National Ins. Co. 113 Mass. 514; Bidwell v. St. Louis Floating Dock & Ins. Co. 40 Mo. 42; Reed v. Windsor Mutual Ins. Co. 54 Vt. 413. See Smith v. Union Ins. Co. 25 R. I. 260, 105 Am. St. Rep. 882, 55 Atl. 715; Towle v. Dirigo Mutual Fire Ins. Co. 107 Me. 317, 78 Atl. 374. See §§ 901 et seq. herein.

[16] Stanstead & Sherbrooke Mutual Fire Ins. Co. v. Gooley, 9 Rap. Jud. Q. B. R. 324.

[17] Eastman v. Carroll County Mutual Ins. Co. 45 Me. 307. See, however, City Fire Ins. Co. v. Mark, 45 Ill. 482.

[18] Davis v. Bremer County Farmers' Fire Ins. Assoc. 154 Iowa, 326, 134 N. W. 860.

loss payable as interest may appear, does not create a new contract but he is held obligated by the conditions in the original policy, as in case of other insurance.[19] But although the policy may provide that no assignment will be valid unless the consent of the company is given thereto, an objection that such provision has not been complied with can only be raised by the company.[20]

Though the policy may require assent to be given before assignment, a forfeiture may be waived by subsequent consent thereto;[1] and a purchaser of property insured, to whom the policy is assigned with the consent of insurer, is not affected by a forfeiture of the policy occurring previous to the assignment.[2] The company cannot, after it has assented to an assignment, set up in defense to an action by the assignee fraud in the original application.[3] And if a policy contains a provision that it shall be void if assigned, before a loss without the consent of the insurer indorsed thereon, and the insurer places on it an indorsement making the loss, if any, payable to a third person, this indorsement operates as a ratification of a prior agreement of the insured to the same effect made without the previous consent of the insurer.[4] When an insurance company without reservation consents to the assignment of a policy, representing upon its face an unearned value, to the purchaser of the insured property, who in good faith pays value for such an assignment, the company will not be allowed to set up mental reservations or prior breaches, which were unknown to either party, in avoidance of its liability on the policy.[5]

**§ 2309. Manner of procuring assent to assignment of policy: same: mutual company.**—The by-laws of a mutual company may require that the transfer of the policy shall be ratified and approved by the directors. Under such by-law it is held that a formal vote of ratification is not necessary where it may be fairly presumed from the acts of their authorized agents or their own acquiescence.[6] And it has been held that, in the absence of any

[19] Franklin Ins. Co. v. Wolff, 23 Ind. App. 549, 54 N. E. 772. See also Holbrook v. Baloise Ins. Co. 117 Cal. 561, 49 Pac. 555, 27 Ins. L. J. 639. See § 2314 herein.

As to right of mortgagor and mortgagee to each sue in his own name for recovery to extent of his interest, see Swaine v. Teutonia Fire Ins. Co. 222 Mass. 108, 109 N. E. 825, 46 Ins. L. J. 709.

[20] Leinkauf v. Coleman, 110 N. Y. 50; Insurance Co. of Pennsylvania v. Trask, 8 Phila. (Pa.) 32.

[1] Shearman v. Niagara Fire Ins. Co. 46 N. Y. 526, 7 Am. Rep. 380.

[2] Continental Ins. Co. v. Munns, 120 Ind. 30, 5 L.R.A. 430, 22 N. E. 78.

[3] Ellis v. Council Bluffs Ins. Co. 64 Iowa, 507, 20 N. W. 782.

[4] Gould v. Dwelling House Ins. Co. 134 Pa. St. 570, 19 Am. St. Rep. 517, 19 Atl. 793.

[5] Hall v. Niagara Fire Ins. Co. 93 Mich. 184, 32 Am. St. Rep. 497, 18 L.R.A. 135, 53 N. W. 727.

[6] Durar v. Hudson Ins. Co. 24 N.

express provision making it the duty of some other officer to assent to assignments, the assent of the secretary will bind the insurer, though the charter requires all policies to be signed by the president.[7] If the policy contains a provision that it shall be void in case of the alienation of the property, but that the directors may ratify an assignment within thirty days, it has been held that the policy is simply voidable, and not void, from the fact of alienation, and the directors may, after the expiration of thirty days, assent to such an assignment, and in case they do, they cannot, in the absence of mistake or fraud, recede from their action.[8] And if the policy provides that the assignee may, by making application to the directors of the company within a certain period of time, procure the assent of the company to the assignment, it cannot refuse its consent without just cause.[9] Though the clause in the policy makes an assignment without consent void, the agent of the company may, by an oral agreement that the policy shall remain in force, bind the company until it has certified its consent to the assignment.[10] A charge to the jury is proper: that a policy may be assigned in writing or by a delivery, which vests in the assignee such a title as to enable him to sue thereon.[11] If an insurer issues a policy of "permanent insurance" by which it agrees to be and remain "forever" liable to assured, his heirs and assigns, and which provides that any assignment of the policy shall be brought to the company's office to be entered and "allowed," it cannot refuse to enter and allow an assignment solely because it has decided not to consent to the transfer of old policies.[12] Again, assured has the right to assume that the required transfer or assignment of the policy has been made in the proper manner and form when made by the authorized officer or insurer, even though the blank form

J. L. (4 Zab.) 171. In this case it was held that the fact that the secretary of the company had assented to the transfer as agent of the company, and indorsed it on the policy, was sufficient to bind the company. See also Phillips v. Merrimack Mutual Fire Ins. Co. 10 Cush. (64 Mass.) 350; Farmers' Mutual Ins. Co. v. Taylor, 73 Pa. St. 342. See, however, Loring v. Manufacturers' Ins. Co. 8 Gray (74 Mass.) 28.

[7] New England Marine Ins. Co. v. De Wolf, 8 Pick. (25 Mass.) 56. *Examine* Davis v. Bremer County Farmers' Fire Ins. Assoc. 154 Iowa, 326. 134 N. W. 860, *considered* under § 2308 herein.

[8] Grant v. Eliott & Kitterly Mutual Fire Ins. Co. 75 Me. 196.

[9] Boynton v. Farmers' Ins. Co. 43 Vt. 256, 5 Am. Rep. 276.

[10] Illinois Mutual Fire Ins. Co. v. Stanton, 57 Ill. 354. See §§ 560, 561 herein.

[11] Manufacturers' Mutual Fire Ins. Co. v. Swaney, 53 Ind. App. 429, 101 N. E. 843, 42 Ins. L. J. 1123.

[12] Marshall v. Franklin Fire Ins. Co. 176 Pa. 628, 38 Wkly. N. C. 473, 34 L.R.A. 159, 35 Atl. 204.

therefor on the policy has not been filled out nor the transfer signed by the assignor.[13]

The manner prescribed in the policy of procuring consent must generally be complied with, unless circumstances show a waiver by the company of such mode, or unless the company is estopped by acts of its duly authorized agent to set up the breach of such conditions.

**§ 2309a. Consent by assurer's agent.**—An authorized agent of insurer may undoubtedly indorse its consent to an assignment of the policy. This rule has been applied and based upon the principle that an assignment of a policy with assurer's consent is in legal effect a new contract, so that an agent with authority to make contracts of insurance may consent to an assignment of such contract.[14] Since the consent of insurer's authorized agent to an assignment is sufficient, the claim that the agency had been revoked will not aid insurer, where no such notice was given thereof as was reasonably necessary to inform a person of ordinary prudence that said agency had terminated.[15] And the agent's consent by a separate writing to an assignment will obligate insurer, especially so where no objection is made thereto for a period of about a year and up to time of the loss, during which period premiums were accepted and retained.[16] If insurer demands an additional premium where an existing policy of fire insurance is about to be transferred on account of a change of ownership of the property, and such additional premium is paid to the agent, who forwards the policy by mail to the company for the purpose of having indorsed thereon its consent to such transfer, the company is answerable where the property is destroyed by fire on the following day before such indorsement is made. And it may be shown by letters to insurer from its agent, that it consented to the assignment.[17]

**§ 2309b. Agreement of vendor to obtain insurer's consent to assignment.**—If a vendor executes and delivers a deed and assignment to the vendee of his policy covering his interest in the buildings on the property conveyed, and receives the purchase price,

[13] Davis v. Farmers' Mutual Fire Ins. Assoc. 134 N. Car. 60, 45 S. E. 955. See § 2312 herein.

On variance between assignment of policy and insurer's consent thereto, see note in 42 L.R.A.(N.S.) 173.

[14] Sheets v. Iowa State Ins. Co. 153 Mo. App. 620, 135 S. W. 80, 40 Ins. L. J. 955, 961.

As to agent's powers: assignment, see §§ 560, 561 herein.

[15] Gragg v. Home Ins. Co. of N. Y. 139 Ky. 472, 32 Ky. L. Rep. 988, 107 S. W. 321. Termination of agency as to assured; notice, see §§ 720, 721 herein.

[16] Home Ins. Co. of N. Y. v. Myers, 32 Ky. L. Rep. 999, 107 S. W. 719.

[17] Medearis v. Anchor Mutual Fire Ins. Co. 104 Iowa, 88, 65 Am. St. Rep. 428, 73 N. W. 495.

his agreement to obtain insurer's consent to said assignment cannot, upon non-performance thereof and the loss by the property by fire, be enforced and the amount of insurance recovered from the vendor as said agreement is without consideration.[18]

**§ 2310. Notice of assignment: fire: marine.**—If the assignment of a marine policy does not vary the risk insured against, it has been held, in the absence of any provision as to notice to the insurer, that notice is not necessary.[19] A different rule would prevail, however, in the assignment of fire policies. Here, as has been stated,[20] the consent of the insurer, though the policy may contain no provision forbidding assignment, has generally been held necessary to render the assignment valid. Consequently, it would be necessary to notify the office of an assignment of a fire policy, in order to obtain its consent and to render the assignment of any validity. If the policy provides that in case of an assignment of the policy notice must be given to the insurers, such provision must, like the other provisions as to transfer of the policy, be complied with by the assignor or assignee.[1] An application to the insurer for consent to the assignment of the policy has been held a good notice under a provision requiring notice to be given.[2] If the charter of an association requires notice to the assurer and its consent to an assignment without complying with said requirement there can be no recovery.[3]

**§ 2311. What constitutes equitable assignment of fire policy.**—Though an assignment of a right to the proceeds in a fire policy may not be a valid legal assignment of the policy, it may, however, operate as an equitable assignment, vesting in the assignee an equitable interest in the proceeds. An equitable assignment, the policy itself not being assigned, will not defeat the policy under the general clause forbidding an assignment thereof, unless it is specially prohibited by the terms of the contract.[4] The assignee

[18] So held in Brawn v. Lyford, 103 Me. 362, 69 Atl. 544.

[19] Earle v. Shaw, 1 Johns. Cas. (N. Y.) 314, 1 Am. Dec. 117.

As to alienation and consent to transfer or sale and assignment: notice to company: mortgage: mortgage clause, see §§ 2248–2248b herein.

[20] Mutual Protection Ins. Co. v. Hamilton, 5 Sneed (37 Tenn.) 269.

[1] McEvers v. Lawrence, 1 Hoff. Ch. (N. Y.) 172.

[2] Hooper v. Hudson River Fire Ins. Co. 17 N Y. 424.

[3] Kamm & Schellinger Brewing Co. v. St. Joseph County Village Fire Ins. Co. 168 Mich. 606, 134 N. W. 999.

[4] *California.*—Bergson v. Builders' Ins. Co. 38 Cal. 541.

*Illinois.* — New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221.

*Massachusetts.*—Hall v. Dorchester Mutual Fire Ins. Co. 111 Mass. 53, 15 Am. Rep. 1; Foster v. Equitable Mutual Ins. Co. 2 Gray (68 Mass.) 216; Wakefield v. Martin, 3 Mass. 558.

of the interest of the vendor in a contract of a sale of real estate, by which the vendee agrees to keep the premises insured for the benefit of the vendor, is equitably entitled to the proceeds of a policy after loss to the extent of his assignor's interest, and the insurance company, with notice of such assignee's claim, is liable for his share of the proceeds, even if the whole amount has been paid over after such notice to the insured.[5] In the absence, however, of any knowledge of the company of the rights of an equitable assignee, the company is not bound, though such an assignment is good as between the immediate parties thereto; so in case of a loss occurring after the execution of a contract of sale of insured property, but before delivery of the deed of the property, the vendor recovers from the company as trustee for the vendee, the latter being entitled to the money.[6] If insured instructs insurer's authorized agent to change his life policy, payable to his estate, so as to make his wife the beneficiary an equitable assignment of the policy is effected even though the change is not made during assured's lifetime.[7]

§ 2312. **Indorsements upon policy.**—Where the policy provides that an assignment shall avoid it unless some officer of the company has approved of such assignment and indorsed the approval of consent on the policy, an indorsement of such approval and consent made by the president on a separate piece of paper, and attached by a wafer to the policy, has been held a sufficient indorsement.[8] And if the policy is stipulated to be void if consent of insurer, an association, is not indorsed thereon, it is not avoided by insured's writing upon the policy, when mortgaging the property, that the proceeds of the policy, in case of loss, are to be paid to the mortgagee as his interest may appear.[9] So an intention to transfer to the person therein named is sufficiently evidenced by indorsement on the policy that it "is hereby assigned to" said person.[10] An

*New York.*—Cromwell v. Brooklyn Fire Ins. Co. 44 N. Y. 42, 4 Am. Rep. 641.

*Pennsylvania.*—Gourdon v. Insurance Co. of North America, 3 Yeates (Pa.) 327.

[5] Cromwell v. Brooklyn Fire Ins. Co. 44 N. Y. 42, 4 Am. Rep. 641. See § 2306b herein.

[6] Shotwell v. Jefferson Ins. Co. 5 Bosw. (N. Y.) 247; Reed v. Lukens, 44 Pa. St. 400, 84 Am. Dec. 425.

[7] State v. Tomlinson, 16 Ind. 662, 59 Am. St. Rep. 335, 45 N. E. 1116. See §§ 740 et seq. herein.

On effect of death of assured before contemplated change of beneficiary is complete, see notes in 34 L.R.A. (N.S.) 277, and L.R.A.1915A, 580.

[8] Pennsylvania Ins. Co. v. Bowman, 44 Pa. St. 89. See Davis v. Farmers' Mutual Fire Ins. Assoc. 134 N. Car. 60, 45 S. E. 955, *considered* under § 2309 herein.

[9] Henderson v. Abbeville-Greenwood Mutual Ins. Assoc. 96 S. Car. 430, 81 S. E. 171.

[10] Rines v. German Ins. Co. of Freeport, 78 Minn. 46, 80 N. W. 839, 29 Ins. L. J. 183.

indorsement upon a policy, "pay under the within policy to J. S., or order," is only an order to pay the amount due to such person in case of loss, and is not an assignment within the clause avoiding the policy if assigned without the consent of the company.[11] Nor does an indorsement "in case of loss pay to ———," together with delivery of policy to the designated payee, constitute an assignment.[12]

**§ 2313. Fraud in making assignment: in procuring assent thereto.**—If a company assents to an assignment of the policy on the false representation that the insured has parted with his interest in the property insured to the assignee of the policy, and such assignment is in reality in fraud of the creditors of the assignor, the liability of the company is held to be terminated under a clause rendering the policy void in case of misrepresentation of interest in the property.[13] Though the assignment is voidable if procured by fraud, the insurer may nevertheless, after knowledge of the same, by acts of his own waive the fraud. So the levying upon the receipt of assessments from the assignee after knowledge thereof is held to be a sufficient waiver of fraud.[14] If a policy is assigned in fraud of a vendor's rights, the assignee who takes with knowledge thereof and recovers for a loss, cannot retain the money, but holds it in trust for the vendor, and recovery may be had of said amount from the assignee.[15]

**§ 2314. Assignment to mortgagee: rights of mortgagee.**—The direction on the policy to pay to the mortgagee is not an assignment of the policy. Its legal effect is that of a direction in advance as to the mode of payment, which when made is performance in the manner agreed to by the insured. Under such a direction, if assented to by the insurer, the person in whose favor the appointment is made acquires equitable rights, which the insurer is bound to regard, but the contract with the insured is not thereby merged or extinguished.[16] It is, as it was before the insertion of this clause,

[11] Minturn v. Manufacturers' Ins. Co. 10 Gray (76 Mass.) 501.

[12] Ross v. Waldo Mutual Ins. Co. 52 Me. 187.

[13] Phenix Ins. Co. v. Willis, 70 Tex. 12, 6 S. W. 825.

[14] Cumberland Valley Mutual Protection Ins. Co. v. Mitchell, 46 Pa. St. 374.

[15] Craig v. Insurance Co. of State of Pennsylvania, 162 Mich. 657, 127 N. W. 757.

[16] Union Building & Loan Assoc. v. Rockford Ins. Co. 83 Iowa, 647, 14 L.R.A. 248, 32 Am. St. Rep. 323, 49 N. W. 1032; Franklin Savings Institution v. Central Mutual Fire Ins. Co. 119 Mass. 240; Milliken v. Woodward, 64 N. J. L. 444, 45 Atl. 796; Martin v. Franklin Fire Ins. Co. 38 N. J. L. 140, 20 Am. Rep. 372; Grosvenor v. Atlantic Fire Ins. Co. 5 Duer (N. Y.) 517. See also citations under next following note. As to assignment to mortgagee of thing insured, see Deering's Annot. Civ. Code Cal. sec. 2541.

"We think it clear that the stipu-

a contract of indemnity to the mortgagor, being an insurance upon his interest, and is not a contract of indemnity to the mortgagee. The latter's right of recovery may be defeated by subsequent acts of the mortgagor prior to the loss.[17] This rule is qualified, or an

lation in the policy for payment to the mortgagees in case of loss was but a provisional assignment of the contingent proceeds of the contract, and had not the effect to substitute the mortgagees for the mortgagor as the party insured. 'It is still', said the supreme court of Wisconsin in the discussion of a similar provision 'the owner of the premises who is insured and the contract of the company is with him alone, and the continued validity of the policy is dependent upon the performance by him of the conditions embraced in it.' Williamson v. Michigan Fire & Marine Ins. Co. 86 Wis. 393, 395, 396, 39 Am. St. Rep. 906, 57 N. W. 46;" Holbrook v. Baloise Fire Ins. Co. 117 Cal. 561, 49 Pac. 555, 27 Ins. L. J. 639—Britt, C., *citing* also Moore v. Hanover Fire Ins. Co. 141 N. Y. 219, 36 N. E. 191, note 28 Am. Law Reg. (N. S.) pp. 221–243.

[17] *United States.*—Bates v. Equitable Mutual Ins. Co. 10 Wall. (77 U. S.) 33, 19 L. ed. 882.

*California.*—Holbrook v. Baloise Fire Ins. Co. 117 Cal. 561, 49 Pac. 555, 27 Ins. L. J. 639.

*Illinois.*—Continental Ins. Co. v. Hulman, 92 Ill. 145, 34 Am. Rep. 122; Illinois Mutual Fire Ins. Co. v. Fix, 53 Ill. 151, 5 Am. Rep. 38.

*Indiana.*—Franklin Fire Ins. Co. v. Wolff, 23 Ind. App. 549, 54 N. E. 772.

*Louisiana.*—Monroe Building & Loan Assoc. v. Liverpool & London & Globe Ins. Co. 50 La. Ann. 1243, 24 So. 238, 28 Ins. L. J. 266.

*Maine.*—Brunswick Savings Institution v. Commercial Ins. Co. 68 Me. 313, 28 Am. Rep. 56.

*Maryland.*—Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 51 Am. St. Rep. 457, 30 L.R.A. 633, 33 Atl. 424.

*Massachusetts.* — McCluskey v. Providence Ins. Co. 126 Mass. 306; Hale v. Mechanics' Mutual Ins. Co. 6 Gray (72 Mass.) 169, 66 Am. Dec. 410.

*Michigan.*—Jaskulski v. Citizens Mutual Fire Ins. Co. 131 Mich. 603, 92 N. W. 98, 32 Ins. L. J. 244; Cronin v. Fire Association of Phila. 123 Mich. 277, 6 Det. L. N. 1048, 82 N. W. 45, 29 Ins. L. J. 564.

*Missouri.*—Griswold v. American Central Ins. Co. 1 Mo. App. 97, aff'd 9 Ins. L. J. 254.

*Nebraska.*—Antes v. State Ins. Co. 61 Neb. 55, 84 N. W. 412.

*New Hampshire.*—Breeyear v. Rockingham Farmers' Mutual Fire Ins. Co. 71 N. H. 445, 52 Atl. 860, 31 Ins. L. J. 972 (act of mortgagor held within the rule but mortgage saved by protective clause); Baldwin v. Phœnix Ins. Co. 60 N. H. 164, 10 Ins. L. J. 34.

*New Jersey.*—Martin v. Franklin Ins. Co. 9 Vroom (38 N. J. Law) 140, 20 Am. Rep. 372.

*New York.*—Grosvenor v. Atlantic Fire Ins. Co. 17 N. Y. 391.

*Pennsylvania.*—State Mutual Fire Ins. Co. v. Roberts, 31 Pa. St. 438.

*Tennessee.*—Hocking v. Virginia Fire & Marine Ins. Co. 99 Tenn. 729, 39 L.R.A. 148, 42 S. W. 451.

*Texas.* — Hamburg-Bremen Fire Ins. Co. v. Ruddell, 37 Tex. Civ. App. 30, 82 S. W. 826. But *compare* Security Co. v. Panhandle National Bank, 93 Tex. 575, 57 S. W. 22; Panhandle National Bank v. Security Co. 18 Tex. Civ. App. 96, 44 S. W. 18.

*Wisconsin.*—Keith v. Royal Ins. Co. of Liverpool, 117 Wis. 531, 94 N. W. 295, 32 Ins. L. J. 1043.

On effect of breach of policy by grantor on rights of mortgagee to whom policy has been assigned, see notes in 18 L.R.A.(N.S.) 197; 25

exception exists thereto, to such extent as the mortgagee's interest is protected by a stipulation in the policy, or where it is provided that his insurance shall not be invalidated by the mortgagor's or owner's acts, in which case these protective stipulations will govern the contract.[18] But in Mississippi, before there was any statute upon the subject, it was held that the mortgage clause constituted a new and independent contract and the mortgagee might recover as to his interest without reference to any condition imposed upon the owner by the policy.[19]

L.R.A.(N.S.) 126; 31 L.R.A.(N.S.) 455, and L.R.A.1915C, 758.

[18] *United States.*—Syndicate Ins. Co. v. Bohn, 65 Fed. 165, 12 C. C. A. 531, 27 L.R.A. 614.

*Florida.*—Glens Falls Ins. Co. v. Porter, 44 Fla. 568, 33 So. 473, 32 Ins. L. J. 577 (principle stated fully).

*Georgia.*—Southern Home Building & Loan Assoc. v. Home Ins. Co. 94 Ga. 167, 27 L.R.A. 844, 21 S. E. 375, 26 Ins. L. J. 524.

*Illinois.*—Queen Ins. Co. v. Dearborn Savings, Loan & Bldg. Assoc. 75 Ill. App. 371, aff'd 175 Ill. 115, 51 N. E. 717 (principle applied, but whether applicable in this case see § 3304 herein).

*Iowa.*—People's Savings Bank v. Retail Merchants' Mutual Fire Ins. Co. 146 Iowa, 536, 31 L.R.A.(N.S.) 455, 123 N. W. 198, 39 Ins. L. J. 76.

*Massachusetts.*—Amory v. Reliance Ins. Co. 208 Mass. 378, 94 N. E. 677, 40 Ins. L. J. 1224; Whiting v. Burkhardt, 178 Mass. 535, 52 L.R.A. 788, 60 N. E. 1, 30 Ins. L. J. 666; Hardy v. Lancashire Ins. Co. 166 Mass. 210, 33 L.R.A. 241, 44 N. E. 209.

*Minnesota.*—Magonn v. Firemen's Fund Ins. Co. 86 Minn. 486, 91 Am. St. Rep. 370, 91 N. W. 5, 31 Ins. L. J. 805 (principle stated).

*Mississippi.*—Bacot v. Phœnix Ins. Co. 96 Miss. 223, 25 L.R.A.(N.S.) 1226, 50 So. 729, 39 Ins. L. J. 214.

*Nebraska.*—Phenix Ins. Co. v. Omaha Loan & Trust Co. 41 Neb. 834, 25 L.R.A. 679, 60 N. W. 133.

*New Hampshire.*—Breeyear v. Rockingham Farmers' Mutual Fire Ins. Co. 71 N. H. 445, 52 Atl. 860, 31 Ins. L. J. 972.

*New Jersey.*—Reed v. Firemen's Ins. Co. 81 N. J. L. 523, 35 L.R.A. (N.S.) 343, 89 Atl. 462.

*New York.*—Eddy v. London Assur. Corp. 143 N. Y. 311, 25 L.R.A. 686, 38 N. E. 307. See also as to principle: Hastings v. Westchester Fire Ins. Co. 73 N. Y. 141.

*Rhode Island.* — Smith v. Union Ins. Co. 25 R. I. 260, 55 Atl. 715, 32 Ins. L. J. 1000 (principle stated).

*England.*—Liverpool & London & Globe Ins. Co. v. Agricultural Savings & Loan Co. 33 Can. S. C. 94, 1 B. R. C. 593.

See § 2795 herein, and *examine* §§ 2248a, 2248b herein.

As to effect of acts of assignor upon rights of assignee who is mortgagee, see § 2320 herein. As to effect of acts of mortgagor after loss upon rights of assignee, see § 2321 herein.

[19] Bacot v. Phenix Ins. Co. 96 Miss. 223, 25 L.R.A.(N.S.) 1226, 50 So. 729, 39 Ins. L. J. 214, 224, *citing* East v. New Orleans Ins. Assoc. 76 Miss. 697, 26 So. 691; principal case decided under Code 1906, sec. 2596. See Queen Ins. Co. v. Dearborn Savings, Loan & Bldg. Assoc. 175 Ill. 115, 51 N. E. 717; Senor v. Western Millers Mutual Fire Ins. Co. 181 Mo. 104, 79 S. W. 687, 33 Ins. L. J. 455; Security Co. v. Panhandle National Bank, 73 Tex. 575, 57 S. W. 22; Boyd v. Thuringia Ins. Co. 25 Wash. 447, 55 L.R.A. 165, 65 Pac. 785. See § 2795 herein.

A mortgagee to whom a fire policy is assigned as security, who appears in an action to recover for a loss under the policy, and disclaims all interest in it, estops himself from ever claiming under the policy, and enables insured to maintain the action.[20]

**§ 2314a. Same subject: instances.**—A mortgage clause making the loss under the policy payable to a mortgagee as his interest may appear, does not amount to an assignment of the insurance nor of the insurance policy;[1] nor is a new contract created, but the mortgagee is held obligated by the original policy conditions where assignment is made to him loss payable as interest may appear;[2] and in so far as not limited by express language in a mortgage clause attached to a policy at the time of its execution, the plain provisions of the policy as between the insured mortgagor and the insurance company must prevail and be observed.[3] If the mortgagee, holding a policy issued to the mortgagor and by him assigned to the mortgagee, obtains a judgment upon the policy in case of loss, the mortgagor is held entitled to the benefit of such judgment where the mortgagee has foreclosed the mortgage.[4] Again, a mortgagee to whom insurance is made payable as his interest may appear, but who is not entitled to the whole insurance, need not be made a party to, or given notice of, an appraisement of damages to the property insured.[5] And an open mortgage clause attached to a fire policy, which merely provides that loss, if any, shall be paid to a mortgagee as his interest may appear, does not create any contract relations between the mortgagee and insurer, or give the mortgagee the right to participate in arbitration proceedings to fix the amount of loss; and, therefore, he will be bound by the award, although he was given no opportunity to be heard.[6] But where a policy assigned to a mortgagee contains a clause that upon the request of either party the amount of loss

[20] Worley v. State Ins. Co. 91 Iowa, 150, 51 Am. St. Rep. 334, 59 N. W. 16.

[1] Erie Brewing Co. v. Ohio Farmers' Ins. Co. 81 Ohio St. 1, 25 L.R.A. (N.S.) 740n, 135 Am. St. Rep. 735, 89 N. E. 1065.

[2] Franklin Ins. Co. v. Wolff, 23 Ind. App. 549, 54 N. E. 772. See also Holbrook v. Baloise Ins. Co. 117 Cal. 561, 49 Pac. 555, 27 Ins. L. J. 639.

[3] Erie Brewing Co. v. Ohio Farmers' Ins. Co. 81 Ohio St. 1, 25 L.R.A. (N.S.) 740n, 135 Am. St. Rep. 735, 89 N. E. 1065.

[4] Robert v. Traders' Ins. Co. 17 Wend. (N. Y.) 631.

[5] Chandos v. American Fire Ins. Co. 84 Wis. 184, 19 L.R.A. 321, 54 N. W. 390. *Compare* Bergman v. Commercial Union Assur. Co. 92 Ky. 494, 15 L.R.A. 270, 18 S. W. 122; Brown v. Hartford Fire Ins. Co. 5 R. I. 394.

[6] Collinsville Savings Soc. v. Boston Ins. Co. 77 Conn. 676, 69 L.R.A. 924, 60 Atl. 647.

On effect of award under terms of policy upon mortgagee not a party thereto, see note in 25 L.R.A.(N.S.) 740.

shall be left to arbitrators, it has been held that the mortgagor and insurer cannot, where the mortgage is unpaid, submit the question for award without the consent of the mortgagee.[7] It is also decided that the rights of a mortgagee in a policy payable to him "as his mortgage interest may appear" cannot be defeated by an accord and satisfaction between the insurer and the owner of the premises, who procured the policy in his own name.[8] Where the policy is made payable to a person as mortgagee, insurer cannot terminate a contract of insurance prior to its designated term without notice to the mortgagee, and, in the absence of a waiver of repayment, a tender of a ratable proportion of the premium.[9] If a debtor at or immediately after execution or assignment of a mortgage on his property to a creditor transfers to him a policy of insurance against fire on the mortgaged premises, though nothing be expressed at the time, or it is transferred as collateral security generally, it is a conclusion of law that the policy is to be held by the creditor as collateral security for the mortgage, and it requires an express agreement to authorize the assignee to apply the insurance money, in case of loss, to any other debt or liability, and the jury should be so instructed.[10]

If, the policy is assigned to the mortgagee, and he gives a new premium note therefor and contracts to pay all future assessments on the policy, agreeing that there shall exist the same lien upon the policy for the payment of assessments as before, this constitutes, it is held, a new contract between the insurer and the mortgagee, and as such it cannot be affected by subsequent acts of the mortgagor.[11] And if a policy is payable to a mortgagee as his interest may appear, and he also has a lien on the property in excess of the policy amount, he is entitled to the entire proceeds where the mortgage debt remains unpaid and there has been no release of the property.[12]

Insurers consent to an assignment to a mortgagee cannot be ex-

[7] Bergmann v. Commercial Union Assurance Co. 92 Ky. 494, 15 L.R.A. 270, 18 S. W. 122; Brown v. Roger Williams Ins. Co. 5 R. I. 394. See Erie Brewing Co. v. Ohio Farmers' Ins. Co. 81 Ohio St. 1, 25 L.R.A. (N.S.) 740n, 89 N. E. 1065. *Examine* Union Institution for Savings v. Phœnix Ins. Co. 196 Mass. 230, 14 L.R.A.(N.S.) 459, 81 N. E. 994; Reed v. Firemen's Ins. Co. 81 N. J. L. 523, 35 L.R.A.(N.S.) 343, 80 Atl. 462. See § 3249 herein.

[8] Hathaway v. Orient Ins. Co. 134 N. Y. 409, 17 L.R.A. 514, 32 N. E. 40.

[9] Lattin v. Royal Ins. Co. 45 N. J. L. 453.

[10] Buckley v. Garrett, 60 Pa. St. 333, 100 Am. Dec. 564.

[11] Foster v. Equitable Mutual Ins. Co. 2 Gray (68 Mass.) 216.

[12] Pan Handle National Bank v. Security Co. 18 Tex. Civ. App. 98, 33 S. W. 15. *Compare* Security Co. v. Panhandle National Bank, 93 Tex.

tended so as to cover other mortgages on the property held by the same mortgagee and of which it had no notice or knowledge.[13]

**§ 2314b. Assignment by mortgagee: form of: effect of.**—The form of an assignment of the mortgagee's interest is sufficient to transfer the same where he states that he transfers all his rights and title to the note and mortgage without recourse for value received, and the actual consideration may in such case be shown by parol evidence.[14] But the contract of insurance is not transferred by an assignment of the mortgage where the written transfer limits the transfer to the mortgage without undertaking, in terms, to assign said contract, and in such case the assignee of the mortgage cannot recover for a loss by action at law as mortgagee.[15] And it does not constitute such an assignment without assurer's consent as to avoid a policy with a mortgage clause, for the mortgagee to deposit it as collateral security with an assignee of the mortgage note.[16]

Where a mortgagee, to whom the policy is payable, in case of loss, as his interest may appear, assigns, not his policy but his rights as mortgagee to the insurance money in case of loss, the original assured mortgagor continues to be the owner and custodian of the property insured unless he has otherwise parted with his interest, and if he has so parted with his interest, without assurer's consent as stipulated, the policy will be avoided as to the mortgagor and his grantee, but if the mortgagee is protected as to his

575, 57 S. W. 22; Hamburg-Bremen Fire Ins. Co. v. Ruddell, 37 Tex. Civ. App. 30, 82 S. W. 826.

[13] Towle v. Dirigo Mutual Fire Ins. Co. 107 Me. 317, 78 Atl. 374. *Examine* Amory v. Reliance Ins. Co. 208 Mass. 378, 94 N. E. 677, 40 Ins. L. J. 1224. As to consent see §§ 2308, 2309 herein.

[14] Rawls v. American Central Ins. Co. 97 S. Car. 189, 81 S. E. 505.

As to release and requirement as to assignment etc., under Massachusetts statute, see Amory v. Reliance Ins. Co. 208 Mass. 378, 94 N. E. 677, 40 Ins. L. 1224. Mass. Standard form.

[15] Weinberger v. Agricultural Ins. Co. 80 N. J. L. 202, 76 Atl. 343. See also Kupfer & Smith v. Delaware Ins. Co. 80 N. J. L. 191, 76 Atl. 329, 81 N. J. L. 664, 80 Atl. 561, 40 Ins. L. J. 1938. In this last case (81 N. J. L.) the court, per Bergen, J., says: "In our opinion, where, as in this case, the deed of assignment of a bond and mortgage does not, in terms, transfer a policy of insurance held as collateral to the mortgage, or a chose in action growing out of a fire loss assured by the policy, and where neither party intended that the policy or the chose in action should be transferred, a contract different from that made by the written agreement cannot be read into it, to give it a more extensive meaning than that expressed nor can it be interpreted to include a right or security incidental to the mortgage assigned, but not disclosed in the deed of assignment, in order to support an action at law. Martin v. Insurance Co. of North America, 57 N. J. L. 623, 31 Atl. 213."

[16] Key v. Continental Ins. Co. 101 Mo. App. 344, 74 S. W. 162.

interests against the acts of the mortgagor by a policy stipulation, his rights and those of subsequent transferees of said rights only, as above stated, are not affected by such conveyance by the mortgagor.[17] If a policy is issued to mortgagors, payable to the mortgagee as his interest may appear, the assignment by the latter of his interest in the policy is not a violation of a condition against the assignment of the policy where the policy stipulations protect the assignee against the mortgagor's acts.[18]

If his entire interest is assigned before loss by a mortgagee to whom the loss is payable as interest may appear, he cannot after loss aid the assignee or confer any right of action upon him by an attempted transfer of his prior rights.[19] So where the contract of insurance is between a mortgagee himself and insurer and he transfers his insurable interest, an attempt to assign all his interest in the contract after loss to a subsequent holder of the mortgage transfers no interest upon which an action at law can be maintained by the transferee for the assignor has then no interest to assign.[20]

If the loss under a policy to a mortgagor, is payable to a mortgagee and "its assigns" and said mortgagee's interest is also protected by stipulation against acts of the mortgagor, and a purchaser of the premises assumes payment of the mortgage, the mortgagor has a right as surety independent of contract to become "its assigns" by paying the mortgagee's debt.[1] But where a mortgagee assigns his mortgage, containing a covenant on the part of the mortgagor to keep the premises insured, and that the mortgagee may procure such insurance upon the failure of the mortgagor to insure, and in his assignment guarantees the payment of the mortgage indebtedness, and subsequently the assignor of the mortgage becomes the owner of the premises and insures them in his own name to the full amount of the insurable interest of the mortgaged property, and a loss occurs while he is guarantor of the mortgage debt, the assignee of the mortgage has an equitable lien on the proceeds of the policy to the extent of his interest in the loss.[2]

[17] Breeyear v. Rockingham Farmers' Mutual Fire Ins. Co. 71 N. H. 445, 52 Atl. 860, 31 Ins. L. J. 972.

[18] Whiting v. Burkhardt, 178 Mass. 535, 52 L.R.A. 788, 86 Am. St. Rep. 503, 60 N. E. 1, 30 Ins. L. J. 666.

[19] Guerin v. Manchester Fire Assurance Co. 29 Can. S. C. 139, 19 Canadian L. T. 1. See also as to same principle, Davis v. Bremer County Farmers' Mutual Fire Ins. Co. 154 Iowa, 326, 134 N. W. 860.

[20] Weinberger v. Agricultural Ins. Co. 80 N. J. L. 202, 76 Atl. 343. See also Kupfersmith v. Delaware Ins. Co. 80 N. J. L. 191, 76 Atl. 329, 81 N. J. L. 664, 80 Atl. 561, 40 Ins. L. J. 1938.

[1] Merchants Ins. Co. v. Story, 13 Tex. Civ. App. 124, 35 S. W. 68.

As to subrogation; insurer, mortgagor, mortgagee, see §§ 3556 et seq., 3563 et seq. herein.

[2] Hyde v. Hartford Fire Ins. Co.

Finally: it would seem to be a self-evident proposition that a mortgagee can neither convey, transfer nor assign any greater rights than he himself possesses, whether the question relates to the extent of his interests or rights under one form of policy or another.[3]

§ 2315. **Assignment of fire policy as collateral.**—A provision of the policy making it void in case of an assignment without the company's assent does not embrace a transfer by way of collateral security for a debt.[4] And as the consent of the insurer that a policy may be assigned to a designated person does not require that such assignment be absolute, an assignment absolute in form, but intended as collateral security for a debt due from the assignor to the assignee, is valid; and does not avoid the policy, where such an assignment is not prohibited therein nor by the by-laws of the insurance corporation, and no misrepresentation of facts was made to the insurer, its assent being given without inquiry on its part.[5] If, however, the policy expressly provides that it shall be void in case of an assignment of the entire interest, or of any interest whatever under the policy, a transfer by way of collateral security is within such prohibition, and renders it void.[6] So also a condition expressly forbidding the assignment or transfer of a policy as collateral security will prevent the person holding the same as collateral from maintaining an action thereon.[7] Since a policy may be transferred as collateral security, therefore, in the absence of any stipulation therein or any regulation of the insurer by which the assured or his assignee may be bound, the assignee may collect any sum which may become payable by the insurer by process in the assignee's own name if the insurer has assented to

70 Neb. 503, 113 Am. St. Rep. 796, 97 N. W. 629.

[3] See Carpenter v. Providence-Washington Ins. Co. 16 Pet. (41 U. S.) 495, 10 L. ed. 1044, per Story, J. *Cited* in Smith v. Union Ins. Co. 25 R. I. 260, 55 Atl. 715, 32 Ins. L. J. 1000, 1003,—Douglas, J.

[4] Griffey v. New York Central Ins. Co. 100 N. Y. 417, 53 Am. Rep. 202, 3 N. E. 309, Earl, J., dissenting; True v. Manhattan Fire Ins. Co. 26 Fed. 83; Scottish Union & National Ins. Co. v. Andrews & Matthews, 40 Tex. Civ. App. 184, 89 S. W. 419, 35 Ins. L. J. 37. "It seems to be well settled that a clause in a policy of insurance which in general terms prohibits its assignment before loss should be construed as only intending to prohibit a complete and absolute divestiture of title by the insured and not a mere conditional transfer to a creditor, which in effect would only give the creditor a lien upon the proceeds of the policy, in event of loss to secure his unpaid indebtedness."—Id. Pleasants, J.

[5] Merrill v. Colonial Mutual Fire Ins. Co. 169 Mass. 10, 61 Am. St. Rep. 268, 47 N. E. 439.

[6] Ferree v. Oxford Fire Ins. Co. 8 Phila. (Pa.) 512. See Lynde v. Newark Fire Ins. Co. 139 Mass. 57, 29 N. E. 222.

[7] Lynde v. Newark Fire Ins. Co. 139 Mass. 57, 29 N. E. 222.

the assignment; otherwise, in the name of the assured. The assignment, if it leaves the assignor with an interest in the contract and in the loss, does not make the insurance void, because the assignee had no insurable interest in the property.[8] And if after the assignment of the policy as collateral a loss occurs, the assignee will have an equitable lien upon the proceeds of the policy as against the assignor or persons claiming under him, though the assignee may have no interest in the property insured and the consent of the insurer to the assignment has never been obtained.[9] The right of a person holding the policy as collateral is merely a defeasible one, of which he is devested by the payment of the debt.[10] Where a policy was assigned "as collateral security only first to A, then to B and assigns," A and B holding the first and second mortgages, respectively, the assignment was held to give A and B a joint right of action, and it was also held that the amount recovered should be applied to the payment of A's mortgage first and then to B's.[11] The assignee of a policy as collateral security for a debt is held subject to all defenses available against the assignor.[12] The insurers may set up in defense the fact that the policy is violated by the transfer as collateral security, but in such a case they must show that it was in fact so transferred, as the mere possession of the policy by another than the insured is not prima facie proof of a pledge.[13] So the assignment of property and the insurance thereon as security for a debt renders the policy void under a provision in the policy making it void if the interest of insured is other than unconditional ownership or if any change takes place in his interest, title, or possession; and it is immaterial that the insurer consents to assignment of the property to the trustee for the creditor, if the consent is based upon ownership by the assignee, and not upon the fact that he is trustee for a creditor.[14] But an assignment or hypothecation of a fire policy to a creditor, as collateral security for an extension of time on a debt of only about one-seventh the face value of the policy, does not constitute or amount to an as-

[8] Merrill v. Colonial Mutual Fire Ins. Co. 169 Mass. 10, 61 Am. St. Rep. 268, 47 N. E. 439.

[9] Bibend v. Liverpool & London Fire & Life Ins. Co. 30 Cal. 78; Wakefield v. Martin, 3 Mass. 558; Cromwell v. Brooklyn Fire Ins. Co. 44 N. Y. 42, 4 Am. Rep. 641.

[10] Robert v. Traders' Ins. Co. 17 Wend. (N. Y.) 631, s. c. 9 Wend. (N. Y.) 474.

[11] Marts v. Cumberland Mutual Fire Ins. Co. 44 N. J. L. 478.

[12] East Texas Fire Ins. Co. v. Coffee, 61 Tex. 287.

[13] Lazarus v. Commercial Ins. Co. 5 Pick. (22 Mass.) 76; People v. Beigler, Lalor's Supp. Hill & D. (N. Y.) 133.

[14] Smith v. Retail Merchants' Fire Co. 29 S. Dak. 332, 42 L.R.A.(N.S.) 173, 137 N. W. 47.

On variance between assignment of policy and insurer's consent thereto, see note in 42 L.R.A.(N.S.) 173.

signment of the policy, in violation of the stipulation contained therein, to the effect that the policy shall be void if "assigned before loss."[15] If a mortgagee under a policy payable to him as his interest may appear, assigns, not the policy, but his rights under the mortgage to another, and said second assignee transfers his rights as security for a loan, the acts of the mortgagor by a conveyance in breach of a policy condition would avoid it, but if the mortgagee is protected by a policy stipulation such protection will extend to the last assignee although the conveyance is made to the assignor, of the said creditor after the assignment to him.[16] An assignment of a policy may be proved by parol evidence to have been given and accepted as collateral security for a debt due from the assignor to the assignee, though the fact that the assignment was intended as collateral security was not communicated to the insurer.[17]

§ 2316. **Assignment to partner.**—If the policy contains a provision that the assignment of the same, or any interest therein, without the assent of the company indorsed thereon, avoids it, such a sale and the assignment by the retiring partner to his copartners, who continue the business, of his interest in the policy does not avoid it.[18] Where a policy of fire insurance conditioned not to be assignable without the written consent of the insurer, and to be void in case of transfer by sale or otherwise without such consent, was issued to a partnership of three persons, and subsequently during the term one partner retired without assigning his interest in the policy, but selling his interest in the partnership to his copartners, who continued the business, a fire subsequently having destroyed the property insured, it was held that the two remaining

[15] Allen v. Phœnix Assurance Co. 12 Idaho, 653, 8 L.R.A.(N.S.) 903, 88 Pac. 245. See G. Obler & Sons Co. v. Buttorff Mfg. Co. 145 Ala. 625, 40 So. 278.

[16] Breeyear v. Rockingham Farmers' Mutual Fire Ins. Co. 71 N. H. 445, 52 Atl. 860, 31 Ins. L. J. 972. *Examine* Amory v. Reliance Ins. Co. 208 Mass. 578, 94 N. E. 677, 40 Ins. L. J. 1224.

[17] Merrill v. Colonial Mutual Fire Ins. Co. 169 Mass. 10, 61 Am. St. Rep. 268, 47 N. E. 439. See G. Obler & Sons Co. v. Buttorff Mfg. Co. 145 Ala. 625, 40 So. 278 (debt was about one third); Imperial Ins. Co. v. Wolf, 21 Ohio Cir. Ct. 202.

[18] West v. Citizens' Ins. Co. 27 Ohio St. 1, 22 Am. Rep. 294. See also Dermani v. Home Mutual Ins. Co. 26 La. Ann. 69, 21 Am. Rep. 544; Wilson v. Genesee Mutual Fire Ins. Co. 16 Barb. (N. Y.) 511; Hoffman v. Ætna Ins. Co. 1 Rob. (24 N. Y.) 501, aff'd in 32 N. Y. 405, 88 Am. Dec. 337; Texas Banking & Ins. Co. v. Cohen, 47 Tex. 406, 26 Am. Rep. 298. But see Buckley v. Garrett, 47 Pa. 204; Hobbs v. Memphis Ins. Co. 1 Sneed (33 Tenn.) 444. See §§ 2293 et seq. herein.

copartners could recover on the policy.[19] The amount of the remaining partner's recovery in case of assignment is not limited to the extent of their interest before loss, but they may recover to the full extent of the loss.[20] A policy on a building and stock of merchandise therein, issued to a partnership and to one of its members, reciting that the former are the owners of the building and that such member is the owner of such merchandise, is, in effect, two different contracts of insurance, and an assignment of the policy by such member affects only his interest in the merchandise.[1]

**§ 2317. By-laws of mutual company as affecting assignment of policy.**—As we have stated the condition inserted in the policy of insurance as to the manner of making the assignment must, in the absence of a waiver of such condition, be strictly complied with. So any provision in the charter or by-laws of a mutual company stating certain things as requisite for a valid assignment must also be complied with where such charter and by-laws are made a part of the policy.[2] So where there is a provision in the by-laws that upon a transfer of the policy the assignee must give his note in place of that of the person originally insured; it is essential to the validity of the transfer that such note be given, and it is not a waiver of such requirement that the secretary indorses his consent to the assignment upon the policy where he retains the same until the new note is given.[3] And where assigns are not included but only members, their heirs and executors under the laws of a mutual company, an assignee cannot acquire any rights without such company's consent to the assignment.[4] It is held, however, that an equitable title is transferred even though the assignment is not in writing as required under the by-laws and the contract, but the assignee can only be received as a member upon compliance with the company's laws relating thereto and some recognition on his part of liability as such member.[5]

[19] Texas Banking & Ins. Co. v. Cohen, 47 Tex. 406, 26 Am. Rep. 298.

[20] West v. Citizens' Ins. Co. 27 Ohio St. 1, 22 Am. Rep. 294.

[1] Manchester Fire Assur. Co. v. Koerner, 13 Ind. App. 372, 55 Am. St. Rep. 231, 40 N. E. 1110, 41 N. E. 848.

[2] Simeral v. Dubuque Mutual Fire Ins. Co. 18 Iowa, 319.

[3] Cranberry Mutual Fire Ins. Co. v. Hawk, (N. J.) 14 Atl. 745, 13 Cent. Rep. 107.

[4] Davis v. County Farmers' Mutual Fire Ins. Assoc. 154 Iowa, 326, 134 S. W. 860.

[5] Cannon v. Farmers' Mutual Fire Assoc. 58 N. J. Eq. 102, 43 Atl. 281.

On transferees of policy or property as members of mutual fire insurance company, see note in 32 L.R.A. 482.

**§ 2318. Rights of creditor of assignor attaching subsequently to assignment of fire policy.**—An assignment of a policy of fire insurance before loss, with the consent of the company, to the vendee or mortgagee of the insured property, or as security for debt, is good as against subsequently attaching creditors.[6] And where the policy has been assigned to a mortgagee, a creditor attaching subsequently to such assignment cannot defeat it by any defects in the mortgage.[7] Where after a loss a written assignment of a fire policy has been made by the holder, and notice of such assignment served on the company, but no delivery of the policy made, it has been held to be a valid assignment, which a subsequent attaching creditor cannot defeat, and such assignment need not be recorded under a statutory requirement that, in case of the sale or mortgage of personal property, the transfer must be recorded where the vendor or mortgagor retains possession.[8]

**§ 2319. Effect of acts of assignor upon rights of assignee: generally.**—If the property insured is sold and the policy assigned with the consent of the company, it constitutes a new contract between the purchaser of the property and the insurer, and the former is not affected by any acts of the assignor, and the company is estopped to deny its validity either for want of consideration or on the ground of ignorance.[9] But if the policy is merely assigned as collateral security, it would seem that the insurer might avail itself as a defense of any acts of the assignor in violation of the conditions in the policy. The contract is one of indemnity to the insured. By such an assignment no new party assumes any obligation to the company; no new consideration moves from the assignee to the insurer. The policy is merely assigned for security, the assignor, after the assignment, occupying the same relation to the insurer as before. It is his interest which is covered. The company, by consent to such an assignment, does not waive all rights to claim a forfeiture for violation of the express condition of a policy. They stand in the same relation as affecting the validity of the policy as before, and any subsequent violation of conditions will defeat

[6] Walters v. Washington Ins. Co. 1 Iowa, 404, 63 Am. Dec. 451; Glover v. Lee, 140 Ill. 102, 29 N. E. 680. See Greenwich Ins. Co. v. Columbia Mfg Co. 73 Ill. App. 560. *Examine* Fritchie v. Miller's Pennsylvania Extract Co. 197 Pa. St. 401, 47 Atl. 351 (garnishee; employers liability); Anoka Lumber Co. v. Fidelity & Casualty Co. 63 Minn. 286, 30 L.R.A. 689, 65 N. W. 353 (garnishee; employers liability); Freis v. Little Black Farmers' Mutual Ins. Co. 120 Wis. 590, 98 N. W. 522.

[7] Leinkauf v. Calman, 110 N. Y. 50, 17 N. E. 389.

[8] Aultman v. McConnell, 34 Fed. 724. See Iowa Code, sec. 1923, for the statute.

[9] Ellis v. Insurance Co. of North America, 32 Fed. 646. See § 2308 herein.

a recovery where no new consideration moves from the assignee to the insurer.[10] Under an assignment of this nature the assignee is subject to the same defenses as might have been made against the mortgagor.[11] So fraud in the application may be availed of by assurer against an assignee of the policy, even though the assignment was made with assurer's consent where it then had no knowledge of said fraud.[12] It has been held, however, in a few cases that subsequent acts of the assignor will not defeat the policy where assigned with the consent of the company.[13] A stipulation in a policy against its assignment can be taken advantage of by the insurer only, and does not enable an assignee to avoid his assignment.[14]

**§ 2320. Effect of acts of assignor upon rights of assignee who is mortgagee.**—If a fire policy is assigned as collateral to a mortgage with the consent of the company, the assignee takes it subject to the conditions thereof, and no recovery can be had merely in consequence of the equities of the assignee if the assignor loses the right to recover by violating the terms of the contract.[15] So a

[10] *Connecticut.*—Birdseye v. City Fire Ins. Co. 26 Conn. 165.

*Illinois.*—Home Mutual Fire Ins. Co. v. Hauslein, 60 Ill. 521.

*Massachusetts.*—Young v. Eagle Ins. Co. 14 Gray (80 Mass.) 150, 74 Am. Dec. 673; Hale v. Mechanics' Mutual Ins. Co. 6 Gray (72 Mass.) 169, 66 Am. Dec. 410.

*New Jersey.*—Warbasse v. Sussex County Mutual Ins. Co. 42 N. J. L. 203.

*New York.*—Grosvenor v. Atlantic Ins. Co. 17 N. Y. 391.

*Pennsylvania.*—State Mutual Fire Ins. Co. v. Roberts, 31 Pa. St. 438.

*Wisconsin.*—Pupke v. Resolute Fire Ins. Co. 17 Wis. 378, 84 Am. Dec. 754.

*England.*—Kanady v. Gore Dist. Mutual Fire Ins. Co. 44 U. C. Q. B. Rep. 261.

[11] Reed v. Windsor County Mutual Fire Ins. Co. 54 Vt. 413. See § 2314 herein.

[12] Northwestern Mutual Life Ins. Co. v. Montgomery, 116 Ga. 799, 43 S. E. 79.

[13] New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221; Pollard v. Somerset Mutual Fire Ins. Co. 42 Me. 221; Boynton v. Clinton & Essex Mutual Ins. Co. 16 Barb. (N. Y.) 254; Burton v. Gore District Mutual Fire Ins. Co. 12 Grant Ch. (U. C.) 156. See Grosvenor v. Atlantic Ins. Co. 17 N. Y. 391; Buffalo Steam Engine Works v. Sun Mutual Ins. Co. 17 N. Y. 401. But *examine* Charleston Ins. & Trust Co. v. Neve, 2 McMull. (S. C.) *p. 237.

[14] Spencer v. Myers, 150 N. Y. 269, 34 L.R.A. 175, 55 Am. St. Rep. 675, 44 N. E. 942. See Reliance Ins. Co. of Philadelphia v. Dalton, — Tex. Civ. App. —, 178 S. W. 966; Ramsay v. Myers, 60 Pa. Dist. R. 468.

[15] Illinois Mutual Fire Ins. Co. v. Fix, 53 Ill. 151, 5 Am. Rep. 38; Tomlinson v. Monmouth Mutual Fire Ins. Co. 47 Me. 232; Loring v. Manufacturers' Ins. Co. 8 Gray (74 Mass.) 28; Buffalo Steam Engine Works v. Sun Mutual Ins. Co. 17 N. Y. 401; Grosvenor v. Atlantic Ins. Co. 17 N. Y. 391. These last two cases overrule Traders' Ins. Co. v. Roberts, 9 Wend. (N. Y.) 404; Viall v. Genesee Mutual Ins. Co. 19 Barb. (N. Y.) 440; Tillou v. Kingston Mutual Ins. Co. 5 N. Y. 405, s. c. 7 Barb.

mortgagee of land cannot recover on a policy taken out by the mortgagor, payable to the mortgagee "as his interest may appear," where the mortgagor burned the insured building for the purpose of realizing on the policy.[16] Nor is an assignment to a mortgagee retroactive so as to protect said transferee and enable him to recover where assured's title to the property was invalid so that he had no insurable interest.[17] So a subsequent conveyance of the property by the insured in violation of the conditions of the policy, which require the consent of the company, will forfeit the policy.[18] And the assignment by one of the mortgagors of his interest in insured property, does not avoid the right of the mortgagee to recover on a policy payable to him, where said policy provides that the act of no one other than himself, or those claiming under him, shall affect his right to recover in case of loss.[19] The fact that the statute of limitations has barred a personal action against the assignor of a mortgage on his guaranty of its payment, when suit is commenced by the assignee to establish a claim to the proceeds of a policy on the property taken out by such assignor, after becoming the owner of the property, does not release or impair the assignee's equitable lien upon such proceeds.[20] The mortgagee may, however, take upon himself the payment of the premiums, and in such a case acts of the mortgagor will not defeat the policy.[1] So where there is an agreement when the policy is assigned "that the mortgagee shall pay any and all assessments upon the property, provided the original insured shall not pay the same on demand," subsequent acts of the mortgagor will not defeat a recovery on the policy in the interest of the mortgagee.[2] If a policy by its mort-

(N. Y.) 570. See §§ 2314, 2314a herein.

On effect on assignee of assignor's acts of forfeiture, see note in 18 L.R.A. 136.

[16] Hocking v. Virginia Fire & Marine Ins. Co. 99 Tenn. 729, 39 L.R.A. 148, 42 S. W. 451.

On effect of breach of policy by grantor on rights of mortgagee to whom policy has been assigned, see notes in 18 L.R.A.(N.S.) 197; 25 L.R.A.(N.S.) 1226; 31 L.R.A.(N.S.) 455; and L.R.A.1915C, 758.

[17] Stanstead & Sherbrooke Mutual Fire Ins. Co. v. Gooley, 9 Rap. Jud. Q. B. R. 324.

[18] Home Mutual Fire Ins. Co. v. Hauslein, 60 Ill. 521; Hale v. Mechanics' Mutual Fire Ins. Co. 6 Gray (72 Mass.) 169, 66 Am. Dec. 410; Swenson v. Sun Fire Office Ins. Co. 68 Tex. 461, 5 S. W. 60; Moulthrop v. Farmers' Ins. Co. 52 Vt. 123.

[19] Whiting v. Burkhardt, 178 Mass. 535, 52 L.R.A. 788, 86 Am. St. Rep. 503, 60 N. E. 1, 30 Ins. L. J. 666.

[20] Hyde v. Hartford Fire Ins. Co. 70 Neb. 503, 113 Am. St. Rep. 796, 97 N. W. 629.

[1] Brannin v. Mercer County Ins. Co. 28 N. J. L. 92.

[2] Francis v. Butler Mutual Fire Ins. Co. 7 R. I. 159. See also Foster v. Equitable Mutual Fire Ins. Co. 2 Gray (68 Mass.) 216; Boynton v. Clinton & Essex Mutual Ins. Co. 16 Barb. (N. Y.) 254.

gage clause provides that it shall not, as to the interest of the mortgagee, be invalidated by any act on the part of the mortgagor or owner, the mortgagee may recover for a loss, though the mortgagor may have voluntarily destroyed the property.[3]

§ 2321. **Effect of acts of mortgagor after loss upon rights of assignee.**—The mortgagor cannot after a loss has occurred, by any agreement with the insurer as to the amount due upon the policy, affect the rights of the mortgagee, who is assignee of the policy or designated payee in case of loss,[4] nor can he by an assignment of his claim against the company, or by any release given to the company, defeat the rights of such assignee or payee.[5]

§ 2322. **Legal effect of assignment after loss.**—A policy of insurance is, after loss has happened, assignable like any other debt, although such policy contains a provision that it shall not be assignable without the consent of the company expressed by indorsement made thereon.[6] After a loss has occurred the right of the assured to the indemnity becomes a fixed and vested right. It is an obligation or debt due from the company to the assured, and as such is assignable, and is not within the clause requiring notice of the assignment of the policy to be given to the company. It is, however, subject to such claims, demands, or defenses as the insurer would be entitled to make against the original insured.[7] A

[3] Hartford Fire Ins. Co. v. Williams, 63 Fed. 925, 11 C. C. A. 503, 27 U. S. App. 493.

[4] Brown v. Hartford Fire Ins. Co. 5 R. I. 394. *Compare* Collinsville Savings Soc. v. Boston Ins. Co. 77 Conn. 676, 69 L.R.A. 924, 60 Atl. 647; Chandos v. American Fire Ins. Co. 84 Wis. 184, 19 L.R.A. 321, 54 N. W. 390 (both cases *considered* under § 2314a herein).

[5] Chowne v. Baylis, 31 Beav. 351, 31 L. J. Ch. 757, 8 Jur. (N. S.) 1028, 8 L. T. 39, 11 W. R. 5. See Amory v. Reliance Ins. Co. 208 Mass. 378, 94 N. E. 677, 40 Ins. L. J. 1224.

[6] Walters v. Washington Ins. Co. 1 Iowa, 404, 63 Am. Dec. 451.

[7] *Alabama.*—Perry v. Merchants' Ins. Co. 25 Ala. 355.

*Georgia.*—Co-operative Fire Assoc. v. Borchardt & Co. 123 Ga. 181, 51 S. E. 429, 34 Ins. L. J. 778.

*Iowa.*—Bartling v. German Mutual Lightning & Tornado Ins. Co. of F. of M. & W. 154 Iowa, 335, 134 N. W. 864, s. c. — Iowa, —, 123 N. W. 63, 39 Ins. L. J. 60; Carter v. Humboldt Fire Ins. Co. 12 Iowa, 287.

*Louisiana.* — Matthews v. General Ins. Co. 9 La. Ann. 590, 591.

*Maryland.*—Consolidated Real Estate & Fire Ins. Co. v. Cashow, 41 Md. 59.

*Massachusetts.*—Hall v. Dorchester Mutual Fire Ins. Co. 111 Mass. 53, 15 Am. Rep. 1; Wilson v. Hill, 3 Met. (44 Mass.) 66.

*Michigan.*—Gourlay v. Insurance Co. of North America, 181 Mich. 286, 148 N. W. 258 (equally divided court); Bonenfant v. American Fire Ins. Co. 76 Mich. 653, 654, 43 N. W. 682; Roger Williams Ins. Co. v. Carrington, 43 Mich. 252, 5 N. W. 303.

*Missouri.*—Archer v. Merchants' & Manufacturers' Ins. Co. 43 Mo. 434.

*New Jersey.*—Combs v. Shrewsbury Mutual Fire Ins. Co. 32 N. J. Eq. 512.

provision in the policy prohibitng an assignment after a loss has occurred has been held to be void, as against public policy.[8] If, however, the property insured is transferred before loss, but the policy is not assigned therewith, it cannot be transferred after loss so as to give the purchaser any rights thereunder. The holder of the policy, having parted with his interest in the property, has no rights at the time of loss, and the loss having occurred, he has no claim or debt against the company to assign.[9] And where the policy holder has parted with her insurable interest by a sale of the property before the loss, she has no interest which can be transferred after the loss, even though consent is given thereto by insurer's assistant secretary.[10]

It is not necessary to transfer the claim in writing after loss to constitute a valid assignment; a parol assignment of the right of action will be sufficient to transfer the cause of action.[11]

If an assignment is made before loss, but is not delivered until after loss, it will operate as an assignment after loss, since the assignment does not take effect until delivery.[12] Where after loss

*New York.*—Carroll v. Charter Oak Ins. Co. 38 Barb. (N. Y.) 402, s. c. 40 Barb. (N. Y.) 292, s. c. 1 Abb. Dec. (N. Y.) 316; Brichta v. Lafayette Ins. Co. 2 Hall (N. Y.) 403; Rogers v. Traders' Ins. Co. 6 Paige (N. Y.) 583.

*Pennsylvania.*—Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460, 475, 2 Am. St. Rep. 686, 12 Atl. 668; West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573.

*Tennessee.*—Pennebaker v. Tomlinson, 1 Tenn. Ch. 598.

*Wisconsin.*—Dogge v. Northwestern Ins. Co. 49 Wis. 501, 5 N. W. 589. See § 904 herein.

[8] *Georgia.*—Georgia Co-operative Fire Assoc. v. Borchardt & Co. 123 Ga. 181, 51 S. E. 429, 34 Ins. L. J. 778.

*Iowa.*—Carter v. Humboldt Ins. Co. 12 Iowa, 287; Walters v. Washington Ins. Co. 1 Iowa, 404, 63 Am. Dec. 451.

*Pennsylvania.*—West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573.

*Wisconsin.*—Alkan v. New Hampshire Fire Ins. Co. 53 Wis. 136, 10 N. W. 91.

See also Spare v. Home Mutual Ins. Co. 9 Saw. (C. C.) 142, 17 Fed. 568; G. Obler & Sons Co. v. Buttorff Mfg. Co. 145 Ala. 625, 40 So. 278; Carroll v. Charter Oak Ins. Co. 38 Barb. (N. Y.) 402; Courtney v. New York City Ins. Co. 28 Barb. (N. Y.) 116; Goit v. National Protection Ins. Co. 25 Barb. (N. Y.) 189. In Dey v. Poughkeepsie Ins. Co. 23 Barb. (N. Y.) 463, it was held that if the parties chose to insert such a provision in the policy, they must be bound by it, as the courts would not interfere. This case is, however, overruled by the cases just cited. See § 904 herein.

[9] Lynch v. Dalzel, 4 Brown Parl. c. 431.

[10] Davis v. Bremer County Farmers' Mutual Fire Ins. Assoc. 154 Iowa, 326, 134 N. W. 860.

[11] Bennett v. Maryland Ins. Co. 14 Blatchf. (U. S. C. C.) 422, Fed. Cas. No. 1321.

[12] Watertown Fire Ins. Co. v. Grover & Baker Sewing Machine Co. 41 Mich. 131, 32 Am. Rep. 146, 1 N. W. 961.

the insured places the policy in the hands of an attorney for collection, instructing him to apply the proceeds in payment of the insured's debt to a third person, it is held that this is not an assignment to the creditor.[13] An order given to a creditor by the insured after loss directing the company to pay him the amount due on the policy makes him assignee of the cause of action, and, under a statute requiring actions to be brought by the real party in interest, the assignee is entitled to sue on the policy.[14]

Although an assignment of a policy is within a statute permitting assignment of instruments for the payment of money, an assignment after loss is not permissible thereunder.[15] If an assignee under a written assignment after loss is given full power to collect the policy proceeds, his rights thereto cannot be questioned as between him and the assignor.[16]

§ 2323. **Assignment of void policy.**—Where a policy is void in the hands of the assured by reason of misrepresentations, it will be equally void in the hands of an assignee, although the company assents to the assignment.[17] So if a person obtains insurance upon property which he has already conveyed to another, such policy is void in his hands, and the consent of the company to a conveyance of all his title and interest in the policy to the grantee will not create a valid, new, and independent contract between the company and the grantee.[18]

§ 2324. **Limitation clauses: assignment.**—Policies of fire insurance generally contain a clause forbidding an assignment of the policy without the consent of the insurer, and imposing a forfeiture for a violation of this restriction. A provision of this nature is enforceable in the courts,[19] as it is not an unlawful restraint upon the right to transfer property.[20] Such a provision will be strictly construed.[1] So a clause in a policy of insurance prohibiting assign-

[13] Aultman v. McConnell, 34 Fed. 724.

[14] Spratley v. Hartford Ins. Co. 1 Dill. (U. S. C. C.) 392, Fed. Cas. No. 13,256.

[15] Davis v. Bremer County Farmers' Mutual Fire Ins. Assoc. 154 Iowa, 326, 134 N. W. 860; Code secs. 3044, 3046.

[16] Freis v. Little Black Farmers Mutual Ins. Co. 120 Wis. 590, 98 N. W. 522.

[17] Citizens' Fire Ins. Security Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360; Eastman v. Carroll County Mutual Ins. Co. 45 Me. 307. See Northwestern Mutual Life Ins. Co. v. Montgomery, 116 Ga. 799, 43 S. E. 79.

[18] McCluskey v. Providence-Washington Ins. Co. 126 Mass. 306.

[19] Stolle v. Ætna Fire Ins. Co. 10 W. Va. 546, 27 Am. Rep. 593.

[20] Lazarus v. Commonwealth Ins. Co. 5 Pick. (22 Mass.) 76.

[1] Lazarus v. Commonwealth Ins. Co. 5 Pick. (22 Mass.) 76; Courtney v. New York City Ins. Co. 28 Barb. (N. Y.) 116; West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573. See §§ 220 et seq. herein.

ment thereof without consent in writing of the company does not apply to a deposit of the policy by way of pledge, and such deposit gives the creditor a lien on the proceeds of the policy, which lien is binding upon the underwriters, the assured, and all persons who with notice of such lien take an interest in the policy from the assured.[2]

**§ 2325. Clause as to assignment: waiver of breach thereof: forfeiture.**—A condition in a policy that no assignment can be made without the consent of the company may be waived, and the company thus prevented from setting up in defense breach of such condition.[3] A clause of this nature rendering the policy void in case certain conditions as to the manner of making the assignment are not complied with is for the benefit of the insurers. They may insist upon a forfeiture or not as they may desire, and though the conditions as to assignment may be clearly violated, still if the assurers desire, they may elect to waive the violations of such conditions and treat the policy as a valid subsisting contract of insurance.

So a requirement as to the manner or mode of assignment or of obtaining consent may be waived.[4] Though the policy may become suspended under the by-laws for nonpayment of an assessment, if the company assents to an assignment of the policy thereafter, such act on its part is held to be a waiver of its right to insist on the objection,[5] and if an insurance company has paid the proceeds of a life policy into court for the lawful owner, it has waived any objection it might have to any transfer of the policy by the insured in his lifetime, and such objection is not available to the personal representative of the deceased or other person interested in his estate.[6] Again, if a policy is conditioned to be void where assigned

[2] Ellis v. Kreutzinger, 27 Mo. 311, 72 Am. Dec. 270. See also Griffey v. New York Central Ins. Co. 30 Hun (N. Y.) 299, s. c. 100 N. Y. 417, 53 Am. Rep. 202, 3 N. E. 309.

[3] *Illinois.*—City Fire Ins. Co. v. Mark, 45 Ill. 482.

*Iowa.*—Furbush v. Consolidated Patrons' & Farmers' Mutual Ins. Co. 140 Iowa, 240, 118 N. W. 371.

*Missouri.*—Borchers v. Barckers, 158 Mo. App. 267, 138 S. W. 555.

*New York.*—Pratt v. New York Central Ins. Co. 55 N. Y. 565, 14 Am. Rep. 304; Northam v. International Ins. Co. of N. Y. 61 N. Y. Supp. 45, 45 App. Div. 177.

*Virginia.*—Wheeling Ins. Co. v. Morrison, 11 Leigh. (Va.) 354.

[4] McGlynn v. Curry, 81 N. Y. Supp. 855, 82 App. Div. 431; Furbush v. Consolidated Patrons' & Farmers' Mutual Ins. Co. 140 Iowa, 240, 118 N. W. 371.

[5] Hale v. Union Mutual Fire Ins. Co. 32 N. H. 295, 64 Am. Dec. 370.

[6] Opitz v. Karel, 118 Wis. 527, 62 L.R.A. 982, 99 Am. St. Rep. 1004, 95 N. W. 948. But see as to principle governing question of waiver or estoppel by payment of fund into court, §§ 746c et seq. herein.

without indorsement of the company's assent thereon, and it is assigned, but several days thereafter the company indorses its consent, the forfeiture is thereby waived.[7] And consent to a transfer or assignment waives a prior breach of conditions.[8] There is no estoppel against an assignor's right under a life policy to set up title against his assignee.[9] And insurer cannot, after it has assented to an assignment, set up in defense misrepresentations of assured of which it had knowledge and of which it had failed to notify said holder, but continued to accept premiums.[10]

If a policy is assignable and the assignee assigns it to another the last assignee takes it subject to the equities of the first assignor in the absence of facts creating an equitable estoppel against said assignor but the mere fact that the first assignment was absolute in form will not create such an estoppel. An estoppel will, however, be created in such case by laches of the first assignor and his practical abandonment of the policy by leaving it in the possession of his assignee for years during which time it would have lapsed except for the payment of premiums by said assignee.[11] And the insurer's assent to an assignment of a policy does not waive a clause rendering an assigned policy void as to all above the debt due the assignee.[12] Nor is there any waiver where there is nothing in the record to show that either the grantee or his transferee was induced by any word or act of insurer or its agent to neglect to have assigned the policy of their predecessor in title, and which was payable to still another party as mortgagee, or that either of them in consequence thereof failed to insure his interest by a new policy; nor is there any waiver where it also appears that the plaintiff's name was not made known either to insurer or its agent, that the policy was at no time taken to either of them before the loss, that the agent did not know of the existence of the policy, and that neither of them knew, other than by general information, that the title had been or has to be conveyed.[13]

[7] Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460, 2 Am. St. Rep. 686, 12 Atl. 668.

[8] North British & Mercantile Ins. Co. v. Gunter, 12 Tex. Civ. App. 598, 35 S. W. 715. See also Rines v. German Ins. Co. 78 Minn. 46, 80 N. W. 839.

[9] Locke v Bowman, 168 Mo. App. 121, 151 S. W. 468.

[10] Union National Bank v. Manchester Life Ins. Co. of N. Y. 52 La. Ann. 36, 26 So. 800, 30 Ins. L. J. 50.

[11] Brown v. Equitable Life Assur. Soc. of U. S. 75 Minn. 412, 79 N. W. 968, 1126, 28 Ins. L. J. 843, rev'g 78 N. W. 671, which granted rehearing in 78 N. W. 103, 28 Ins. L. J. 315.

[12] McQuillan v. Mutual Reserve Fund Life Assoc. 112 Wis. 665, 56 L.R.A. 233, 87 N. W. 1069.

[13] Swaine v. Teutonia Fire Ins. Co. 222 Mass. 108, 109 N. E. 825, 46 Ins. L. J. 709.

**§ 2325a. Same subject: agent's acts or knowledge.**—The insurer's local agent may consent to an assignment even though it is stipulated that only a specified officer has power to waive any of the policy conditions.[14] So where a policy provided that it should be void in case of assignment before loss without the consent of the company indorsed thereon, and the secretary of the company told the assured that he could assign the policy without such consent, it was held that this waived the condition.[15] And if a policy is renewed by an agent of the company with knowledge that it has been assigned, the breach of condition is waived by the renewal.[16] But the fact that a director of a mutual company had knowledge of the assignment and received premiums from the assignee's agent does not operate as a waiver of the required notice and consent.[17] So where the agent of the assignee had knowledge of a forfeiture, it was held that the consent of the company did not constitute a waiver.[18] And where an assignee has not complied with the requirements necessary to becoming a member of a mutual company, and he has not recognized any liability as a member, insurer is not estopped to assert non-membership by reason of the acts and declarations of its officers made after loss, especially so when the same are not relied on in inducing subsequent action.[19] Where certain acts are required to be performed to make an assignment operative as to insurer and it is claimed that there is a waiver by reason of the acts of the authorized officer of insurer, and evidence is offered tending to sustain such a claim the question of waiver may be one for the jury, or the court may instruct the jury as to the legal effect of the evidence according to its character.[20]

[14] Sheets v. Iowa State Ins. Co. 153 Mo. App. 620, 135 S. W. 80, 40 Ins. L. J. 955.

That agent may waive conditions notwithstanding inhibition in policy, see § 439 herein.

As to agent's powers; assignment: see § 560 herein. See also as to agent's powers as to waiver or estoppel, §§ 533 et seq. herein.

[15] Stolle v. Ætna Fire & Marine Ins. Co. 10 W. Va. 546, 27 Am. Rep. 593. See Furbush v. Consolidated Patrons' & Farmers' Mutual Ins. Co. 140 Iowa, 240, 118 N. W. 371.

[16] Bilson v. Manufacturers' Ins. Co. 3 Phila. 547, Fed. Cas. No. 1410, 16 Leg. Int. 228, 7 Am. L. Reg. 661.

[17] Kamm & Schellinger Brewing Co. v. St. Joseph County Village Fire Ins. Co. 168 Mich. 606, 134 N. W. 999.

[18] Fire Assoc. of Philadelphia v. Flourney, 84 Tex. 632, 31 Am. St. Rep. 39, 19 S. W. 793.

[19] Cannon v. Farmers' Mutual Fire Assoc. 58 N. J. Eq. 102, 43 Atl. 281.

[20] Corcoran v. New York Mutual Life Ins. Co. 183 Pa. 443, 41 W. N. C. 469, 39 Atl. 50. If the evidence is direct and certain, presenting no question of credibility, and leaving no sufficient ground for inconsistent inference of fact, the court may be asked to instruct the jury as to its legal effect. But if it is uncertain, if it depends upon the credibility of witnesses, and if there is room for drawing from it different inferences of fact, it must go to the

**§ 2326. Assignment of life policies: generally: written assignment: parol assignment.**—The rule that fire policies cannot be assigned without the consent of the insurer does not control in the assignment of policies of life insurance.[1] Under the strict rules of common law, laid down in the earlier cases as to assignments, policies of life insurance are not assignable at law so as to give the assignee any rights thereunder in a court of law, but equity recognized such an assignment, and would compel the assignor to permit the use of his name in an action to recover as trustee for the assignee.[2] Policies of life insurance have, however, under later decisions, been held to be governed by the principles controlling choses in action and assignable by indorsement and delivery, vesting the entire right in the assignee.[3] Such acts even have been held unnecessary to constitute a valid assignment. With the gradual extension of the principles as to assignment of choses in action, courts of law now recognize an assignment thereof to the extent of vesting the assignee with an equitable interest, and permitting him to recover for his own benefit in the name of his assignor. And this rule is now said to control as to the rights of the assignees of life policies.[4]

Although it is decided that in order to vest the legal title to a

jury. They must clear up the doubts, settle questions of credibility, draw the correct inferences, and give final shape to the findings of fact. Id.

[1] New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742; Mutual Protection Ins. Co. v. Hamilton, 5 Sneed (37 Tenn.) 269. See §§ 916, 918 herein.

[2] See Wright v. Wright, 1 Ves. Sr. 409, where it was declared by Lord Chancellor Hardwicke in case of a devise of lands to daughters, their heirs and assigns that: "There was a wise reason of the law's not allowing a right to sue to be assigned: that it tended to *champerty* and *maintenance* to pass debts into the hands of the more powerful and to oppress lower people. Yet it is now established in this court, that a *chose in action* may be assigned for a valuable consideration." Decided 1749–50.

[3] *Indiana.*—Harley v. Heist, 86 Ind. 196, 45 Am. Rep. 285; Bushnell v. Bushnell, 92 Ind. 503. State v. Tomlinson, 16 Ind. App. 602, 59 Am. St. Rep. 335, 45 N. E. 1116.

*Maryland.*—Fitzgerald v. Rawlings Implement Co. 114 Md. 470, 79 Atl. 915, 40 Ins. L. J. 1565; New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742.

*Massachusetts.*—Palmer v. Merrill, 6 Cush. (60 Mass.) 282, 52 Am. Dec. 782.

*Minnesota.*—Brown v. Equitable Life Assur. Soc. 75 Minn. 103, 79 N. W. 968, 78 N. W. 103.

*New York.*—McNevin v. Prudential Ins. Co. 57 Misc. 608, 108 N. Y. Supp. 745. See Russell v. Grigsby, 168 Fed. 577, 94 C. C. A. 61, rev'd upon point of insurable interest in Grigsby v. Russell, 222 U. S. 149, 56 L. ed. 133, 32 Sup. Ct. 58, 36 L.R.A.(N.S.) 642. See §§ 914, 918 herein.

On validity of assignment of interest in life insurance policy to one paying premium, see notes in 3 L.R.A.(N.S.) 935, and 33 L.R.A. (N.S.) 949.

[4] Palmer v. Merrill, 6 Cush. (60

life policy in an assignee, it is essential that the assignment should be in writing,[5] nevertheless the assignment of a life policy need not be in writing to be valid;[6] but it is governed by the rules applicable to ordinary simple written contracts.[7] So life insurance policies may be validly assigned by parol;[8] and a parol assignment accompanied by delivery is valid.[9] Also a parol assignment of a policy, made by the insured to his wife, is valid, if the policy does not declare an assignment without the consent of the company void.[10] Nor does an oral assignment by assured to his mother, to whom he is indebted financially, invalidate it even though he took out the policy intending it for his administrator's benefit.[11] So, as between an assignor and assignee, a parol assignment of a policy by the beneficiary is valid, where the policy does not forbid it nor provide in what manner the assignment may be made, and especially so where insurer does not object thereto.[12] But although the policy prohibits oral assignments, the validity thereof can only be questioned by assurer.[13] If a contingent interest in a life policy, such as a right to its cash surrender at the expiration of a specified time, is assigned, such assignment is sufficient, although not in writing, if the policy is deposited as collateral security and retained, with the consent of the pledgor, as such by the assignee, until maturity of assured's rights when

Mass.) 282, 52 Am. Dec. 782, per Shaw, C. J. See American Bonding & Trust Co. v. Baltimore & Ohio Southwestern Ry. Co. 124 Fed. 866, 882, 60 C. C. A. 52, 68.

[5] Steele v. Gatlin, 115 Ga. 929, 59 L.R.A. 129, 42 S. E. 253. *Compare* Southern Mutual Life Ins. Co. v. Durdin, 132 Ga. 495, 131 Am. St. Rep. 210, 64 S. E. 264, 38 Ins. L. J. 648, Ga. Civ. Code, 1895, secs. 2116, 3077.

[6] Colburn's Appeal, 74 Conn. 463, 92 Am. St. Rep. 231, 51 Atl. 139; Steward v. Gwynn, 41 Ind. App. 320, 82 N. E. 1000; Macauley v. Central National Bank, 27 S. C. 215, 3 S. E. 193; Nashville Trust Co. v. First National Bank, 123 Tenn. 617, 134 S. W. 311, 40 Ins. L. J. 664, 669. See Gledhill v. McCoombe, 110 Me. 341, 45 L.R.A.(N.S.) 26, 86 Atl. 247.

[7] Nashville Trust Co. v. First National Bk. 123 Tenn. 617, 134 S. W. 311, 40 Ins. L. J. 664, 669.

[8] McNevins v. Prudential Ins. Co. 57 Misc. 608, 108 N. Y. Supp. 745; Thompson v. Equitable Life Assurance Soc. of U. S. 95 S. Car. 16, 78 S. E. 439; Barron v. Williams, 58 S. Car. 280, 79 Am. St. Rep. 840, 36 S. E. 561; Nashville Trust Co. v. First National Bank, 123 Tenn. 617, 134 S. W. 311, 40 Ins. L. J. 664; Hancock v. Fidelity Mutual Life Ins. Co. — Tenn. Ch. —, 53 S. W. 181.

[9] Hancock v. Fidelity Mutual Life Ins. Co. — Tenn. Ch. —, 53 S. W. 181; Box v. Lanier (Lanier v. Box) 112 Tenn. 393, 64 L.R.A. 458, 79 S. W. 1042.

[10] State v. Tomlinson, 16 Ind. App. 662, 59 Am. St. Rep. 335, 45 N. E. 1116.

[11] Hancock v. Fidelity Mutual Life Ins. Co. — Tenn. Ch. —, 53 S. W. 181.

[12] Rahders, Merritt & Hagler v. People's Bank of Minneapolis, 113 Minn. 496, 130 N. W. 16, 40 Ins. L. J. 675.

[13] Embry's Admr. v. Harris, 107 Ky. 61, 52 S. W. 958.

the policy may be surrendered and its proceeds applied to the debt.[14]

We have already discussed the question of the necessity of an insurable interest in the assignee of life insurance policies, and refer to those sections.[15]

**§ 2326a. Life policies: right to assign.**—A person whose life is insured has a right to realize upon his policy by its assignment.[16] And if a policy is by statute assignable, the right to assign cannot be limited by a policy clause making it nonassignable, and even if such a prohibition were valid it cannot be availed of where it is waived.[17] And policy stipulations against assignment cannot aid an assignor if the insurer declines to take advantage of them and pays the money into court.[18]

An insured may assign a life policy payable to his "legal representatives." [19] And where at the expiration of a stated period a life policy has a cash surrender value, assured's right thereunder constitutes such a sufficient contingent interest as to be validly assignable before the expiration of said specified period.[20]

But the option of surrendering a policy for its cash value cannot be assigned to a creditor by one who has insured his life for the benefit of his children.[1]

**§ 2326b. Life policies: nature of assignment: construction.**—An assignment of a policy is a contract separate and distinct from the contract of insurance.[2] But an insurance policy is not an independent right of property capable of being transferred separately from the notes which it is given to secure, so that one person can hold the principal obligation, another the policy.[3] Though the payment of a life policy is not made until after the death of insured, his assignment of it is not testamentary in

[14] Cornell v. Mutual Life Ins. Co. of N. Y. 179 Mo. App. 420, 165 S. W. 858.

[15] See §§ 914–19 herein.

On validity of assignment of life insurance policy to one having no insurable interest, where the assignment is not made by way of cover for a wager policy, see note in 6 L.R.A.(N.S.) 128.

[16] Steinback v. Dispenbrock, 158 N. Y. 24, 70 Am. St. Rep. 424, 44 L.R.A. 417, 52 N. E. 662.

[17] Doty v. Dickey, 29 Ky. L. Rep. 900, 96 S. W. 544, 36 Ins. L. J. 73. As to stipulations contrary to statute see §§ 176, 194(g), 194(h) herein.

[18] Spencer v. Myers, 150 N. Y. 269, 34 L.R.A. 175, 44 N. E. 942.

[19] Hurst v. Mutual Reserve Fund Life Assoc. 78 Md. 59, 20 L.R.A. 761, 26 Atl. 596.

[20] Cornell v. Mutual Life Ins. Co. of N. Y. 179 Mo. App. 420, 165 S. W. 858.

[1] McCutchen v. Townsend, 127 Ky. 230, 16 L.R.A.(N.S.) 316 and note, 105 S. W. 937.

[2] New York Life Ins. Co. v. Dunlevy, 214 Fed. 1, 130 C. C. A. 473, 44 Ins. L. J. 335.

[3] Stone v. Sargent, 220 Mass. 445, 107 N. E. 1014. *Examine* Tower v. Stanley, 220 Mass. 429, 107 N. E. 1010, 45 Ins. L. J. 561.

character.[4] A policy issued in a foreign state by insurer is held to be governed by the laws of such state as to assignments.[5] The assignability of insurance contracts is, however, held not affected by the question whether the policy was issued by a corporation created under the laws of the state in which the controversy arises.[6]

§ 2326c. **Life policies: consideration for assignment.**—Love and affection between parent and child constitute a good consideration for an assignment, not only for an executed, but also for an executory contract, and this applies to an assignment of the policy to assured by his wife and children even though the policy provides that it is not assignable.[7] Where an assignment of a life policy purports to be for a valuable consideration, it will be presumed that a sufficient consideration existed.[8] And it is held that an assignment of a paid up policy is made in good faith and for a valuable consideration even though the original policy amount is over five times that paid for it, and the evidence as to its fair cash value is that paid for it, and also that it is worth over double the amount paid.[9] One who procures from a member of a partnership a loan of the firm's money by misrepresentation, is, after such member has made good to his firm the loss resulting to the firm, under a moral obligation to repay him, and this obligation will support an assignment of the policy upon his life made for the purpose of indemnifying such person for the loss he had thus sustained.[10]

An agreement to marry constitutes a sufficient consideration for an assignment of a paid up policy by assured to the affianced wife.[11] And the same consideration will, in the absence of prior

[4] Southern Mutual Life Ins. Co. v. Durdin, 132 Ga. 495, 131 Am. St. Rep. 210, 64 S. E. 264.

[5] Western Life Indemnity Co. v. Rupp, 147 Ky. 489, 144 S. W. 743, 41 Ins. L. J. 863; Wilde v. Wilde, 209 Mass. 205, 95 N. E. 295, 40 Ins. L. J. 1538. See §§ 225 et seq. herein.

On conflict of laws as to assignment of policy, see notes in 63 L.R.A. 858; 23 L.R.A.(N.S.) 978; and 52 L.R.A.(N.S.) 281.

[6] Brick v. Campbell, 122 N. Y. 337, 10 L.R.A. 259, 25 N. E. 493.

[7] Doty v. Dickey, 29 Ky. L. Rep. 900, 96 S. W. 544, 36 Ins. L. J. 73; Northwestern Mutual Life Ins. Co. v. Wright, 153 Wis. 252, 140 N. W. 1078 (love and affection between insured and his mother and sister sufficient).

[8] Colburn's Appeal, 74 Conn. 463, 92 Am. St. Rep. 231, 51 Atl. 139.

[9] Morschauser's Admr. v. Pierce, 72 N. Y. Supp. 328, 64 App. Div. 558.

[10] Robinson v. Hurst, 78 Md. 59, 67, 20 L.R.A. 761, 44 Am. St. Rep. 266, 26 Atl. 959.

[11] Graves v. Von Below, 160 Mich. 408, 125 N. W. 379. See Tepper v. New York Life Ins. Co. 151 N. Y. Supp. 1049, 89 Misc. 224, 45 Ins. L. J. 568.

creditors' rights, sustain an assignment of an ordinary life policy.[12] But even though an agreement to marry is a good consideration for an assignment such consideration becomes of no force if the assignee was then a married woman.[13] Again, an assignment of a policy as collateral security based upon a valuable consideration, is good against a subsequent assignment made in consideration of an agreement to marry, although assured did not deliver possession of the policy to the first assignee, and such assignment for value is good against every one except a purchaser in good faith for value.[14]

A policy issued to a person in his own name, payable to his representatives, is assignable by him with effect to enable the assignee on the death of the insured to recover the sum named in the policy, whether he has paid a full consideration therefor or not.[15]

§ 2326d. **Life policies: valid and invalid: assignments.**—A policy payable to insured's wife and children may be assigned to him by them, even though it provides that it is not assignable, and an assignment thereof by him to a second wife is valid.[16] If assured agrees to assign a policy to his niece if she will pay the premiums, and her husband gives his notes therefor but does not pay them because of the refusal of assured to sign a request that the policy be so rewritten as to make her the payee, said assignment is not invalidated by the refusal to pay said notes before insured's death, where the liability thereon continues in favor of insurer's agent who had remitted the amount of the premium to the company.[17] And a secretary of a building and loan association is not prevented by his relation to the association from acquiring by assignment an insurance policy taken out by a member on his life for the benefit of the association, contrary to public policy, so as to prevent his compelling the association to account in case it receives the proceeds of the policy.[18] If a person is unable on the ground of public policy to take an assignment he is not qualified so to do, nor aided in this respect by reason of a statute making insurance policies and other obligations assignable though not negotiable at common law.[19] But while this propo-

[12] Howe v. Hagan, 97 N. Y. Supp. 86, 110 App. Div. 392.

[13] Howe v. Hagan, 97 N. Y. Supp. 86, 110 App. Div. 392.

[14] Howe v. Hagan, 97 N. Y. Supp. 86, 110 App. Div. 392.

[15] St. John v. American Mutual Life Ins. Co. 13 N. Y. 31, 64 Am. Dec. 529.

[16] Doty v. Dickey, 29 Ky. L. Rep. 900, 96 S. W. 544, 36 Ins. L. J. 73. See §§ 837 et seq. herein.

[17] McFarlane v. Robertson, 137 Ga. 132, 73 S. E. 490.

[18] Tate v. Commercial Building Assoc. 97 Va. 74, 45 L.R.A. 243, 33 S. E. 382.

[19] Russell v. Grigsby, 168 Fed.

sition of itself seems sound the case so deciding was reversed, so that it is at least qualified or modified to the extent that the reversing case holds that a clause in a life policy that any claim against the company arising under any assignment of the policy shall be subject to proof of interest does not diminish the rights of an assignee with no insurable interest, as against the personal representatives of the insured, if there is no rule of law to that effect, and the company sees fit to pay.[20]

An assignment by an administratrix at private sale of a policy on intestate's life, is illegal and cannot be validated by order of the ordinary of a court which has no authority to approve of such transfer.[1]

If the validity of an assignment depends upon a state statute which has been construed by the courts of the state of its enactment said construction will govern in the Federal court.[2]

§ 2326e. **Life policies: material alteration of assignment.**—While an assignment which is completed but is thereafter altered materially may avoid the policy, still if an assignment is given for amounts actually loaned and it is incomplete and executed in blank by the borrower, and the original assignee thereafter fills in the name of another as assignee and as attorney without authority from assured, and said assignee acted in good faith and believed that the first transferee to whom the assignment and policy had been delivered and who had them in his possession had the right to deal with the assignment in filling in the blank, a contention that said assignment was invalid is precluded, but as to subsequent loans and acts of the original pledgee after the assignment had ceased to be an instrument in blank the facts may be of such a character as not to estop assured from denying the authority of said pledgee to borrow money or pledge the policy.[3]

§ 2326f. **Life policies: executory contract to assign.**—An executory contract to assign is distinguished from an assignment, and this applies, and an agreement is within the former class where the beneficiary, being induced thereto by representations of deceased's son, that she is not entitled to the proceeds of the policy, enters into a contract to divide said proceeds with him and his

577, 94 C. C. A. 6; Shannon's Tenn. Code, sec. 3516.

[20] Griggsby v. Russell, 222 U. S. 149, 56 L. ed. 133, 32 Sup. Ct. 58, 36 L.R.A. 642.

[1] Empire Life Ins. Co. v. Mason, 140 Ga. 141, 78 S. E. 935, 42 Ins. L. J. 1421.

[2] New York Life Ins. Co. v. Dunlevy, 214 Fed. 1, 130 C. C. A. 473, 44 Ins. L. J. 335.

[3] Tower v. Stanley, 220 Mass. 429, 107 N. E. 1010, 45 Ins. L. J. 561. *Examine* Stone v. Sargent, 220 Mass. 445, 107 N. E. 1014.

brothers and sisters, whose names as well as his own he signed to said contract although as to them he had no authority.[4]

§ 2326g. **Life policies: equitable assignment.**—Insured's instructions by letter to the general agents of insurer to make the policy payable to his wife, effects an equitable assignment though not made until after assured's death.[5] But a mere statement to creditor without offering to assign the policy to secure his particular debt, does not operate as an equitable assignment, nor does an entry in a pocket memorandum without date and without any description of the policy so operate.[6] And if a benefit certificate is issued to a member, and the by-laws of the association declare that no assignment shall be deemed binding on it unless made upon application to it and accompanied by the payment of a specific fee and the certificate already issued, such by-laws do not prevent the creation of equitable interest in the fund to be collected; and if an assignment is made, though not in the manner specified, the assignee is entitled, in a controversy between him and the administrator of the assignor, to receive the benefit.[7]

§ 2326h. **Life policies: assignment by assignee: generally.**—An assignee of an assignee of a life policy takes such rights and only such rights as his assignor had.[8] An indorser of a promissory note holding an assignment of a policy as collateral, may transfer such assignment to the holder of the note to secure the same debt for which he is secured, and his said assignee or transferee becomes vested with the title to such extent as is necessary to enable him to hold the policy as collateral security for the debt and to sustain an action thereon.[9] An assignee is estopped to claim against a subsequent bona fide assignee without notice, where he has not taken the requisite action as to insurer to protect himself, and does not have possession of the policy even though such possession was not obtained by reason of false representations by assured's agent.[10]

[4] Banholzer v. Grand Lodge Ancient Order United Workmen, 119 Mo. App. 177, 95 S. W. 953.

[5] State v. Tomlinson, 16 Ind. App. 662, 59 Am. St. Rep. 335, 45 N. E. 1116. As to distinction between assignment and change of beneficiary, see § 2327a, and *examine* §§ 744 et seq. herein.

[6] Little v. Berry, — Ky. —, 113 S. W. 902.

[7] Brierly v. Equitable Aid Union, 170 Mass. 218, 64 Am. St. Rep. 297, 48 N. E. 1090.

On right of one to whom policy of life or benefit insurance was assigned by insured to proceeds where provisions as to change of beneficiary were not complied with, see note in L.R.A.1916A, 877.

[8] Locke v. Bowman, 168 Mo. App. 121, 151 S. W. 468.

[9] Corcoran v. New York Mutual Life Ins. Co. 183 Pa. 443, 39 Atl. 50.

[10] Herman v. Connecticut Mutual Life Ins. Co. 218 Mass. 181, 105 N. E. 450.

§ 2326i. **Assignment to undertaker, tradesmen, etc.**—An assignment in violation of a statute, of a policy issued for the payment of burial benefits or other expenses of deceased members, by a company or association engaged in such business or engaged in the business of providing any other kind of insurance, is void when made to any designated undertaker or undertaking concern, or to any particular tradesman or business man.[11]

§ 2326j. **Life policies: rights of assignee: generally.**—The assignee of a life policy takes it subject to such defenses as existed in the hands of the assignor when it was assigned.[12] But an assignee of a life policy who pays premiums thereon, is entitled to reimbursement therefor out of the proceeds of the policy, with interest.[13] So where there are no restrictions as to assigning a policy on assured's life payable to his executors, administrators, or assigns, and he assigns it with assurer's consent to a third party and said assignee pays the premiums, he may recover the proceeds upon assured's death.[14] So an endowment policy on which the full annual premiums have been paid and which is payable to assured, his executors, administrators, and assigns, is assignable and the assignee will have the same rights as assured.[15] And even though an assignment is void for want of the beneficiary's consent thereto, the assignee is entitled to a lien on the policy and its proceeds for premiums advanced at request of the assured and the beneficiary.[16] An assignee is also entitled to relief in equity although he does not have possession of the policy where a subsequent assignment has been made by assured to another.[17] And an assignee who has not obtained possession of the policy is entitled to redeem upon payment of the debt to a subsequent assignee of insured.[18]

[11] Robbins v. Hennessey, 86 Ohio St. 181, 99 N. E. 319; Rev. Stat. sec. 289, am'd April 9, 1908, 99 Ohio Genl. L. p. 131. See § 797a herein.

[12] Dormay v. Borradaile, 10 Beav. 335. *Cited* in Northwestern Life Ins. Co. v. Montgomery, 116 Ga. 799, 810, 43 S. E. 79, secs. 2326, 2308 at p. 810.

[13] Insurance Co. v. Dunscomb, 108 Tenn. 724, 58 L.R.A. 694, 91 Am. St. Rep. 641, 69 S. W. 234.

[14] Prudential Ins. Co. of America v. Liersch, 122 Mich. 436, 81 N. W. 258.

[15] Eisenbach v. Mutual Life Ins. Co. of N. Y. 147 N. Y. Supp. 462, 162 App. Div. 595, 44 Ins. L. J. 144.

[16] Morgan v. Mutual Benefit Life Ins. Co. 16 Cal. App. 85, 116 Pac. 385. See also Morgan v. Mutual Benefit Life Ins. Co. 116 N. Y. Supp. 989, 132 App. Div. 455. See Morgan v. Mutual Benefit Life Ins. Co. 189 N. Y. 447, 82 N. E. 438, 38 Ins. L. J. 464, 197 N. Y. 607, 91 N. E. 1117. See § 842 herein.

[17] Herman v. Connecticut Mutual Life Ins. Co. 218 Mass. 181, 105 N. E. 450.

[18] Herman v. Connecticut Mutual Life Ins. Co. 218 Mass. 181, 105 N. E. 450.

§ 2326k. **Life policies: reassignment.**—Where the consideration for an assignment fails, as in case of a nonperformance of a contract, and the assignment is qualified by the words "as interest may appear" and such words are inserted to enable the original assignee to recover such sums as he might advance in performing the consideration, an action lies to compel a reassignment of the policy even against a second assignee, who holds an absolute assignment from the first assignee given for a nominal and other considerations.[19] But a formal reassignment to an assignee by insured under a tontine policy is unnecessary as against legatees and distributees upon assured's survival of the tontine period, where he has requested that the policy continue for the assignee's benefit and thereafter he pays an increased premium up to the time of his decease.[20]

§ 2326l. **Life policies: gift.**—Provided that insured has power to transfer the policy on his life under the law and the terms of his contract, he may dispose of it by gift, and when such transfer meets the requirements of the law relating to gifts, the title to the fund at its maturity is vested in the donee.[1] When a gift of life policy is consummated, the donee's right and interests become absolute, and all possibility of a devolution of benefits under the policy to the personal representatives of the insured named in the policy as beneficiaries is at an end.[2] If a life policy, payable to the personal representative of insured, merely provides that if assigned, the assignment must be in writing, and that the company shall not be required to notice such assignment, until the original or a duplicate thereof is filed in the home office, the company assuming no responsibility for its validity, such policy may be the subject of a parol gift inter vivos, without notice to the insurance company and to the exclusion of the beneficiaries named in the policy.[3]

§ 2327. **No assignment by insured where interest in policy has vested in beneficiary.**—The insured, where the policy is made payable to one in whom the interest becomes vested as beneficiary, cannot thereafter assign the policy to another so as to defeat the rights of the beneficiary first named, unless he consents thereto. No action will lie to compel the performance of an agreement to

[19] Bohleber v. Waelden, 150 N. Y. 405, 44 N. E. 104.

[20] Sanson Estate (Pa.) 63 Leg. Int. 200, 15 Dist. R. 296.

[1] Opitz v. Karel, 118 Wis. 527, 62 L.R.A. 982, 99 Am. St. Rep. 1004, 95 N. W. 948.

[2] Opitz v. Karel, 118 Wis. 527, 62 L.R.A. 982, 99 Am. St. Rep. 1004, 95 N. W. 948.

[3] Opitz v. Karel, 118 Wis. 527, 62 L.R.A. 982, 99 Am. St. Rep. 1004, 95 N. W. 948.

make such an assignment.[4] And the above rule also applies to a combination life and endowment policy.[5] So an assignment executed by a person whose life is insured, but not by the beneficiary, is inoperative.[6] If, however, the policy so stipulates, or, the right to assign is reserved, the consent of the beneficiary is not necessary.[7]

**§ 2327a. Distinction between assignment and change of beneficiary.**—A distinction is made between an assignment and a change of beneficiary in that an assignment is the transfer by one of his rights or interest in the property, rests upon contract and generally requires the delivery of the thing assigned, while the right to change the beneficiary is the power to appoint which must be exercised in the manner specified in the contract.[8] There is also a distinction in that a substituted beneficiary is not an assignee, at least, not so as to come within a statute prohibiting certain testimony by parties sustaining certain relations to each other.[9] If a policy designates a beneficiary and also provides a certain mode for its assignment and it is assigned not in the manner provided but by parol and delivery as a gift to another who retains possession and assists in paying the premiums thereon, such assignee cannot recover as against the designated beneficiary especially where the stipulation as to the manner of changing the beneficiary is not complied with. And it was also provided substantially that so far as assured was concerned the right of an absolute beneficiary was vested during assured's lifetime, so that the question of assignment cannot in this case be disassociated from that of the right to change the beneficiary.[10]

[4] Johnson v. New York Life Ins. Co. 56 Colo. 178, L.R.A.1916A, 868, 138 Pac. 414; Potter v. Spilman, 117 Mass. 322; Cornell v. Mutual Life Ins. Co. 179 Mo. App. 420, 165 S. W. 858; Sullivan v. Maroney, 76 N. J. Eq. 104, 73 Atl. 842. As to assignment by beneficiary, see §§ 837 et seq. herein. As to change of beneficiary and vested interest reserved right to change, etc., see §§ 730 et seq. 740 et seq. herein.

[5] Breard v. New York Life Ins. Co. 138 La. 774, 70 So. 799.

[6] Tremblay v. Aetna Life Ins. Co. 97 Me. 547, 94 Am. St. Rep. 521, 55 Atl. 509.

[7] Cornell v. Mutual Life Ins. Co. of N. Y. 179 Mo. App. 420, 165 S. W. 858. See Johnson v. New York Life Ins. Co. 56 Colo. 178, L.R.A. 1916A, 868, 138 Pac. 414.

On power of insured to destroy rights of beneficiary, see note in 49 L.R.A. 737.

[8] Mutual Benefit Life Ins. Co. v. Swett, 222 Fed. 200, 137 C. C. A. 640, 46 Ins. L. J. 111.—Sater, D. J. See Howe v. Fidelity Trust Co. 28 Ky. L. Rep. 485, 89 S. W. 521.

[9] Crowell v. Northwestern National Life Ins. Co. 140 Iowa, 258, 118 N. W. 412, Code sec. 4604.

[10] Johnson v. New York Life Ins. Co. 56 Colo. 178, L.R.A.1916A, 868n, 138 Pac. 414.

On right of one to whom policy of

**§ 2328. No assignment if policy forbids.**—There can be no assignment of a life insurance policy if the policy by its terms expressly forbids the same.[11]

**§ 2329. Notice of assignment: life policy.**—In life insurance the same principles as to notice of assignment do not control as in the case of fire insurance. In life insurance where there is no provision in the policy as to notice of an assignment of the policy, or as to the consent of the insurer being necessary thereto, it may be assigned without any notice of such act being given to the company.[12] And such assignment is good as between assignor and assignee, but it has been held that it is necessary to give notice to the company in order to constitute an assignment valid as against a subsequent assignee, and free from acts of an assignor as to surrender of the policy to the office.[13] In Mutual Protective Insurance Company v. Hamilton,[14] the court said: "The assent of the assurer to the assignment of the policy or notice of such assignment is not indispensible in order to entitle the assignee of the policy to recover the money from the insurer. We are of the opinion, therefore, that as between the insurer and the assignee of the life policy notice of assignment is not required to complete the right of the latter to receive the insurance money from the former. Upon this principle, as it seems to us, the right of the assignee must be held to be perfect, and in a case like the present, by force of the assignment alone." The policy may, however, provide that notice must be given to the company, and in such a case the provision should be complied with to render the assignment a valid one.[15] Noncompliance therewith will not, however, render the policy void, unless it is so stipulated by express words.[16] The policy may simply provide that in case of assignment notice is to be given to the company, not specifying any particular time within which it shall be given. Under such a provision notice of assignment of an insurance policy is sufficiently early when given two days subsequent to the assignment, but after the death of the assured.[17] If a life policy is assigned to

life or benefit insurance was assigned by insured to proceeds where provisions as to change of beneficiary were not complied with, see note in L.R.A.1916A, 877.

[11] Unity Mutual Life Assur. Assoc v. Dugan, 118 Mass. 219. *Compare* § 2322 herein.

[12] New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742. See §§ 914–16, 2331a herein.

[13] Stocks v. Dobson, 4 De G. M. & G. 11, 22 L. J. Ch. 884, 17 Jur. 539.

[14] 5 Sneed (37 Tenn.) 269.

[15] Stevens v. Warren, 101 Mass 564.

[16] Marcus v. St. Louis Ins. Co. 68 N. Y. 625.

[17] New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742.

secure a certain indebtedness and thereafter assured by letter directs the application of the balance to the proceeds to a satisfaction of further liability, then in so far as said direction is an additional assignment it is effective, even though no written notice thereof is given assurer, as the requirement of such a written notice is for assurer's protection and cannot be set up by another to defeat an assignment made without compliance therewith.[18]

§ 2330. **What is sufficient notice: life.**—No special form or mode is necessary to constitute a sufficient notice. A notice to the company in any form or to any agent of the company authorized to receive notice is good,[19] except where the agent has an interest in the policy.[20] If the policy does not require notice to be in writing, a verbal notice is sufficient.[1] Though no special form of words is necessary to constitute a sufficient notice, still the words used and the manner of their use must be such as would necessarily convey the knowledge to the insurers. A mere casual and incidental mention of the fact of assignment to an agent or officer of the company, or in a casual conversation, has been held insufficient as against a subsequent assignee.[2]

§ 2331. **Assignment of life policy: consent.**—Life policies may expressly provide that they are not assignable without the consent of the company issuing them, and in such a case the provision must be complied with the same as when inserted in any other policy of insurance, to give the assignee any right thereunder as against the company.[3] It is held, however, that a life insurance policy payable to the estate of the assured, may be assigned without the consent of the insurer.[4] Where a mutual company, the object of which is to protect the families of the insured members, issues a policy forbidding assignment without consent of the company, it is held that the fact that the company has received assessments from the assignee since insured's death is no waiver of the breach of the condition.[5] If the requirements as to making an assignment are complied with, an endorsement thereof on

[18] Mutual Benefit Life Ins. Co. v. Swett, 222 Fed. 200, 137 C. C. A. 640, 46 Ins. L. J. 111.

[19] Gale v. Lewis, 9 Q. B. 730, 16 L. J. Q. B. 119.

[20] Browne v. Savage, 4 Drew. 635, 5 Jur. (N. S.) 1020.

[1] Wells v. Archer, 10 Serg. & R. (Pa.) 412, 13 Am. Dec. 682; North British Assur. Co. v. Hallett, 9 Week. Rep. 880.

[2] Edwards v. Scott, 2 Scott (N. R.) 266, 1 Man. & G. 962, 10 L. J. C. P. 11; Ex parte Stright, 2 Deac. & Chit. 314; Edwards v. Martin, 1 L. R. Cas. 122.

[3] Unity Mutual Life Ins. Co. v. Dugan, 118 Mass. 219.

[4] Southern Mutual Life v. Durdin, 132 Ga. 495, 131 Am. St. Rep. 210, 64 S. E. 264, Civ. Code 1895, sec. 2116.

[5] National Mutual Aid Soc. v. Lupold, 101 Pa. St. 111.

the policy by assurer, made after assured's death, but without knowledge on its part, of such fact, will not be set aside where its rights are not prejudiced thereby.[6] If an assignment is upon a blank prepared and furnished by the insurer, and its receipt is acknowledged by him, with a statement that it is placed on file "for such attention as it may deserve when such policy becomes a claim," he cannot subsequently defend on the ground that he did not consent to the assignment.[7] But it is also decided that sending to the assignee a written receipt of assignments of the policy, stating also that they had been filed, does not operate as an acknowledgment of liability to him.[8]

**§ 2331a. Same subject: manner or mode of assignment.**—If the assignment is only required to be executed in duplicate and sent to insurer, mere informalities; such as the attestation of the genuineness of the notary's signature to the acknowledgment, do not invalidate it.[9] Nor is an assignment invalid by reason alone of the fact that a request that it be rewritten was not signed by assured, nor by the fact that it was not delivered after being rewritten.[10] And failure of the beneficiary to indorse an assignment to assured on the policy as required does not render it invalid.[11] So it is unnecessary that an assignment of a life policy be attached thereto.[12] Nor is an assignment of a policy void because of failure to affix a revenue stamp under Act of Congress requiring stamps to be affixed to certain documents.[13] And it is decided in Kentucky that an assignment of a policy by a husband to his wife does not constitute an assignment or transfer between them of such a character as is required by statute of that state to be acknowledged and recorded.[14] And where there is an assignment of a partial interest a delivery to insurer of one of the duplicate assignments constitutes a sufficient delivery to the assignee even though possession of the policy is retained by assured.[15]

[6] Thompson v. Equitable Life Assurance Soc. of the U. S. 95 S. Car. 16, 78 S. E. 439.

[7] Tremblay v. Aetna Life Ins. Co. 97 Me. 547, 94 Am. St. Rep. 521, 55 Atl. 509.

[8] Morrill v. Manhattan Life Ins. Co. 183 Ill. 260, 55 N. E. 656, 29 Ins. L. J. 481, aff'g 82 Ill. App. 410.

[9] Burges v. New York Life Ins. Co. — Tex. Civ. App. —, 53 S. W. 602.

[10] McFarlane v. Robertson, 137 Ga. 132, 73 S. W. 490.

[11] Doty v. Dickey, 29 Ky. L. Rep. 900, 96 S. W. 544, 36 Ins. L. J. 73.

[12] Tower v. Stanley, 220 Mass. 429, 107 N. E. 1010, 45 Ins. L. J. 561. See Herman v. Connecticut Mutual Life Ins. Co. 218 Mass. 181, 105 N. E. 450.

[13] Steeley's Creditors v. Steeley, 23 Ky. L. Rep. 996, 64 S. W. 642. See §§ 33, 2525 herein.

[14] Steeley's Creditors v. Steeley, 23 Ky. L. Rep. 996, 64 S. W. 642. See also Morehead's Admr. v. Mayfield, 100 Ky. 51, 58 S. W. 473, 22 Ky. L. Rep. 580.

[15] Northwestern Mutual Life Ins.

Again, an intention to assign the tontine as well as the life benefits of a policy is sufficiently shown by a recital in the assignment, that for value received the policy upon the assignor's life is assigned and all the dividend therefrom.[16]

In the absence of fraud or mutual mistake, a written assignment complete in itself cannot be shown by extrinsic evidence to be for a special and limited purpose, with a right in the assignors to have the interest revert to them upon the accomplishment of said purpose.[17]

The failure of insured to comply with the rules as to the manner of executing the assignment, cannot be availed of by the assignor's administrator as between him and the assignee, where the assignor actually did execute and deliver an otherwise valid assignment.[18] And the beneficiary named in a life policy, cannot take advantage of provisions in the policy as to methods of its assignment, which were inserted for the benefit of the insurer.[19] And as between insured and his assignee an assignment of a life policy will be valid though not attached or indorsed thereon, and even though no reference thereto appears thereon, nor any notice as required is given assurer.[20]

§ 2332. **Delivery of assignment of life policy.**—Delivery of an assignment of a life insurance policy is sufficient to vest title in the assignee, and is good against all but the creditors of the assignor when made by the assignor to the representative of the assignee.[1] It is not necessary to constitute a good delivery that the policy be delivered to the assignee. A delivery to a third party as trustee for the assignee will be sufficient.[2] So delivery of the policy to the assignee is held unnecessary to constitute a valid assignment, in the absence of fraud, if it appears that an assignment was in fact made, or where the assignee has after the assignment paid all the premiums due upon the policy. So where the assignee left the policy in the possession of the assignor, it was held that,

Co. v. Wright, 153 Wis. 252, 140 N. W. 1078.

[16] New York Life Ins. Co. v. Dunlevy, 214 Fed. 1, 130 C. C. A. 473, 44 Ins. L. J. 335.

[17] Doty v. Dickey, 29 Ky. L. Rep. 900, 96 S. W. 544, 36 Ins. L. J. 73.

[18] Burges v. New York Life Ins. Co. — Tex. Civ. App. —, 53 S. W. 602.

[19] Brick v. Campbell, 122 N. Y. 337, 10 L.R.A. 259, 25 N. E. 493.

[20] Herman v. Connecticut Mutual Life Ins. Co. 218 Mass. 181, 105 N. E. 450.

[1] New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742.

[2] Jones v. Consolidated Investment Assur. Co. 26 Beav. 256, 28 L. J. Ch. 66; Lemon v. Phœnix Ins. Co. 38 Conn. 294; Estate of Trough, 8 Phila. (Pa.) 214.

On validity of assignment of insurance policy to persons to be named in will, see note in 27 L.R.A.(N.S.) 184.

in the absence of fraud, he was entitled to the benefits of the policy, and that delivery was not necessary.[3] So an assignment is valid even though there is no actual delivery thereof to the assignee.[4] And a policy and assignment may be placed so far within the assignee's direction and control that there is a valid delivery and assignment.[5] A life policy payable to the legal representatives of insured may be transferred by mere delivery without written assignment,[6] where there is an intent to transfer.[7] So a parol assignment, accompanied by delivery of the policy, is sufficient to transfer the right to the proceeds of a life insurance policy.[8] So the acceptance of an assignment of a policy of life insurance is sufficiently implied from the failure of the assignee to dissent.[9] Again, a delivery of the policy by assured to his brother with intent to vest the title, constitutes a valid assignment as against the deceased's representatives, even though assurer had not completed the same by indorsement thereof upon the policy.[10] So the delivery of a policy to the mother of a person substituted as beneficiary, on consideration of a promise to marry, constitutes a valid assignment, even though said policy is returned to assured for safe keeping.[11] And where the assignment by assured to his wife is formally executed, recorded by insurer and returned, there is a legal delivery even though said assignment attached to the policy was found, after assured's death, among his papers.[12] If it appears in evidence that an insured during his lifetime had executed a regular assignment in writing and under seal to his wife of insurance policies on his life, and that when on his death bed he informed witnesses that he had

[3] Neale v. Molineaux, 2 Car. & K. 672; Scott v. Dickson, 108 Pa. St. 56, 56 Am. Rep. 192. But see Dexter Savings Bank v. Copeland, 77 Me. 263; Ballou v. Giles, 50 Wis. 614, 7 N. W. 561.

[4] Burgess v. New York Life Ins. Co. — Tex. Civ. App. —, 53 S. W. 602; Colburn's Appeal, 74 Conn. 463, 92 Am. St. Rep. 231, 51 Atl. 139. See Southern Mutual Life Ins. Co. v. Durdin, 132 Ga. 495, 131 Am. St. Rep. 210, 38 Ins. L. J. 648; McNevins v. Prudential Ins. Co. 108 N. Y. Supp. 745, 57 Misc. 608; Howe v. Hagan, 97 N. Y. Supp. 86, 110 App. Div. 392.

[5] Humphry v. Mutual Life Ins. Co. 86 Wash. 672, 151 Pac. 100.

[6] Gledhill v. McCoombs, 110 Me. 341, 45 L.R.A.(N.S.) 26, 86 Atl. 247. See § 2326 herein.

[7] McNevins v. Prudential Ins. Co. 57 Misc. 608, 108 N. Y. Supp. 745.

[8] Box v. Lanier (Lanier v. Box) 112 Tenn. 393, 64 L.R.A. 458, 79 S. W. 1042; Hancock v. Fidelity Mutual Life Ins. Co. — Tenn. Ch. —, 53 S. W. 181.

[9] Colburn's Appeal, 74 Conn. 463, 92 Am. St. Rep. 231, 51 Atl. 139.

[10] Thompson v. Equitable Life Assurance Soc. of the U. S. 95 S. Car. 16, 78 S. E. 439.

[11] Tepper v. New York Life Ins. Co. 151 N. Y. Supp. 1049, 89 Misc. 224, 45 Ins. L. J. 568. See § 2326c herein.

[12] Shorey v. Webb, 122 Md. 209, 89 Atl. 391.

transferred his life insurance to his wife, requesting his brother to get such insurance as soon as possible, as his wife would need the money, and stating that the assignment and policies were in his safe among his private papers, where they were found after his death in an envelope with his wife's name indorsed thereon, the evidence is sufficient to authorize a finding or verdict of an assignment of the policies and a sufficient delivery thereof.[13] And where an intention to pass title to the assignees, under an assignment to them of a partial interest, is clearly shown and such interest is recognized by assurer the assignment is sufficient as to them even though assured retains possession of the policy.[14] And there is a sufficient delivery if in compliance with a requirement of the policy the assignment is made in duplicate to insurer.[15]

While a mere execution of an assignment and a delivery of a copy thereof to insurer without notice to the assignee, the original being held by assured, who continues payment of the premiums thereon, would not in all cases constitute a sufficient assignment, nevertheless, it would be sufficient if the assignee sustained the relation of wife or minor child to assured, since the essentials of a delivery of an assignment are those which accord with the relations between the parties and the nature of the transaction; accordingly so held where it clearly appeared that the assignor intended that an assignment to his daughter, a minor, should operate immediately, and the assignment was made in strict conformity with insurer's requirements, being signed, sealed, acknowledged and lodged with insurer in accordance with its rules.[16]

§ 2333. **Possession of policy: life.**—Possession of a policy of life insurance is not conclusive proof of the right of the holder to recover the money due on the policy. It is, however, prima facie

[13] Kulp v. March, 181 Pa. St. 627, 59 Am. St. Rep. 687, 37 Atl. 913.

[14] Northwestern Mutual Life Ins. Co. v. Wright, 153 Wis. 252, 140 N. W. 1078.

[15] Burgess v. New York Life Ins. Co. — Tex. Civ. App. —, 53 S. W. 602.

[16] New York Life Ins. Co. v. Dunlevy, 214 Fed. 1, 130 C. C. A. 473, 44 Ins. L. J. 335 (204 Fed. 670), *citing* and *considering:*

*New York.*—McDonough v. Aetna Life Ins. Co. 78 N. Y. Supp. 217, 38 Misc. Rep. 625; Hurlbut v. Hurlbut, 49 Hun, 189, 1 N. Y. Supp. 854.

*Pennsylvania.*—Turner v. Warren, 160 Pa. 336, 28 Atl. 781; Smith v. Hawthorne, 22 Pa. Co. Ct. R. 519; Appeal of Madeira, 1 Sadler (Pa.) 491, 4 Atl. 908.

*Texas.*—Burges v. New York Life Ins. Co. — Tex. Civ. App. —, 53 S. W. 602.

*Wisconsin.*—Northwestern Mutual Ins. Co. v. Wright, 153 Wis. 252, 140 N. W. 1078. *Distinguishing,* Scott v. Dickson, 108 Pa. 6, 65 Am. Rep. 192, in that no statute was construed.

See Cuyler v. Wallace, 183 N. Y. 291, 76 N. E. 1. *Compare* Weaver v. Weaver, 80 Ill. App. 370, 31 Chic. Leg. N. 259 (in this case insured informed the donee of the assignment) rev'd 182 Ill. 287, 55 N. E. 338.

evidence that the person holding it has a title to the same, and consequently a right in the proceeds. But it is only prima facie, as the contract is not a negotiable one, and the claim to the money due thereon may be assigned by agreement outside of the policy.[17] Where the person procuring insurance retains possession of the policy, he may, if he desires, change the beneficiary named therein and designate another as beneficiary.[18] Mere possession of policies by an assignee, under an assignment which was voidable because of the legal incapacity of the assignor to make the assignment, and without any affirmative acts of the assignor ratifying or recognizing the validity of such voidable assignment is not sufficient to validate it.[19]

**§ 2334. Assignment of mutual benefit certificate.**—The right of the holder of a mutual benefit certificate to assign the same is dependent upon the by-laws, charter, or articles of association of the society issuing the certificate. The large majority of these societies are founded for the purpose of protecting persons standing in a certain relation to the insured member. Where the charter and by-laws designate the classes for whose benefit certificates of insurance are to be issued, a member cannot procure a certificate of insurance therein and prior to the death of a member assign the certificate to a person not within the designated class. Nor can the beneficiary so assign it.[20] Where, however, the laws of the society are permissive of an assignment of the certificate, it may be assigned subject to the manner prescribed in the rules and by-laws.[1] It has been held where the certificate provided that "this certificate may be assigned, transferred, or set over by and with the consent of the association," that such provision only authorized the assignment by the beneficiary, and not the original insured.[2] An assignment of a mutual benefit certificate by the beneficiary named therein, no consideration being given, has been held to operate as a gift, and cannot be subsequently defeated by the beneficiary on the ground of want of consideration where it does not appear that there was fraud, duress, or undue influence.[3] An assignment as collateral security will not vest any right in the assignee where the beneficiary is named in the certificate and the

[17] Wood v. Phœnix Ins. Co. 22 La. Ann. 617.

[18] Lemon v. Phœnix Ins. Co. 38 Conn. 301. See chapters on Beneficiaries, herein.

[19] Brick v. Campbell, 122 N. Y. 337, 10 L.R.A. 259, 25 N. E. 493.

[20] Bayse v. Adams, 81 Ky. 368. For a consideration of the question of change of beneficiary, see chapter on Beneficiaries, herein.

[1] Jackson v. Anderson, 9 Ky. L. Rep. 165, 4 S. W. 326.

[2] Block v. Valley Mutual Ins. Co. 52 Ark. 340, 12 S. W. 477.

[3] Gary v. Northwestern Masonic

charter provides that the certificates shall be for the benefit of a certain class, which includes the beneficiary named and not the assignee.[4] If a benefit certificate provides that the charter and by-laws are a part thereof, the assignee is bound by such provision.[5] Where the by-laws of a mutual benefit society permit a change of beneficiary, but prescribe the manner in which it may be done, there must be a compliance therewith to constitute a valid change. So where the certificate named the wife as beneficiary, and the husband, after the issue of such certificate, executed a paper assigning the policy as collateral security to a creditor, but failed to comply with the rules of the society in regard to making the assignment, and the company had no notice thereof until after the death of the insured, it was held that the creditor had no rights in the certificate, and that the widow was entitled to the proceeds.[6] The fact that a member of a mutual benefit society, who assigned the membership certificate, was insolvent at the time of his death, does not invalidate the assignment where it is not shown that he was insolvent at the time he made the assignment.[7] A certificate of membership in a mutual benefit association, payable to the heirs or legal representatives of the member, which is assigned by him, is payable to the assignee, in the absence of objection by the association, under the Indiana statute providing that such certificates shall be a contract between the association and the insured, and that the beneficiary may be changed by agreement between the parties.[8] If the by-laws of a friendly society permit only the nearest kin, executors, administrators, or legal nominees to receive the policy proceeds the policy cannot be assigned.[9] A person to whom an endowment certificate is payable in case of the death of the assured within the limit of the endowment period, has no assignable interest during that period, while assured is living, when the latter has the right to change his beneficiary.[10] A sale, for a valuable consideration, of mutual benefit certificates insuring a member's life, is void, not only by force of

Aid Assoc. — Iowa, —, 50 N. W. 27; Connecticut Mutual Life Ins. Co. v. Ryan, 8 Mo. App. 535.

[4] Dietrich v. Madison Relief Assoc. 45 Wis. 79.

[5] Miller v. Hillsborough Mutual Fire Assurance Assoc. 42 N. J. Eq. 459, 7 Atl. 895.

[6] Hotel Men's Mutual Benefit Assoc. v. Brown, 33 Fed. 11. See chapters herein on Beneficiaries.

On changing designation of beneficiary in benefit certificate otherwise than in prescribed method, see note in 15 L.R.A. 350.

[7] Milner v. Bowman, 119 Ind. 448, 5 L.R.A. 95, 21 N. E. 1094.

[8] Milner v. Bowman, 119 Ind. 448, 5 L.R.A. 95, 21 N. E. 1094.

[9] Caddick v. Highton, 68 L. J. Q. B. (N. S.) 281. See §§ 730 et seq. herein.

[10] Carpenter v. Knapp, 101 Iowa, 712, 38 L.R.A. 128, 70 N. W. 764.

the society's regulations, where they prohibit such sales, but also as against public policy.[11]

**§ 2335. Fraud in procuring or making assignment of life policy.**—If by fraud or undue influence a beneficiary under a life policy is induced to make an assignment of such beneficial interest in the policy, the assignment may be avoided.[12] So where a husband fraudulently procured his wife's signature to an assignment of certain policies of life insurance in which she was named as beneficiary, the assignment was held invalid.[13] Where a husband procured insurance upon his life for the benefit of his wife, and delivered to her the policy, and afterward, without consideration and without any design to part with her property therein, but by the undue influence and control of her husband, she was induced to execute an assignment of the policy, without any knowledge of the purpose or purport, to a third person, who assigned it to a fourth, and these assignees paid the premiums, it was held in an action on the policy wherein the wife was made a party by order of interpleader that she was entitled to the amount of the insurance, independent of the question whether the policy was assignable under the statute.[14] Fraud on the part of the assignee will vitiate an assignment procured by such means; as where the assignee knew of the dangerous illness of the insured, of which the assignor had no knowledge, and of which the assignee did not inform him, an assignment was held void.[15] So an assignment of a policy made in extremis to a brother-in-law at the latter's solicitation, upon a consideration of fifty per cent of the policy amount, is void for fraud and because unconscionable.[16] A mortgagee who has secured a policy on the life of the mortgagor's wife as security for the debt, by having it issued to her and assigned to him under circumstances amounting to fraud upon the insurer, will not be permitted to collect the proceeds of the policy as administrator of her estate, on the theory that she might secure the policy on her own life, and that the assignment, being void, had not affected the integrity of the policy or the right of her administrator to enforce the contract,—at least where he is to be

[11] Stoelker v. Thornton, 88 Ala. 241, 6 L.R.A. 140, 6 So. 680.

[12] Connecticut Mutual Life Ins. Co. v. Westervelt, 52 Conn. 586; Whitridge v. Barry, 42 Md. 140; Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Barry v. Brune, 71 N. Y. 261, 8 Hun (N. Y.) 395; McCutcheon's Appeal, 99 Pa. St. 133.

[13] Mutual Benefit Life Ins. Co. v. Wayne County Savings Bank, 68 Mich. 116, 35 N. W. 853.

[14] Fowler v. Butterly, 78 N. Y. 68, 34 Am. Rep. 507.

[15] Jones v. Keene, 2 Moody & R. 348.

[16] Prudential Life Ins. Co. of America v. La Chance, 113 Me. 550, 95 Atl. 223.

permitted by the husband to retain the proceeds for his own benefit.[17] If insurer with knowledge that an assignment of a policy payable in instalments was fraudulently obtained continues to pay instalments to the fraudulent assignee, or those claiming under him, it makes such payments at its peril.[18] But insurer may resist payment to the assignee, on the ground of fraud, of the amount due on a policy secured by the holder of a purchase-money mortgage on the life of the mortgagor's wife, who was not bound by the mortgage, to secure his debt, where, knowing that, if the insurer knew the facts, it would not issue a policy in his favor, he procured it to be issued to her, paying the premiums himself, and then took an assignment of it without notice to, and contrary to the rules of the insurer.[19]

§ 2335a. **Assignment: mental capacity: undue influence.**—It is declared in Missouri that the rules governing mental capacity and undue influence applicable to a testator ought to be applied to an assignment and what constitutes capacity in such case means intelligence sufficient to understand the act the testator is about to perform, the property he possesses, what disposition he is making of it and the persons and objects of his bounty and applying this test to the case before it, it was held that undue influence was not proven.[20] And the inability of a person either through insanity or a long-existing habit of intoxication to act rationally or to understand the consequences of his acts precludes recovery thereunder on an assignment of a policy made by such person even though at the time of making it he was not intoxicated and did not manifest any aberration.[1]

[17] Hinton v. Mutual Reserve Fund Life Assoc. 135 N. Car. 314, 65 L.R.A. 61, 102 Am. Rep. 545, 47 S. E. 474.

[18] Empire Life Ins. Co. v. Mason, 140 Ga. 141, 78 S. E. 935, 42 Ins. L. J. 1421.

[19] Hinton v. Mutual Reserve Fund Life Assoc. 135 N. Car. 314, 65 L.R.A. 61, 102 Am. St. Rep. 545, 47 S. E. 474.

[20] Borchers v. Barckers, 143 Mo. App. 72, 122 S. W. 357, 39 Ins. L. J. 38. See Mutual Reserve Fund Life Assoc. v. Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212, 54 U. S. App. 290 (not proven); Penn Mutual Life Ins. Co. v. Union Trust Co. (U. S. C. C.) 83 Fed. 891 (what is not undue influence); Andrews v. Laverty, 159 Mich. 26, 16 Det. Leg. N. 820, 123 N. W. 543.

As to mental capacity and undue influence in case of wills, see Mason v. Havens, 78 Conn. 410, 3 L.R.A. (N.S.) 172n, 62 Atl. 615; Slaughter v. Heath, 127 Ga. 747, 27 L.R.A. (N.S.) 1, 57 S. E. 69; Speer v. Speer, 146 Iowa, 6, 27 L.R.A.(N.S.) 294, 123 N. W. 176; Powell, In re, 138 Iowa, 326, 26 L.R.A.(N.S.) 479, 111 N. W. 821; Kirby v. Sellards, 82 Kan. 291, 28 L.R.A.(N.S.) 270, 108 Pac. 73.

[1] Searles v. Northwestern Mutual Life Ins. Co. 148 Iowa, 65, 126 N. W. 801, 29 L.R.A.(N.S.) 405.

**§ 2336. Absolute assignment of life policy to creditor: agreement to retain only amount due.**—In many instances policies of insurance upon a debtor's life are assigned to creditors to secure such amount as may be due from insured to the creditor, the whole interest being transferred.[2] Under such an assignment, in the absence of any agreement as to the balance recovered over the amount of the debt, it has been held that the creditor was not merely limited to the amount of the debt, but could retain the entire amount of the policy where there did not appear to be such a disproportion between the debt and the amount of the policy as to render it a wagering transaction.[3] There may, however, be an agreement between the debtor and the creditor that the latter shall, after deducting such amount as he might be legally entitled to recover if there were no insurance, deliver the balance of the amount recovered to certain designated persons. So where the debtor made absolute assignment of all rights in the policy to a creditor, and the latter agreed that, in case the debtor died before payment of the debt had been made and the proceeds of the policy were paid to him, he would make such a settlement with the representatives of the debtor as the case might require, it was held that this was an authorization to the creditor to collect the money due on the policy in case the debtor died without having paid the debt, and that after deducting such amount as was due to him the creditor must deliver the balance to those entitled to the same.[4] In brief, therefore, an absolute assignment of a life policy may be held an assignment only as a security for money loaned where such is fairly shown to be the intent.[5] So an assignment to secure a debt, is not absolute where it is not clearly evidenced that it is so intended, especially where

[2] See § 954 herein.

[3] Amick v. Butler, 111 Ind. 578, 60 Am. Rep. 722, 12 N. E. 518; Ruth v. Katterman, 112 Pa. 251, 3 Atl. 833; Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924. See § 954 herein.

[4] Page v. Burnstine, 102 U. S. 664, 26 L. ed. 268.

[5] Page v. Burnstine, 102 U. S. 664, 26 L. ed. 268.

*Cited* in: *United States.*—Diack, In re, 100 Fed. 770, 772, 2 N. B. N. Rep. 666; Manhattan Life Ins. Co. v. Hennessy, 99 Fed. 64, 68, 39 C. C. A. 629; Sides v. Knickerbocker Life Ins. Co. 16 Fed. 650, 653; Armstrong v. Mutual Life Ins. Co. 11 Fed. 576, 20 Blatchf. 496.

*Georgia.*—Exchange Bank v. Loh, 104 Ga. 446, 453, 44 L.R.A. 376, 31 S. E. 459.

*Illinois.*—Binkley v. Jarvis, 102 Ill. App. 59, 65.

*Indiana.* — Amick v. Butler, 111 Ind. 578, 581, 60 Am. Rep. 722, 12 N. E. 518; Nye v. Grand Lodge American Order United Workmen, 9 Ind. App. 131, 153, 36 N. E. 429.

*Michigan.*—Metropolitan Life Ins. Co. v. O'Brien, 92 Mich. 584, 589, 52 N. W. 1012.

*Virginia.*—Roller v. Moore (Roll-

the premiums are charged to the debtor.[6] And an assignment which limits the extent of recovery and which is in effect one for security of advances will operate as a contract of security only.[7] Again, although an assignment is absolute on its face the entire transaction is a matter of inquiry by the court and the interest should be limited to the sum or amount which it was intended should be secured.[8] And an agreement that an assignee of the policy can recover only to the extent of his advances will be so treated where the parties themselves have agreed to comply with such construction.[9] Under an agreement of this nature other creditors of the insured have no rights to the fund remaining unless there is actual fraud or they are actually injured by the transaction.[10] The right of assured to assign a policy payable to his executors, administrators, or assigns, is absolute under the Tennessee statute, as against the claims of his wife and children, to the extent that if such absolute assignment is made to secure a particular debt the legal title is vested in the assignee and if assured, after paying said debt, permits such assignee to retain the policy under the original assignment, as security by way of general collateral, for debts which may be incurred with him from time to time, only an equity remains by virtue of which assured's widow and heirs at law are entitled only to the policy proceeds remaining after satisfying such indebtedness.[11]

er v. Beam) 86 Va. 512, 515, 6 L.R.A. 138, 10 S. E. 241.

See also Atkin v. Van Sickle, 187 Mich. 635, 153 N. W. 1070.

[6] Pittman v. Milton, 69 Fla. 304, 68 So. 658.

[7] Crowell v. Northwestern National Life Ins. Co. 140 Iowa, 258, 118 N. W. 412.

[8] Aldrich v. Brinker (U. S. D. C.) 143 Fed. 563.

[9] Crowell v. Northwestern National Life Ins. Co. 140 Iowa, 258, 118 N. W. 412.

[10] Johnson v. Alexander, 125 Ind. 575, 9 L.R.A. 660, 25 N. E. 706.

[11] Nashville Trust Co. v. First National Bank, 123 Tenn. 617, 134 S. W. 311, 40 Ins. L. J. 664. The court per Buckhannan, J. said: "Strictissimi juris, the policy was not pledged or deposited as collateral; it was, on the contrary, absolutely signed. The distinctive characteristics of pledge or deposit of collateral are that the property must be capable of delivery to the pledgee, and must be delivered to him actually or constructively, and under a contract, the essence of which is that the thing delivered is to be held by the pledgee as a security from some debt or engagement of the pledgor. The pledgee does not acquire absolute title by such a contract, but only a special property in the thing pledged, with the right to possession until the object of the pledge be accomplished. If the pledgor make default, the pledgee may file a bill in equity and foreclose, or he may sell without judicial process on reasonable notice to the pledgeor to redeem the pledge. The absolute title to the thing pledged is not devested out of the pledgor until foreclosure or a sale on proper

**§ 2336a. Assignment of life policy to creditor: amount recoverable: continued.**—A life policy is assignable to secure a debt so as to transfer such portion of the proceeds of the policy as will pay the debt actually due.[12] A creditor of a person having his life insured, who takes an assignment of the policy to secure his debt, is entitled to retain from the proceeds of the policy only sufficient to pay the debt, together with all advances made by the creditor to keep the policy in force.[13] In Maryland a creditor may in good faith and in pursuance of a bona fide effort to secure payment of his debt, validly insure his debtor's life, take the policy in his own name for his own benefit, and so become entitled to the proceeds.[14] But a person procuring insurance upon the life of another, and to whom it is assigned as security for a debt, can hold the policy only as security for what the insured owed him when it was assigned, and such advances as afterwards may have been made on account of it.[15] Where a life policy is assigned

notice by the pledgee. This is the law of pledge or deposit of property, as collateral security for a debt. See Johnson v. Smith, 11 Humph. 397, *citing* Story on Bailments.

"The theory of appellants was that the policy was pledged. The fact was that it was absolutely assigned, leaving no vestige of legal right to it or the proceeds of it in the decedent. So it was, from the date of the assignment, during his life and at his death, an equity, pure and simple, and not a legal right. With this equitable interest as his basis of credit, he contracted the debts shown by the record. If he, during life, had sought to recover the policy, and to cancel his absolute assignment of it without paying these debts, he would have been repelled by a court of equity on the ground that he who would have equity must do equity. His wife and children can have no higher rights than he. The legal right to the policy was not in them, for we have seen that, notwithstanding the statute, written as the policy was, decedent had the right to make absolute assignment of it, and exercised it in such a way as to cut off all their legal rights. They are clothed only with his equity, and as he would have been bound, so they are bound to do equity.

"Aside from the effect of the absolute transfer of the policy, which was in writing, it is well settled that the act of the decedent in permitting the policy which had been so assigned to remain in the hands of the appellee, and oft repeated agreements by him that it should stand as security for any amount in which he might be from time to time indebted to appellee, would have amounted to an estoppel against him, and he, during his life, attempted to secure possession of the policy without payment to the appellee of the indebtedness incurred on the faith and credit of the policy as a security." Shannon's Code, sec. 4030. See §§ 879 et seq., 2338 herein.

[12] Hays v. Lapeyre, 48 La. Ann. 749, 35 L.R.A. 647, 19 So. 821.

[13] Morris v. Georgia Loan, Savings & Banking Co. 109 Ga. 12, 46 L.R.A. 506, 34 S. E. 378. See Bridge v. Connecticut Mutual Life Ins. Co. 167 Cal. 774, 141 Pac. 375.

[14] Fitzgerald v. Rawlings Implement Co. 114 Md. 470, 79 Atl. 915, 40 Ins. L. J. 1565.

[15] Cammack v. Lewis, 15 Wall. (82 U. S.) 643, 21 L. ed. 244.

*Cited* in: *United States.*—Warnock v. Davis, 104 U. S. 775, 782, 26 L. ed. 924, 927; Re Slingluff, 106 Fed. 154, 158, 3 N. B. N. Rep. 258;

to secure a certain debt, and thereafter assured directs by letter that the assignee apply the proceeds to the payment of said indebtedness and the balance to satisfy another obligation, said assignee is thereby authorized to assign an interest in the policy to accomplish said purpose and the second assignees, or such assignees, become vested with such title as is necessary to enable them to hold the policy as collateral security for an amount sufficient to satisfy their claim and to sue upon the policy.[16] A policy of life insurance having been assigned to a creditor of the assured the policy providing that in such circumstances the whole beneficial interest therein shall vest in the assignee, and that upon the death of the assured the liability of the company shall be limited to the amount due such assignees from the assured and payments made by the former to keep up the policy; and the assignee, after making proof of the death of the assured, having assigned the policy to the widow of the assured, who was the beneficiary named

Widaman v. Hubbard, 88 Fed. 806, 812; Sides v. Knickerbocker Life Ins. Co. 16 Fed. 650, 652; Langdon v. Union Mutual Life Ins. Co. 14 Fed. 272, 273; Armstrong v. Mutual Life Ins. Co. 20 Blatchf. (U. S. C. C.) 493, 498, 11 Fed. 573, 577.

*Colorado.* — Sheets v. Sheets, 4 Colo. App. 450, 453, 36 Pac. 310.

*Georgia.*—Morris v. Georgia Loan, Savings & Banking Co. 109 Ga. 12, 18, 46 L.R.A. 506, 510, 34 S. E. 378; Exchange Bank v. Loh, 104 Ga. 446, 453, 44 L.R.A. 372, 376, 31 S. E. 459.

*Indiana.* — Amick v. Butler, 111 Ind. 578, 581, 60 Am. Rep. 722, 12 N. E. 518; Nye v. Grand Lodge Ancient Order United Workmen, 9 Ind. App. 131, 146, 36 N. E. 429; Kessler v. Kuhns, 1 Ind. App. 511, 517, 27 N. E. 980.

*Louisiana.*—Hays v. Lapeyre, 48 La. Ann. 749, 755, 35 L.R.A. 647, 652, 19 So. 821.

*Maryland.* — Ritter v. Smith, 70 Md. 261, 266, 2 L.R.A. 844, 846, 16 Atl. 890.

*Missouri.*—Singleton v. St. Louis Mutual Ins. Co. 66 Mo. 63, 74, 27 Am. Rep. 321; Strode v. Meyer Bros. Drug Co. 101 Mo. App. 627, 634, 74 S. W. 379; Hensner v. Mutual Life Ins. Co. 47 Mo. App. 336, 343.

*New Hampshire.*—Mechanics' National Bank v. Comins, 72 N. H. 12, 19, 101 Am. St. Rep. 650, 55 Atl. 191.

*North Carolina.*—Hinton v. Mutual Reserve Fund Life Assoc. 135 N. Car. 314, 324, 65 L.R.A. 161, 166, 102 Am. St. Rep. 545, 47 S. E. 474.

*Pennsylvania.* — Carson's Appeal, 113 Pa. 438, 57 Am. Rep. 479, 6 Atl. 213.

*South Carolina.*—Croswell v. Connecticut Indemnity Assoc. 51 S. Car. 103, 107, 28 S. E. 200.

*Texas.*—Equitable Life Ins. Co. v. Hazlewood, 75 Tex. 338, 351, 7 L.R.A. 217, 16 Am. St. Rep. 893, 12 S. W. 621; Price v. Supreme Lodge Knights of Honor, 68 Tex. 361, 367, 4 S. W. 633.

*Virginia.* — Tate v. Commercial Building Assoc. 97 Va. 74, 80, 45 L.R.A. 243, 245, 75 Am. St. Rep. 770, 33 S. E. 382; Roller v. Moore (Roller v. Beam) 86 Va. 512, 518, 6 L.R.A. 136, 10 S. E. 241.

*Distinguished* in Mutual Life Ins. Co. v. Allen, 138 Mass. 24, 32, 52 Am. Rep. 245.

[16] Mutual Benefit Life Ins. Co. v. Swett, 222 Fed. 200, 137 C. C. A. 640, 46 Ins. L. J. 111.

in the policy, but consented to the first assignment,—such widow's interest is limited to the amount due her assignor at the time of the death of her husband and the amount paid by such assignor to keep up the policy.[17] An assignment cannot be extended to cover a new note given for an additional loan in place of the one first secured, where no further assignment is taken, and said assignee is not aided by stating in writing over assured's signature and within his knowledge, that the policy was security therefor.[18] The owner of a life insurance policy having agreed to pay a city for support, furnished him out of its poor fund, the city is his creditor for the value of the support furnished, within the meaning of a clause of the policy providing that, in case of its assignment to a creditor, it shall be valid only to the amount of his claim.[19] If an assigmennt of a life policy is made to secure payment of a note, renewals of said note do not destroy the assignment in the absence of evidence of an intention to the contrary.[20]

§ 2337. **Assignment of life policy as collateral.**—A policy of life insurance may be assigned as collateral security, and it is not necessary to procure the insurer's consent thereto.[1] So an assignment limiting in its terms the recovery by the assignee to the extent of his interest may be treated as security for advances.[2] But a policy cannot be validly hypothecated upon the forged names of both insured and the named beneficiary.[3] It is held that the word "indebtedness" covers only that existing at the time of making an assignment as collateral security and does not extend to that which may be created in the future.[4] But where the assignment recited an indebtedness of equal amount with that of the policy, and thereafter the assured directs that the balance, over a certain amount, which it is claimed was alone to be protected, be so applied as to relieve assured from his entire indebtedness to

[17] McQuillan v. Mutual Reserve Fund Life Ins. Assoc. 112 Wis. 665, 56 L.R.A. 233, 88 Am. St. Rep. 986, 87 N. W. 1069.

[18] Herman v. Connecticut Mutual Life Ins. Co. 218 Mass. 181, 105 N. E. 450.

[19] McQuillan v. Mutual Reserve Fund Life Assoc. 112 Wis. 665, 56 L.R.A. 233, 88 Am. St. Rep. 986, 87 N. W. 1069.

[20] Mutual Benefit Life Ins. Co. v. Swett, 222 Fed. 200, 137 C. C. A. 640, 46 Ins. L. J. 111; Corcoran v. New York Mutual Life Ins. Co. 183 Pa. 443, 39 Atl. 50.

[1] Helmetag v. Miller, 76 Ala. 183, 52 Am. Rep. 316.

On validity of assignment of collateral security to one paying premiums, see notes in 3 L.R.A.(N.S.) 951, and 33 L.R.A.(N.S.) 949.

[2] Crowell v. Northwestern National Life Ins. Co. 140 Iowa, 258, 118 N. W. 412.

[3] Lesem v. Mutual Life Ins. Co. of N. Y. 149 N. Y. Supp. 559, 164 App. Div. 507, 45 Ins. L. J. 5.

[4] De Haven's Estate, In re (Battey's Appeal) 236 Pa. 146, 84 Atl. 676. See Ward v. Ward, 154 Ky. 355, 157 S. W. 700.

the assignee, it was held that said direction explained and confirmed the original intent and passed whatever value the policy possessed and that assured was not restricted to a single assignment.[5] So where a resident of Illinois, who had insured his life in a Massachusetts company, the policy being conditioned to be void if assigned without consent of the insurer, delivered the policy as collateral security to the plaintiff, a resident of Massachusetts, it was held in an action by the assignee, he having been appointed ancillary administrator in Massachusetts, that the bringing of a suit by the principal administrator in Illinois was no bar to the present action, and that the ancillary adminstrator was entitled to recover, as he represented the equitable interest and possessory right of the pledgee of the policy.[6] A wife who has obtained a policy upon her husband's life, payable to her or assigns, may assign the same as collateral security.[7] And if a debtor has made an assignment of a policy upon his life as collateral security for a debt, the assignee does not waive his rights in the policy, by reason of having procured an allowance of his claim against the estate, because he has assigned the policy without recourse to the administrator for collection.[8] A son may make a valid assignment of policies of insurance upon his own life as security for debts due from his father to the assignee.[9] A life policy issued to a creditor may be assigned by him as collateral security to one without insurable interest in the life insured, and the assignee may enforce payment of the policy, even though proof of interest is required by the terms of the policy.[10] Assignments as collateral security, as well as absolute ones, are included in a provision in a life insurance policy that, in case of assignment, claims by any creditor or assignee shall not exceed bona fide indebtedness, together with premiums paid and interest, and that the policy, "as to all amounts in excess thereof, shall be null and void."[11] If an assignment of the contingent interest under a life policy with a cash surrender value, maturing at a specified time, is made as collateral security and upon its maturity the policy is surrendered, the debt satisfied and the contract com-

[5] Mutual Benefit Life Ins. Co. v. Swett, 222 Fed. 200, 137 C. C. A. 640, 46 Ins. L. J. 111.

[6] Merrill v. New England Mutual Life Ins. Co. 103 Mass. 245, 4 Am. Rep. 548.

[7] Robinson v. Mutual Benefit Life Ins. Co. 16 Blatchf. (U. S. C. C.) 194, Fed. Cas. No. 11,961.

[8] Hight v. Taylor, 97 Ind. 392.

[9] Bursinger v. Watertown Bank, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290.

[10] Curtiss v. Ætna Life Ins. Co. 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211.

[11] McQuillan v. Mutual Reserve Fund Life Assoc. 112 Wis. 665, 56 L.R.A. 233, 88 Am. St. Rep. 986, 87 N. W. 1069.

pleted, it is immaterial as between assurer and the original beneficiary, whether or not legal or equitable rights existed under the assignment.[12] The recovery by an assignee is limited to the amount of indebtedness for which the policy is held as collateral security, together with interest and the sum paid by him in premiums, where it is agreed that said security shall be held until the indebtedness is paid, when the policy shall be reassigned and premiums paid by him shall be added to the debt.[13] An assignment may be enforced and the pledge foreclosed by an assignee or pledgee holding lawfully under the policy provisions, even without subsequent authorization or ratification.[14] And the pledgee of a policy of life insurance has the right and power to sell the policy to the highest bidder for the purpose of realizing money to pay the debt which it secures, and both immediate and remote assignees under such a sale take good title to the policy and to its proceeds, although they have no insurable interest in the life insured by the policy.[15] It is not necessary that transfer and ownership be decreed by a judgment of court in order to enable a pledgee of a life policy to exercise the rights of owner. It is sufficient to give such rights that in conformity with the exact terms of the pledge that the policy was sold at public auction after compliance with certain conditions precedent and that the pledgee thereby became owner.[16] A policy of life insurance which was pledged by the insured to secure an indebtedness, having been sold and the proceeds applied to the debt under order of court, in an action by the pledgee against the insured and his wife, the beneficiary, both of whom appeared and admitted the pledge and consented to the trial of the case, the administrator of the estate of the beneficiary is estopped to claim title to the policy on the ground that subsequent assignments of the policy were void because the immediate and remote assignees of the pledgee who bought the policy on the sale, had no insurable interest on the life of the insured.[17]

§ 2337a. **Power of attorney: pledge of policy: loan obtained by forgery: set-off.**—A power of attorney does not by inference confer upon the agent thereunder the right to hypothecate for his

[12] Cornell v. Mutual Life Ins. Co. of N. Y. 179 Mo. App. 420, 165 S. W. 858.

[13] Ontario Mutual Life Assur. Co. In re, 30 Ont. 666.

[14] Cornell v. Mutual Life Ins. Co. of N. Y. 179 Mo. App. 420, 165 S. W. 858.

[15] Gordan v. Ware National Bank, 132 Fed. 444, 65 C. C. A. 580, 67 L.R.A. 550.

[16] Feliciana Bank & Trust Co. v. Union Central Life Ins. Co. 137 La. 674, 69 So. 91.

[17] Gordon v. Ware National Bank, 132 Fed. 444, 65 C. C. A. 580, 67 L.R.A. 550.

own use his principal's property, and where pledging a policy is not one of the specific powers conferred expressly or impliedly, nor such an act as is necessary to the execution of any power given, such unauthorized pledge by the agent for a loan of money constitutes a breach of trust which will not be tolerated by the court, and this applies where an agent under a power of attorney given by assured and his wife, forges their names to loan papers and obtains from insurer a loan on the policy, and where the latter is ignorant of the existence of such power of attorney or of any agency, it must, in order to defend an action by the wife as beneficiary for the policy amount, or to set off the amount so loaned and so shift the responsibility for the agent's fraudulent act upon the plaintiff, show that an absolute right was conferred on said attorney to hypothecate the policy for his benefit to the beneficiary's injury; and in such case the husband's name having been forged there was no such consent on his part as to validate the assignment under the law of New York.[18]

§ 2338. **Assignment of policy payable to executors, administrators, or assigns: estate.**—The power of assignment of a life insurance policy is not limited by a provision to pay the sum secured to the "legal representatives," of the insured. but the provision is designed to apply only in case the latter should die without having previously assigned. So where the contract was with the assured, "his executor, administrator, and assigns," and at the bottom of the policy were the words. "N. B.—If assigned, notice to be given to the company," the policy was held assignable.[19] A policy made payable to the insured or his assigns at a certain specified time, or in case of his death before such time to his personal representatives, is likewise assignable, though the insured die before the time specified for payment.[20] So a policy on the life of the assured payable to his legal representative, may be assigned by him with assent of the insurer, and the rights of the assignee are paramount to the claims of the heirs or personal representatives of the assured.[1] And although a life policy provides that it is payable to the "executor or administrator"

[18] Lesem v. Mutual Life Ins. Co. of N. Y. 149 N. Y. Supp. 559, 164 App. Div. 507, 45 Ins. L. J. 5. *Cited* as to authorization under power of attorney in Keyes v. Metropolitan Trust Co. 155 N. Y. Supp. 888, 892, 169 App. Div. 765.

[19] New York Mutual Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742. See also Winchester v. Stebbins, 16 Gray (82 Mass.) 52; St. John v. American Mutual Life Ins. Co. 13 N. Y. 31, 64 Am. Dec. 259. See § 2336 herein.

[20] New York Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. 877.

[1] Robinson v. Hurst, 78 Md. 59, 20 L.R.A. 761, 44 Am. St. Rep. 266, 26 Atl. 956.

of insured, reserving the right to insurer, at its option, to pay the amount of the insurance to any person appearing to insurer to be entitled thereto by reason of having incurred expense in the burial of insured, the policy may be assigned by the latter and the amount thereof recovered by the assignee against insurer, unless the latter has exercised his option thus reserved.[2] Again, if a policy is issued on assured's life, payable to his administrators or assigns, and he afterward, with the consent of insurer, assigns the policy to his children, it must subsequently be given the same construction and effect as if they had originally been named therein as beneficiaries, and it cannot be avoided by any act of the insured which would not have avoided it had they been named in the policy as beneficiaries.[3] Where a policy of life insurance was made payable to the estate of the insured, and he made a written statement that he had that day made application to the company to change the beneficiary from his estate to a person named, stating that if the change was not made during his life he wanted the money paid to such person, who had rendered to him services as a cook during a number of years, for which he owed such person, and where he delivered the policy together with this written statement to the person named, he intending it and she accepting it as an assignment of the policy; and where on the same day he wrote to the company inclosing the amount which it charged for assenting to a change of beneficiary and informing it of the desired change, and that he owed the person mentioned and wished such person to "have something as a gift after I am gone," held, that this operated as a transfer of the policy, and authorized the assignee to bring suit on it after the death of the insured.[4]

§ 2339. **Assignment of policy to trustees.**—Where a policy was assigned to trustees to hold in trust for the wife of the insured, it was held that though the trustees had become bankrupt, they were entitled to the proceeds of the policy, and not their assigns in bankruptcy.[5] Where a person assigned a policy upon his life for the benefit of his sister and her children, and delivered the assignment but not the policy, which he afterward surrendered for a consideration, it was held in an action by the trustee to have the value of the policy replaced that the assignment was a

[2] Prudential Ins. Co. v. Young, 14 Ind. App. 560, 56 Am. St. Rep. 319, 43 N. E. 253.

[3] Patterson v. Natural Premium Mutual Life Ins. Co. 100 Wis. 118, 42 L.R.A. 253, 69 Am. St. Rep. 899, 75 N. W. 980.

[4] Southern Mutual Life Ins. Co. v. Durdin, 132 Ga. 495, 131 Am. St. Rep. 210, 64 S. E. 264.

[5] North British Ins. Co. v. Hallett, 7 Jur. N. S. 1263, 9 Week. Rep. 880.

valid one, and the assured must give sufficient security for the entire value of the policy.[6] A written assignment of an insurance policy to trustees to be named in the will of the assignor for the benefit of a certain person named, which is not witnessed as required by statute to make it a valid will, is not effectual to transfer title, where no delivery is made to anyone to hold for the trustees, and assignor does not manifest an intention to hold for himself, although the assignment is assented to by the beneficiary.[7] An assignment of an interest in a life policy, payable at the death of insured, to a trustee, for the benefit of the assignor and others, entitles the assignee to such interest on the death of insured, although the assignor died previously.[8]

§ 2340. **Assignment of policy pro tanto.**—An assignment of an insurance policy pro tanto, by order indorsed thereon directing the insurers to pay a part of the insurance money to the assignee, the policy being retained in the possession of the assured, is not valid and effectual, though notice thereof is given to the insurers.[9] But assured has a right to make a partial assignment as where he reserves to himself the right to exercise certain options in making an assignment of a semi-tontine policy.[10]

§ 2341. **Effect of insolvency or bankruptcy upon policy: assignment for benefit of creditors: rights of assignee or trustee.**—The proceeds of a life policy which is taken out by an insolvent for the benefit of his parents as a mere gift to them, will be subjected to the claims of his creditors, where he created a valid liability against himself or his estate by giving a check for a part of the premium, which is held as an existing obligation at the time of his death, although no part of the premium is actually paid by him or out of his property, and the check is never presented against his estate, but is paid gratuitously by his administrator out of the latter's own funds.[11] But creditors of an insolvent have no right to the proceeds of his life insurance, made payable to other persons, where he paid the premium therefor only by a

[6] Fortescue v. Barnett, 3 Mylne & K. 36, 2 L. J. Ch. 98.

On validity of assignment of insurance policy to persons to be named in will, see note in 27 L.R.A.(N.S.) 184.

[7] Frost v. Frost, 202 Mass. 100, 27 L.R.A.(N.S.) 184n, 88 N. E. 446.

[8] Hewlett v. Home for Incurables, 74 Md. 350, 17 L.R.A. 447, 24 Atl. 324.

[9] Palmer v. Merrill, 6 Cush. (60 Mass.) 282, 52 Am. Dec. 782; Pedder v. Mosely, 31 Beav. 159, 7 L. T. 205. But see Pomeroy v. Manhattan Life Ins. Co. 40 Ill. 398, where it was held that such an assignment would be protected in equity.

[10] Northwestern Mutual Life Ins. Co. v. Wright, 153 Wis. 252, 140 N. W. 1078.

[11] Lehman v. Gunn, 124 Ala. 213, 51 L.R.A. 112, 27 So. 475.

worthless check, and never put into the insurance anything upon which the creditors could have had any claim.[12] Where a creditor insures the life of his debtor and afterwards assigns for the benefit of his own creditors, but keeps the policy, which after that he transfers to a third person, the administrator of the insured cannot recover the amount from the transferee to whom it was paid on the ground that the first holder could transfer no title after this general assignment, for whether he could or not is no concern of the insured or his administrator.[13]

Where a policy is issued upon the life of a person in his own name, and he thereafter makes an assignment for the benefit of his creditors, it has generally been held that the policy passes to the assignees in bankruptcy, unless there has been a prior valid assignment, and such a policy, it has been held, will pass to the assignees in bankruptcy where the policy has been deposited as security for a debt, no notice being given to the insurers of such deposit and the insured having retained control of the same.[14] In a Massachusetts case an assignment was made for the benefit of creditors payable on a certain date to assured, his executors, administrators, or assigns, or if he should die before that time, then to his children, naming them, if they survived insured, (with power to insured to surrender the policy to insurer) otherwise to insured's executors, administrators, or assigns. The policy was assignable and the amounts of the surrender value which would be paid at the end of successive years was specified. It was held that his right of surrender was a valuable property right, vested in him by the terms of the policy; that all insured's interest and property rights which the creditors could have reached for the satisfaction of their demands by any process legal or equitable, were conveyed to the assignee; that he could not as against said assignee surrender the policy and take the amount of the surrender value for his own benefit, although as against insurer he had that right; and that the childrens' right was subject to assured's unrestricted right of surrender.[15] A policy on the life of

[12] Roberts v. Winton, 100 Tenn. 484, 41 L.R.A. 275, 45 S. W. 673.

[13] Shaak v. Meily, 136 Pa. 161, 20 Atl. 515. See also Hurlbut v. Hurlbut, 49 Hun (N. Y.) 189, 1 N. Y. Supp. 854.

[14] Cook v. Black, 1 Hare, 390, 11 L. J. Ch. 268, 6 Jur. 164; Williams v. Thorp, 2 Sim. 257; West v. Reid, 2 Hare, 249, 12 L. J. Ch. 245, 7 Jur. 147; Edwards v. Martin, 1 L. R. Eq. 121, 13 L. T. N. S. 236, 35 L. J. Ch. 188. See §§ 879 et seq. herein.

[15] Blinn v. Dame (Dame v. Blinn) 207 Mass. 159, 93 N. E. 601. 40 Ins. L. J. 458. The court, per Sheldon, J., said: "Under this state of affairs, the elder Dame made his assignment to the predecessors of the plaintiffs in the first action, hereinafter called the plaintiffs. The language of that instrument is broad and sweeping.

a bankrupt, payable to his legal representatives, and having no cash surrender value and no value for any purpose except the con-

It passes all his 'estate, property and effects, real, personal and mixed, of whatever name and nature, legal and equitable; . . . also all claims, debts, choses in action owing to him, whether now or hereafter payable, and all evidences thereof; also any and all other property, real or personal, of or belonging to him, of whatever description and wheresoever the same may be; . . . except such property as is exempt from being taken on execution by law.' This exception does not cover property which could not be taken on a writ of execution at common law; it manifestly refers only to the statutory exemptions stated in Rev. Laws, c. 177, sec. 34. The instrument, we are satisfied, was intended to convey, and does convey to the assignees all the property and property rights of the assignor which the creditors could have reached for the satisfaction of their demands by any process, legal, equitable, or under the provisions of Rev. Laws, c. 168, sec. 10.

"We do not doubt that that right of the assignor under this policy to receive the amount thereof on July 10, 1918, if he shall then be living, and his right to have the same amount paid to his personal representative upon his prior decease if his children shall not survive him, would have been available to his creditors and would have passed under the assignment. Anthracite Ins. Co. v. Sears, 109 Mass. 383; Lord v. Harte, 118 Mass. 271; Brigham v. Home Ins. Co. 131 Mass. 319; Pierce v. Charter Oak Ins. Co. 138 Mass. 151; Haskell v. Equitable Assur. Soc. 181 Mass. 341, 63 N. E. 890; Alexander v. McPeck, 189 Mass. 34, 75 N. E. 88; Biggert v. Straub, 193 Mass. 77, 78 N. E. 770, 118 Am. St. Rep. 449. It seems equally plain that he may not now, as against his assignees, surrender the policy and take the amount of the surrender value for his own benefit. As against the insurance company no doubt he has that right. But it is a right secured to him by his contract with the company, and is a valuable right of property available to his creditors. See the cases last above cited. It is a chose in action which was in existence at the time of the assignment and passed by its terms.

"What we have said is also in our opinion decisive upon the only remaining question in the case. His right of surrender was a valuable property right, vested in him by the language of the policy. It constituted an integral part of the value to him or his estate of the policy itself. That pecuniary value would be very much less either to himself or to any one to whom he might transfer his property rights if this unqualified and paramount right of surrender were not secured to him. There was here an agreement on the part of the company to pay the surrender value to him upon his surrender; this was a contract right given to him by the policy, which materially increased its value to him. This was not merely a right to surrender under the third article or the third clause of the eighth article of the provision attached to the policy. Under the parenthetical clause contained in the promise of the company he had the right to surrender the policy at any time and to receive its surrender value. Moreover this clause was made a part of the conditional limitation or appointment in favor of his children, apparently for the very purpose of saving to him the absolute ownership and control of the policy. The children's right was made subject to his unrestricted right of surrender. This was a valuable property right incident to his general right under the policy such as would pass with an assignment of the latter. It now must be held, in the

tingency of its becoming valuable at the death of the bankrupt if the premiums are kept paid, does not vest in the trustee in bankruptcy as assets of the bankrupt's estate.[16] Where a person procured two policies upon his life payable to his legal representatives, and shortly after made an assignment for the benefit of his creditors, informing them of the existence of these policies, to which they made no claim, as they considered them to be of no value, and the insured, after holding them about a year, surrendered them and procured new ones payable to his wife, and he afterward received his discharge in bankruptcy, it was held that his act in surrendering the policies was not fraudulent, there being no intention to defraud, and the policies being of no value as assets, and therefore creditors, whether those prior to his discharge or subsequent thereto, had no claim upon the policies.[17] If a wife joins with her husband in an assignment of a policy on his life under which she is a beneficiary, and there is a reserved power to change the beneficiary, the husband, even without changing the beneficiary, has a transferable interest therein and may assign the same to secure his indebtedness and notwithstanding any assignment made by him and any remaining interest over and above that due the as-

opinion of the majority of the court, that it did pass, with the policy itself, under the general language of the assignment.

"We have found no case which seems to us to be quite decisive upon the point raised here, though in some cases the question decided, and in others the reasoning of the courts, approaches it more or less closely. The decisions are not uniform; but the general trend of authority is in favor of our view. See Atlantic Mutual Life Ins. Co. v. Gannon, 179 Mass. 291, 60 N. E. 933; Travelers Ins. Co. v. Healey, 49 N. Y. Supp. 29, 25 App. Div. 53, aff'd in 164 N. Y. 607, 58 N. E. 1093; Steele, In re, (D. C.) 98 Fed. 78; Diack, In re, (D. C.) 100 Fed. 770; Boardman, In re (D. C.) 103 Fed. 783; Slingliff, In re (D. C.) 106 Fed. 154; Welling, In re, 113 Fed. 189, 51 C. C. A. 151; White, In re, 174 Fed. 333, 98 C. C. A. 205, 26 L.R.A.(N.S.) 451; Hettling, In re, 175 Fed. 65, 99 C. C. A. 87; Townsend v. Townsend, 127 Ky. 230, 16 L.R.A.(N.S.) 316, 105 S. W. 937.

"It follows that under his covenant of further assurance it is the duty of Warren S. Dame now to execute in favor of the plaintiffs any written surrender that may be necessary to enable them to collect the surrender value of the policy in question, and the duty of the insurance company upon receiving proper surrender of the policy to pay such surrender value to the plaintiffs and in the first case a decree must be entered for the plaintiff substantially as prayed for. The bill in the second case must be dismissed." There were two bills in equity, the first suit was by the assignees, the second by the children.

[16] Morris v. Dodd, 110 Ga. 606, 50 L.R.A. 33, 78 Am. St. Rep. 129, 36 S. E. 83. See also Bullon, In re (U. S. D. C.) 98 Fed. 86.

[17] Barbour v. Connecticut Mutual Life Ins. Co. 61 Conn. 240, 23 Atl. 154, 21 Ins. L. J. 3.

signee, or even to a sub-assignee will pass to assured's trustee in bankruptcy as of the date of adjudication.[18]

Where there is no policy provision to the contrary and it is not a wager policy and it is assigned by assured to his sister-in-law, his subsequent insolvency and being adjudicated a bankrupt does not constitute a conveyance in fraud of creditors, and the status of the trustee as such, confers upon him no greater rights than those possessed by assured to set aside such transfer.[19]

A fire policy conditioned to be void if assigned without the assent of insurer, is avoided by an assignment for the benefit of creditors.[20] So an absolute assignment for the benefit of creditors avoids the policy.[1] So under a New York decision if insured makes a general assignment for the benefit of his creditors, it constitutes such a change in the title and interest of the insured as will render the policy void, unless it is saved by estoppel or waiver.[2] But an adjudication that a mortgagee is a bankrupt is such an involuntary act as not to avoid the policy upon his interest.[3]

When the subject of fire insurance has been assigned by insured, before a loss, for the benefit of his creditors, and without the company's consent, indorsed upon or added to the policy, a waiver of its conditions as to change of title is not established by evidence that, after the assignment and before the fire, the insured notified the company's agent that the assignment had been made; that the assignee wanted the insurance kept good and promised to pay a balance of premium due, but that he did not have the policy with him; that the agent replied: "I will see that the insurance is all right," and to the effect that the assignee should have the benefit of it; and that the remainder of the premium was not paid before the fire. Nor do such facts authorize the application of the doctrine of estoppel.[4]

Under the Federal Bankruptcy Act it was the purpose of congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset otherwise to leave

[18] Mutual Benefit Life Ins. Co. v. Swett, 222 Fed. 200, 137 C. C. A. 640, 46 Ins. L. J. 111. As to vested interest of beneficiary and reserved right to change same, see §§ 730 et seq., 740 et seq. herein.

[19] King v. Cram, 185 Mass. 103, 69 N. E. 1049.

[20] Dube v. Mascoma Mutual Fire Ins. Co. 64 N. H. 527, 1 L.R.A. 57, 15 Atl. 141. See §§ 2288, 2288a herein.

[1] Roper v. National Fire Ins. Co. 161 N. Car. 151, 76 S. E. 869.

[2] Northam v. Dutchess County Ins. Co. 166 N. Y. 319, 82 Am. St. Rep. 655, 59 N. E. 912.

[3] Roper v. National Fire Ins. Co. 161 N. Car. 151, 76 S. E. 869.

[4] Northam v. Dutchess County Ins. Co. 166 N. Y. 319, 82 Am. St. Rep. 655, 59 N. E. 912.

*Life insurance as assets of bankrupt or insolvent,* see notes in 50 L.R.A. 333; 26 L.R.A.(N.S.) 451; 30 L.R.A.(N.S.) 990; 41 L.R.A. (N.S.) 123; and 46 L.R.A.(N.S.) 148.

to insured the benefit of his life insurance, and the assignee of insured has the same right to retain the policy as the bankrupt has. If the policy has no cash surrender value or if such surrender value is exhausted by a loan by the assignee it does not pass as general property to the trustee but remains the bankrupt's property. Such statute also undertakes to vest in the trustee property which, prior to the filing of the petition, the bankrupt could by any means have transferred or which might have been levied upon or sold under judicial process against him.[5] Again, it is decided that under said Act the only right of a trustee in bankruptcy to the bankrupt's life insurance relates to those policies that have a cash surrender value payable to the bankrupt, his estate or personal representative, and the amount of said cash surrender value on the date of filing the petition in bankruptcy, constitutes the measure of such right, otherwise and in all other respects said policies of life insurance and the avails thereof are not property to which such trustee has any claim, but they remain the property of the bankrupt without any limitation. It follows, therefore, that policy provisions, under which assured is guaranteed payment at some later time, if either the face value of the policy or some other amount of money, are immaterial if said policies are payable to someone other than assured. In such cases the beneficiary has a vested interest requiring his consent to the payment of any cash value if the policy contains nothing contra, and the beneficiaries may have such an interest in the cash value regardless of any statute that said values are not payable to the bankrupt or his estate. Unless exempt by state law, such policies as have, on the date of filing the bankruptcy petition, a cash value payable to the bankrupt, such cash surrender value is the property of the trustee and not that of the bankrupt.[6] In addition to what we have above stated and as there are certain insurance features, rather than insurance principles, connected with bankruptcy of insured we append the following decisions with a brief mention of the points decided in connection therewith.[7]

[5] Burlingham v. Crouse, 228 U. S. 459, 57 L. ed. 920, 33 Sup. Ct. 564, 30 Am. B. 6, 46 L.R.A.(N.S.) 148 & note; bankr. act July 1, 1898, c. 541, sec. 70a, 30 Stat. 565 (Comp. Stat. 1913, sec. 9654).

[6] Eddy, Matter of (referee's decision), 36 Am. B. R. 294, *citing* Andrews v. Partridge, 228 U. S. 479, 57 L. ed. 929, 33 Sup. Ct. 570, 30 Am. B. R. 4 (rev'g Andrews, In re, 191 Fed. 325, 112 C. C. A. 69, 41 L.R.A. (N.S.) 123n); Everett v. Judson, 228 U. S. 474, 57 L. ed. 927, 32 Sup. Ct. 568, 30 Am. B. R. 1, 46 L.R.A.(N.S.) 154; Burlingham v. Crouse, 228 U. S. 459, 57 L. ed. 920, 33 Sup. Ct. 564, 30 Am. B. R. 6, 46 L.R.A.(N.S.) 148, and note under Fed. bankr. act. Pub. Stat. Vt. sec. 3050.

[7] *United States.*—Arkin, In re, 231 Fed. 947, 146 C. C. A. 143 (where

**§ 2342. Rights of company where policy assigned.**—The assignment of an insurance policy with the consent of the insurer, creates

policy is property of bankrupt's wife, and she is sole beneficiary, has paid the premiums, and the property has a cash value, it need not be turned over to trustee so as to deprive her of her interest); Cohen, In re (U. S. D. C.) 230 Fed. 733 (trustee not entitled to cash surrender value of policy making wife beneficiary, even though right reserved to change beneficiary, especially where state law protects her beneficial interest. Federal bankr. act, also Park's Annot. Code Ga. sec. 2498); Flanigan, In re (U. S. D. C.) 228 Fed. 339 (policy does not pass to trustee where policy taken out for wife's benefit or she becomes assignee. Pa. L. April 15, 1868, P. L. 103, sec. 1. If right to change beneficiary exists, right to surrender value passes to trustee. If, however, there has been bona fide assignment to wife of whole policy including right to cash surrender value as well as insurance moneys, or if assignment made for value or before debts contracted by husband. So that policy property of wife trustee could not surrender policy or claim its surrender value); Levy, In re (U. S. D. C.) 227 Fed. 1011 (assignment not listed in schedule; effect of death of bankrupt after discharge; when wife has right to redeem; when trustee not entitled to entire amount of policy); Orear, In re, 178 Fed. 632, 102 C. C. A. 78, 30 L.R.A.(N.S.) 990, and note, 24 Am. B. R. 343 (policy payable to estate with right to change beneficiary passes to trustee); Smith v. Mutual Life Ins. Co. of N. Y. 178 Fed. 510, 158 Fed. 365, 24 Am. B. R. 514 (annuity purchased in fraud of creditors; consideration paid therefor recoverable by trustee who is not bound to trace same); Johnson, In re, 176 Fed. 591, 24 Am. B. R. 277 (policy payable to wife with right to change beneficiary; exemptions; surrender value not recoverable by trustee. Fed. act 1898, also Rev. L. Minn. 1905, secs. 1691, 1692); Hettling, In re, 175 Fed. 65, 99 C. C. A. 87, 23 Am. B. R. 61 (policy with certain options payable to wife if she survives, otherwise to estate with right to change beneficiary; property passes to trustee); Kyte, In re, 174 Fed. 867, 23 Am. B. R. 414 (not fraud to fail to list policies on which full surrender value borrowed and not listed on advice of counsel); White, In re, 174 Fed. 333, 98 C. C. A. 205, 26 L.R.A.(N.S.) 451, 23 Am. B. R. 90 (policy with surrender value payable to wife or assured's estate, trustee has right to surrender value; exemption statute; Domestic Relations Law, N. Y. Consol. L. C. 14, sec. 52, not applicable. *Distinguished* in Grems v. Traver, 87 Misc. 644, 148 N. Y. Supp. 200, 44 Ins. L. J. 226, 236.—Emerson, J.); Van Kirk v. Vermont Slate Co. (U. S. D. C.) 140 Fed. 38, 15 Am. B. R. 239 (bona fide prior assignee entitled to have value of claim fixed as against trustee; trustee's right to redeem; apportionment); Welling, In re, 113 Fed. 189, 51 C. C. A. 151, 7 Am. B. R. 340 (semi-tontine policy payable to wife passes to trustee although it has technically no surrender value; relative rights of bankrupt and trustee); West Norfolk Lumber Co. In re, 112 Fed. 759, 7 Am. B. R. 648 (proceeds of fire policy belong to pledgee; not part of debtor's estate); Scheld, In re, 104 Fed. 870, 44 C. C. A. 233, 52 L.R.A. 183, 5 Am. B. R. 1602 (policy with cash surrender value passes to trustee unless such value is paid over or secured to trustee notwithstanding state exemption laws as to claims of creditors; specific provisions of sec. 70, Fed. bankr. act, 1898, limits provision of sec. 6, Id.).

*Georgia.*—Traders' Ins. Co. v. Mann, 118 Ga. 381, 45 S. E. 426, 11 Am. B. R. 269 (trustee holds beneficial interest; policy transferred to

a new contract between the latter and the assignee, which is unaffected by any causes of forfeiture previously existing and unknown to either party.[8] But an insurer's consent to an assignment of the policy does not waive a clause rendering an assigned policy void as to all above the debt due the assignee.[9] If insurer issues a policy of "permanent insurance" by which it agrees to be and remain "forever" liable to the assured, his heirs and assigns, and which provides that any assignment of the policy shall be brought to the company's office to be entered and "allowed," it cannot refuse to enter and allow an assignment solely because it has decided not to consent to the transfer of old policies.[10] The insurer may resist payment to the assignee, on the ground of fraud, of the amount due on a policy secured by the holder of a purchase-money mortgage on the life of the mortgagor's wife, who was not

creditor after fire and before bankruptcy; reassignment by creditor and surrender of policy to trustee).

*Louisiana.*—Gordon v. Mechanics' & Traders Ins. Co. 120 La. 441, 15 L.R.A.(N.S.) 827 (annotated on effect of bankruptcy or insolvency proceedings or assignment for benefit of creditors on fire insurance), 45 So. 384, 22 Am. B. R. 649 (fire occurred between adjudication in bankruptcy and appointment of receiver; after receiver appointed composition with creditors was confirmed; held that composition nullified bankruptcy proceedings, and assured's rights under policy were intact notwithstanding condition against change of interest or title).

*Massachusetts.*—Fuller v. New York Fire Ins. Co. 184 Mass. 12, 67 N. E. 879 (assignable policies pass to trustee; property destroyed between adjudication and appointment of trustee, he may enforce obligation).

*Minnesota.*—Remley v. Travelers' Ins. Co. 108 Minn. 31, 121 N. W. 230 (fifteen-year endowment policy payable to insured's executors, administrators and assigns; policy delivered to and held by bank; creditors entitled to surrender value; Rev. L. Minn. 1905, secs. 1691, 1692, also Fed. bankr. act; insured did not secure amount to trustee; policy passed to trustee).

*Mississippi.*—Dreyfus v. Barton, 98 Miss. 758, 54 So. 254 (policy payable to executor or administrator; proceeds and cash surrender value exempt; bankrupt's legal representative had right to exemption; Fed. acts no application to state statutory exemptions; code 1906, sec. 2141).

*New York.*—Grems v. Traver, 87 Misc. 644, 148 N. Y. Supp. 200, 44 Ins. L. J. 226, 236 (unless the policy is payable to insured, or it has a surrender value payable by the terms of the policy to him alone he has no interest that passes to the trustee. A policy that does not assure to the bankrupt some actual value as an asset does not pass to the trustee, Emerson, J.)

On voidability of assignment of policy within four months of bankruptcy pursuant to executory agreement antedating such period, see note in 17 L.R.A.(N.S.) 939.

[8] Hall v. Niagara Fire Ins. Co. 93 Mich. 184, 18 L.R.A. 135, 53 N. W. 727. See § 2308 herein.

[9] McQuillan v. Mutual Reserve Fund Life Assoc. 112 Wis. 665, 56 L.R.A. 233, 67 N. W. 1069. See § 2325 herein.

[10] Marshall v. Franklin Fire Ins. Co. 176 Pa. 628, 34 L.R.A. 159, 35 Atl. 204.

bound by the mortgage, to secure his debt, where, knowing that, if the insurer knew the facts, it would not issue a policy in his favor, he procured it to be issued to her, paying the premiums himself, and then took an assignment of it, without notice to, and contrary to the rules of, the insurer.[11] Where a policy which provides that all sums due from the insured to the company are to be deducted before payment is assigned, the company consenting thereto and reserving its "rights as expressed in the policy," it is held that the insurer may deduct premium notes given by the assignor subsequent to such assignment where no fraudulent intent to defeat the assignment appears.[12]

§ 2343. **Assignment by husband to wife of life policy.**—A husband may assign a policy of insurance upon his life to his wife in the absence of a prior assignment. If, however, he has assigned the policy to another by a prior assignment, the subsequent assignment to the wife will fail.[13] If an assignment of a life policy is made by a husband to his wife, the only intention on his part which is to be regarded is that expressed in the assignment, and therefore if his wife dies, his intention cannot be proved to prevent her collateral relatives from taking an interest.[14] The assignment by a man to his wife of his contingent interest in a policy of insurance on his life, which is payable to her should she survive him, but to his personal representatives or assigns in case she dies before he does, devests him of all interest in the policy, so that, he will acquire a right to the proceeds of the policy, if at all, by virtue of his right as surviving husband, and not under the terms of the policy.[15] And if an endowment policy has matured and he would have been entitled to its surrender value and it is payable to his executors, administrators and assigns, insured may validly assign the same and the assignee will take his rights, and where it is assigned to his wife if living, if not then to his child or children, said wife will be entitled to the surrender value and the children do not take during her life.[16] So an endowment policy, which has been pledged to secure a debt, may be validly assigned by insured to his wife, subject to creditor's lien where she pays the premiums

[11] Hinton v. Mutual Reserve Fund Life Ins. Co. 135 N. Car. 314, 65 L.R.A. 161, 47 S. E. 474.

[12] Wiggin v. Suffolk Ins. Co. 18 Pick. (35 Mass.) 145, 29 Am. Rep. 576.

As to deduction of note from loss, see § 1237 herein.

[13] Chapman v. McIlwrath, 77 Mo. 38, 46 Am. Rep. 1; Roberts v. Phœnix Life Ins. Co. 120 U. S. 86, 30 L. ed. 613.

[14] Colburn's Appeal, 74 Conn. 463, 92 Am. St. Rep. 231, 51 Atl. 139.

[15] Box v. Lanier (Lanier v. Box) 112 Tenn. 393, 64 L.R.A. 458, 79 S. W. 1042.

[16] Eisenbach v. Mutual Life Ins. Co. of N. Y. 147 N. Y. Supp. 462, 162 App. Div. 595, 44 Ins. L. J. 144.

which he was unable to pay, and also satisfies certain of his debts, and a creditor who thereafter obtains judgment against him cannot compel satisfaction thereof out of the insurance unless fraud be shown.[17] Where the husband has disposed by will of the proceeds of a policy of insurance on his life, but subsequently to the making of his will assigns the policy to his wife, who pays the assessments thereon, it is held that she may recover in preference to persons named in the will.[18] An assignment will likewise fail if in fraud of the creditors of the husband.[19] But if a policy has no salable value an assignment thereof by a debtor to his wife does not constitute a fraud upon creditors.[20] And if a policy on a husband's life has no cash surrender or market value when he assigns it to his wife, and in addition the premiums are thereafter paid by her, out of funds not derived from him, his creditors have no right in equity as against her to have their claims satisfied out of the policy amount, especially where credit was extended merely on the fact of insured's general representations as to policies being payable to his estate and that said creditors would have the benefit of the proceeds.[1] And an attempted assignment by insured to his wife and daughter will be set aside where it is in fraud of creditors and the entire insurance will be subjected to his creditors' benefit and not merely the cash value thereof where insured dies before judgment setting aside such transfer.[2] Where a statute permitted a father to insure his life for the benefit of a minor child, it was held that such statute was not permissive of an assignment by the father of a policy in his own name to his minor children, he being in debt at the time of the assignment.[3] A husband may by a parol assignment and delivery to the wife create such equitable rights in her as will be good against creditors, unless the assignment is intended to be in fraud of the creditors.[4]

Whether an assignment of policies of life insurance from a husband to his wife, passes the whole interest in it, depends upon the law of the state of their domicil, and if this is Massachusetts the effect is the same as if the assignment were made to her by a third person, to whom the husband had previously assigned the policy.[5]

[17] Bodwell v. Johnson, 152 Ind. 525, 52 N. E. 798.

[18] Swift v. Railway Passenger & Freight Conductors' Mutual Aid & Benefit Assoc. 96 Ill. 309 (one judge dissenting).

[19] Appeal of Elliott's Exrs. 50 Pa. St. 75, 88 Am. Dec. 525.

[20] Steeley's Admr. v. Steeley, 23 Ky. L. Rep. 996, 64 S. W. 642.

[1] Brooke v. Morris, 111 Ga. 879, 36 S. E. 937.

[2] Continental National Bank v. Moore, 82 N. Y. Supp. 302, 83 App. Div. 419.

[3] Friedman v. Fennel, 94 Ala. 570, 10 So. 649.

[4] Chapman v. McIlwrath, 77 Mo. 38, 46 Am. Rep. 1.

[5] Colburn's Appeal, 74 Conn. 463,

**§ 2344. Assignment of life policy to wife or dependents by insolvent bankrupt: creditors' rights.**—Under a statute permitting a wife to insure her husband's life for her benefit and hold the proceeds as against his creditors—less premiums with interest paid by him, within the statutory period of limitation, with intent to defraud creditors, she may in like manner hold the proceeds of a policy which the husband has procured on his own life and assigned to her when insolvent.[6] So an assignment by an insolvent husband of his life insurance policy to his wife, is valid as against creditors, although the policy was taken out only two years before such assignment and the death of the insured.[7] The fact that a member of a mutual benefit society who assigned the membership certificate was insolvent at the time of his death does not invalidate the assignment where it is not shown that he was insolvent at the time he made the assignment.[8] Again, although it is declared, that there is much diversity of opinion on the question it is held in Massachusetts that a wife and daughter of a bankrupt, to whom paid-up endowment policies are assigned, are entitled to the proceeds thereof less sums paid for premiums in fraud of creditors, and the creditors are entitled to such sums with interest under the statutes of that state governing the rights of a married woman as against the claims of creditors.[9] It is also held in the same state that even on the eve of bankruptcy, the bankrupt can absolutely and unreservedly transfer to his wife all his interest under a policy on his life, notwithstanding both had knowledge of his insolvent or bankrupt condition, as the statute provides that in such case of assignment, or transfer to her of a policy after its issuance it inures to her separate use and benefit, and this applies to an assignment to her of an endowment policy, subject to the reserved right to obtain a loan or surrender the policy for its cash value, where such reserved right is not exercised by reason of assured's death, although the power to surrender could have passed to the trustee in bankruptcy.

92 Am. St. Rep. 231, 51 Atl. 139. As to place of contract, see §§ 225 et seq. herein.

[6] Cole v. Marple, 98 Ill. 58, 38 Am. Rep. 83. See §§ 879 et seq., 2341 herein.

[7] State v. Tomlinson, 16 Ind. App. 662, 59 Am. St. Rep. 335, 45 N. E. 1116.

[8] Milner v. Bowman, 119 Ind. 448, 5 L.R.A. 95, 21 N. E. 1094.

[9] Bailey v. Wood, 202 Mass. 562, 89 N. E. 149, 38 Ins. L. J. 1037; Bailey v. Wood, 202 Mass. 549, 25 L.R.A.(N.S.) 722 (annotated on whether paid-up or endowment policies are within statutes exempting life insurance policies), 89 N. E. 147; Mass. Rev. Laws 1902, c. 118, sec. 73; Id. c. 159, sec. 3, cl. 7; banking act July 1, 1898, c. 541, 30 Stat. 565. U. S. Comp. Stat. 1901, p. 3451. *Compare* Frost v. Frost, 202 Mass. 100, 27 L.R.A.(N.S.) 184, 132 Am. St. Rep. 476, 88 N. E. 446; Conant v. Boston Chamber of Commerce, 201 Mass. 479, 87 N. E. 906. See §§ 2341–2344, 3488 herein.

A distinction was made in this, that the case was not one where the bankrupt had either a general or special title to the policy.[10] If a parol agreement is made by assured with his wife to assign his life policies to her in consideration of a relinquishment of dower rights in property so as to enable him to transfer the same to secure a loan, and the amount of the policies and the value of the dower rights are substantially the same, such agreement vests in her so as to constitute an equitable lien against her husband's trustee in bankruptcy, even though the assignment was not formally made until after he became insolvent, although so made within four months prior to his bankruptcy.[11] In Pennsylvania, however, a distinction is made between a person's taking out a policy on his own life, under the statute, for the benefit of his family and dependent relatives, and taking out a policy on his own life and assigning it to his wife, child or other dependent, the court holding that in the former case the title becomes vested in such beneficiaries to the exclusion of creditor's claims without regard to the question of good or bad faith or fraud upon creditor's rights as such question is precluded. In the latter case, however, the assignee's title may, under the statute, be attacked by the creditors of the assignor if the assignment has been made in fraud of their rights, but no inference is warranted that the assignment is fraudulent as to creditors by the mere fact that the assignor was insolvent when he made the assignment, since it may, nevertheless, have been made in good faith and without fraud.[12] So in an Indiana decision if a

[10] Eldredge v. Mutual Life Ins. Co. of N. Y. 217 Mass. 444, 105 N. E. 361, 32 Am. B. R. 530, 44 Ins. L. J. 140. This arises out of the provisions of the Federal bankruptcy act (given in last preceding note) which preserves exemptions given to bankrupts by state laws and of the Mass. Stat. above noted.

[11] J. F. Grandey & Son, In re (U. S. D. C.) 146 Fed. 318.

[12] McCutcheon's Appeal, 99 Pa. 133, 11 Wkly. N. C. 125, 39 Leg. Int. 238, 29 Pitts. L. J. 215; act April 15, 1868, sec. 1, Pamphl. L. 103. In this case A took out a policy on his own life payable to his wife, and becoming subsequently indebted to various parties, induced her by fraud and coercion to assign said policy to B as collateral security for an antecedent debt due from A to B. B was ignorant of the fraud and coercion, and paid several premiums on the policy, and afterwards, A proving insolvent, was active in inducing A's creditors to sign a composition agreement which was accordingly effected. B concealed the fact that the policy had been assigned to him, and there was no evidence that the other creditors of A knew of it. Afterwards A died. In a contest between his widow and B for the amount of the policy, it was held that B was not to be regarded as an innocent purchaser for value, and was therefore entitled only to a return of the premiums paid by him with interest thereon, and that the widow of A was entitled to the fund. It was held further, that as none of A's other creditors had attacked the validity of the assignment to B, it

person takes out a policy on his life and subsequently assigns it to his wife, child, or other dependent relative, the mere fact that the assignor is insolvent at the time of making the assignment does not warrant the inference that the assignment was in fraud of his creditors.[13]

**§ 2345. Right of husband to assign policy issued for benefit of wife or children.**—A policy of insurance taken out by a husband upon his life for the benefit of his wife vests an interest in the wife which the insured cannot devest her of without her consent. And this rule also prevails where the policy is for the benefit of the wife and children of the insured.[14] If, however, after the wife's death the husband assigns the policy which was issued for the benefit of the wife, the assignee will become entitled to such interest as the husband would receive in the distribution of her estate. So where S. insured his life for the benefit of his wife, and paid the premiums until her death, he and two children surviving, and afterward he assigned his interest to H as security, and H paid the premium until S's death, it was held that on the wife's death one-third of the policy went to the husband and two-thirds to the children, and that H could take only the one-third, but that he was entitled to be reimbursed for the premiums he had paid with interest.[15] As a general rule, if the husband assigns such a policy, the assignee

was not affected by the circumstance that B concealed the fact of the assignment from such other creditors. Id.

[13] State v. Tomlinson, 16 Ind. App. 662, 59 Am. St. Rep. 335, 45 N. E. 1116. See also Lytle v. Baldinger, 84 Ohio St. 1, 95 N. E. 389; Ohio Rev. Stat. sec. 6343.

[14] *Colorado.*—Goodrich v. Treat, 3 Colo. 408, 7 Ins. L. J. 269.

*Illinois.*—Hubbard v. Stapp, 32 Ill. App. 541.

*Indiana.*—Pence v. Makepeace, 65 Ind. 345.

*Kentucky.*—Robinson v. Duval, 79 Ky. 83, 42 Am. Rep. 208.

*Louisiana.*—Pilcher v. New York Life Ins. Co. 33 La. Ann. 322.

*Massachusetts.*—Unity Mutual Life Assur. Assoc. v. Dugan, 118 Mass. 219.

*Minnesota.*—Ricker v. Charter Oak Life Ins. Co. 27 Minn. 193, 38 Am. Rep. 289, 6 N. W. 771, 10 Ins. L. J. 143.

*Missouri.*—Charter Oak Life Ins. Co. v. Brandt, 47 Mo. 419, 4 Am. Rep. 328; Baker v. Young, 47 Mo. 453.

*New York.*—Ferdon v. Canfield, 104 N. Y. 143, 10 N. E. 146; De Jonge v. Goldsmith, 46 N. Y. Super. Ct. 131; Connecticut Mutual Life Ins. Co. v. Van Campen, 32 N. Y. St. Rep. 1125, 57 Hun, 592, 11 N. Y. Supp. 103.

*Tennessee.*—Goslin v. Caldwell, 1 Lea (69 Tenn.) 454, 27 Am. Rep. 774.

See contra, Rison v. Wilkerson, 3 Sneed (37 Tenn.) 565.

*As to vested interest of beneficiary—change of interest.* See §§ 730 et seq., 740 et seq. herein.

On power of insured to destroy rights of beneficiary, see note in 49 L.R.A. 737.

[15] Harley v. Heist, 86 Ind. 196, 44 Am. Rep. 285.

has no rights in the same, but if he pays any premiums after the policy has been assigned to him, he will be entitled to recover the amount of premiums paid.[16] In a case in Indiana it has, however, been held that the assignee cannot even recover the amount of premiums paid except upon the clearest proof of fraud.[17] An assignee of a policy cannot exercise the right of surrender for cash value stipulated for therein at certain periods where the policy is payable to insured's wife, or in case of her death, to his children, and said wife did not join in the assignment. In such case the right of surrender is personal to insured.[18] In Wisconsin, although an assignment by a husband of a policy upon his life, payable to his wife, is made while he is temporarily residing in a state wherein it is invalid, still it is valid in a state where the contract itself was made and in which such an assignment could validly be made.[19]

**§ 2346. Right of guardian to assign policy issued for benefit of ward.**—A father who is acting as guardian for his children has no right to assign a policy of life insurance running to their benefit.[20]

**§ 2347. Right of wife to assign a policy on life of husband.**—Statutes are in existence in many of the states providing that policies of insurance may be procured upon the life of a husband which shall inure to the sole use of a wife, or of the wife and children, free from all claims of creditors. The cases decided under these statutes in the different states are not entirely in accord with each other. In some of the states it has been held that such policies are not assignable by the wife, while in the decisions in other states there is the suggestion that where statutes are in existence giving the wife absolute control over her separate personal property, and she has paid the premiums upon the policy of insurance, she ought to be permitted to assign the same.[1] In New York it was early

[16] Pilcher v. New York Life Ins. Co. 33 La. Ann. 322; De Jonge v. Goldsmith, 46 N. Y. S. C. 131.

[17] Pence v. Makepeace, 65 Ind. 345.

[18] Moser v. Connecticut Mutual Life Ins. Co. 134 Ky. 215, 119 S. W. 792.

When policy cannot be surrendered without consent of beneficiary in life policy. See §§ 853 et seq. herein.

On surrender of policy of ordinary life insurance without consent of beneficiary, see note in 35 L.R.A. (N.S.) 844.

[19] Northwestern Mutual Life Ins. Co. v. Adams, 155 Wis. 335, 144 N. W. 1108. See Trovendale v. Highleyman (1908) — Ky. —, 113 S. W. 812. See Henry v. Thompson, 78 N. J. Eq. 142, 78 Atl. 14. See § 232 herein.

[20] Pratt v. Globe Mutual Life Ins. Co. — Tenn. —, 17 S. W. 352.

[1] In many of the states provisions have been made by statute or code for the protection of the interest of wife and children for whose benefit policies have been issued. These laws are in substance the same in all the states. They provide that insurance

held [2] that such policies were not assignable, and that any assignment by the wife was void and of no effect. This was decided under the statute of 1840. The reason controlling this case is, that the statute was passed for the special protection of the widow and children of the insured, and that the spirit of the statute is not permissive of any assignment or transfer in any way of the policy. It is not passed for the benefit of the wife while the husband is living, so that she may assign the same, but it is to protect her during her widowhood, or to protect the orphan children after their father's death.[3] And in that state a policy on the life of her husband, issued for the benefit of the wife, or, in case of her death before her husband, of her children, was not assignable by her during the lifetime of her husband until the statute of 1879,[4] and an assignment by a wife without her husband's consent of a policy upon his life, is void.[5] But a married woman is capable of assigning a policy issued upon the life of her husband for her benefit, in those cases only in which, and to the precise extent to which, she has been expressly enabled to assign by statute.[6] So the New York

may be procured upon the life of the husband for the benefit of the wife and children, and that such insurance policies shall be free from the claims of the creditors of the insured. It is also generally provided that in case premiums paid out of the estate of the husband exceed a certain amount, the excess with interest shall inure to the benefit of the creditors of the husband. See statutes under § 879 herein.

It has been held in New York that the policy need not specially refer to such a statute or certain provision for the benefit of the children in case the wife dies before the husband, in order to bring it within the operation of the statute: Brummer v. Cohn, 58 How. Pr. (N. Y.) 239.

[2] Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395, and note.

[3] See also, in line with this principle, Smith v. Head, 75 Ga. 755; Knickerbocker Life Ins. Co. v. Weitz, 99 Mass. 157; Frank v. Mutual Life Ins. Co. 102 N. Y. 266, 267, 55 Am. Rep. 807, 6 N. E. 667; Wilson v. Laurence, 76 N. Y. 585; Grems v. Travers, 148 N. Y. 200, 44 Ins. L. J. 226; Whitehead v. New York Life Ins. Co. 33 Hun (N. Y.) 425; Frank v. Mutual Life Ins. Co. 12 Daly (N. Y.) 267; Brummer v. Cohen, 6 Abb. N. C. (N. Y.) 409, aff'd 58 How. Prac. 239; Barry v. Equitable Life Assurance Soc. 14 Abb. Prac. N. S. (N. Y.) 385n; Pratt v. Globe Mutual Life Ins. Co. 3 Tenn. Cas. 174, 17 S. W. 352; Bell v. Cureton, 2 Mylne & K. 503.

[4] Brick v. Campbell, 122 N. Y. 337, 10 L.R.A. 259, 25 N. E. 493; N. Y. Laws 1879, c. 248. See Travelers' Ins. Co. v. Healey, 49 N. Y. Supp. 29, 25 App. Div. 53; Fuller v. Kent, 43 N. Y. Supp. 649, 13 App. Div. 529; Dudley v. Fifth Avenue Trust Co. 100 N. Y. Supp. 934, 115 App. Div. 396.

[5] Lesem v. Mutual Life Ins. Co. 149 N. Y. Supp. 559, 164 App. Div. 507, 45 Ins. L. J. 5. See §§ 879 et seq. herein. *Compare* Dannhauser v. Wallenstein, 169 N. Y. 199, 62 N. E. 160, 31 Ins. L. J. 367, 65 N. Y. Supp. 219, 52 App. Div. 312, 60 N. Y. Supp. 50, 28 Misc. 690.

[6] Brick v. Campbell, 122 N. Y. 337, 10 L.R.A. 259, 25 N. E. 493. See Travelers' Ins. Co. v. Healey, 49 N.

Domestic Relations Law [7] permitting a married woman in her own name or in the name of a third person with his consent as her trustee, to insure her husband's life and providing that the married woman may dispose of such policy by will or written acknowledged assignment to take effect at her death, can only be assigned as specified.[8] This statute as well as that of 1840 was passed for a most beneficial purpose, to effect which, it applies as well to policies negotiated by the husband and payable to her, as to those procured by his wife.[9]

There are other cases, however, some of which hold expressly that in the absence of statutory prohibition, if the statute of the state gives a wife control over her property so that she may transfer the same, that under such power she should be held authorized to transfer a policy of insurance upon her husband's life.[10] The right to assign the policy in these cases is based upon the enabling statutes of the states in which the decisions have been rendered, giving a married woman the right to transfer her sole and separate property and choses in action. Under these decisions such an assignment is not enforceable at law, but is held to constitute an equitable assignment of all rights of the wife in the policy, which the assignee may enforce in a court of equity.

A Connecticut case,[11] while it accepted the doctrine stated in New York as applicable to the state of facts before the court, seemed inclined, however, to modify the rule somewhat. The court said, referring to the New York case: [12] "The reasoning of the court goes so far as to hold that a policy of this description prior to the decease of the husband is absolutely and under all circumstances unassignable by the wife. That such should be the law under a policy, premiums on which were paid by the husband, certainly

Y. Supp. 29, 25 App. Div. 53; Fuller v. Kent, 43 N. Y. Supp. 649, 13 App. Div. 529; Dudley v. Fifth Avenue Trust Co. 100 N. Y. Supp. 934, 115 App. Div. 396.

[7] Domestic Relations Law (Laws 1909, c. 19) sec. 52; Laws 1858, c. 179, am'd L. 1874, c. 277; L. 1866, c. 656; L. 1840, c. 80; L. 1877, c. 278, sec. 2; L. 1879, c. 248.

[8] Dannhauser v. Wallenstein, 169 N. Y. 199, 62 N. E. 160, 65 N. Y. Supp. 219, 52 App. Div. 312, 60 N. Y. Supp. 50, 28 Misc. 690.

[9] Grems v. Traver, 87 Misc. 644, 148 N. Y. Supp. 200, 44 Ins. L. J. 226.

[10] Collins v. Dawley, 4 Colo. 138, 34 Am. Rep. 72; Pomeroy v. Manhattan Life Ins. Co. 40 Ill. 398; Norwood v. Guerdon, 60 Ill. 253; Damron v. Pennsylvania Mutual Life Ins. Co. 99 Ind. 478; Everett v. Oakley, 35 Ind. 188; Merrill v. New England Mutual Life Ins. Co. 103 Mass. 245, 4 Am. Rep. 548; Charter Oak Life Ins. Co. v. Brandt, 47 Mo. 419, 4 Am. Rep. 328; Kerman v. Howard, 23 Wis. 108.

[11] Connecticut Mutual Life Ins. Co. v. Burrows, 34 Conn. 305, 91 Am. Dec. 725.

[12] Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395, and note.

seems reasonable and just. While on the other hand, if the wife paid the premiums out of her separate estate, it is difficult to suggest a reason why she should not have the same power to assign her interest in the policy that she has to assign any other chose in action belonging to her." These points were not, however, expressly decided by the court, as the wife died before the husband, and the policy provided that in case of her death before the insured's, the policy should inure to the benefit of the children. In the absence of a provision in the policy or the statutes of the state as to any rights of children in such a policy, the principle as suggested in the Connecticut case [13] might prevail if the policy were made payable to the wife for her sole use. If, however, it clearly appears from the statute or the terms of the policy that the contract, in case of the death of the wife before the husband, is intended to be continued in favor of the children, these facts will constitute a material difference between the policy and ordinary choses in action. In such a case the ordinary rules of law applicable to choses in action will not apply so as to permit a married woman to assign a policy of insurance upon her husband's life, though empowered by statute to transfer her personal property.[14] The words of the Connecticut court [15] are pertinent in this connection: "But it is suggested that the clause in the policy making it payable to the children 'is simply the indication of her purpose at that time to give the sum specified in the policy to them in case she deceased before her husband;' and again, that 'it must be held to be on her part an expressed, but unexecuted intention to give this sum to the children,' which purpose she could abandon at pleasure, and make a different disposition of the fund. The intention was not only expressed, but executed. The contract was complete, and the money, when due, was payable to the children without any further act on her part. But we do not regard the transaction as a gift. The charter of the company and the statute law required the policy to be made as it was, to protect it from the claims of creditors and the representative of the husband. The object of the legislature was to authorize a reasonable provision to be made for the family of the husband for the widow, if living, if not, for the children. Mrs. K., when she purchased this policy, doubtlessly intended to secure the benefits of this statute, not only for herself, in case she survived her husband, but for her children, in case she did not, and to that end

[13] Connecticut Mutual Life Ins. Co. v. Burrows, 34 Conn. 305, 91 Am. Dec. 725.

[14] Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395.

[15] Connecticut Mutual Life Ins. Co. v. Burrows, 34 Conn. 305, 91 Am. Dec. 725.

she caused the policy to be made according to the requirements of the statute. Having done so, and the contract relations between the company and the children having thereby become fixed, it was not in her power to defeat the purpose of the legislature, in respect to the children and the manifest intention of the parties to the contract, by an assignment of the policy during the life of her husband." The court also, in this case, held that the instrument could not be considered testamentary in its nature, and therefore revocable by her. In a later Connecticut decision,[16] where a policy upon a husband's life was issued for the benefit of the wife, or the children in case the wife died before her husband, it was held that the rights of the children were not affected by an assignment by her, but that such assignment would have been a valid one in case there had been no children.

From the consideration of the cases upon this subject both under this and the sections next following we think the following principles may be deduced as being sustained by the weight of authority. In the absence of any provision in the policy, or of any statutory provision that the policy shall inure to the benefit of the children as well as the wife, it would seem that the wife, in those states where she is permitted to have absolute control over her sole and separate property, may assign a policy of insurance upon her husband's life issued for her sole benefit. If, however, it is clearly expressed in the policy to be for the benefit of the children as well as the wife, and it is the manifest intention, as declared in the statute, to make such a provision for the children, then they are vested with certain rights, of which they cannot be deprived by an assignment of the policy by the wife or husband.

§ 2347a. **Same subject: where wife has contingent interest only.**—The assignee of the wife takes only her contingent interest, which will become an absolute title where her husband predeceases her, if, during his life a policy payable to her for her sole use, if living, otherwise to the children.[17] If a wife's interest under the terms of a policy issued to her upon her husband's life, depends upon whether or not she survives him, and it terminates and her children become the beneficiaries if she does not so survive, her interest is only a contingent one so that her assignee can take no greater interest than she possesses, even though the assignment is made with her husband's consent.[18] And when a wife's interest under a policy

[16] Phœnix Mutual Life Ins. Co. v. Dunham, 46 Conn. 79, 33 Am. Rep. 14.

[17] Brown's Appeal, 125 Pa. 303, 11 Am. St. Rep. 900, 17 Atl. 419; Entwhistle v. Travelers' Ins. Co. 202 Pa. 141, 31 Atl. 759.

[18] Hagerman v. Mutual Life Ins. Co. of N. Y. 45 Colo. 459, 103 Pac. 276. See §§ 827–829 herein.

payable to her, is contingent upon her surviving her husband, her assignee, where her husband has not consented to the assignment as required by statute, is not entitled to have an absolute assignment executed to him so as to entitle him to the surrender value of the policy, even though by reason of her husband's indebtedness said assignor had agreed to collect the value and pay over the policy to such assignee. But, however, while he could not hold the policy absolutely and receive the surrender value because of want of power in the wife to assign it to him without her husband's consent, said assignee would be entitled to a delivery of the policy and to a right to her interest therein since she could agree to receive, if she were living, money when due under the policy and hold it for him.[19] If a married woman is permitted by statute to obtain insurance upon her husband's life and to assign the policy if she has no children, or to assign the same with her husband's consent, in any event the policy gives her a contingent interest only, in that it is payable to her if she survives her husband, otherwise to her children. Her assignee, even though her husband consents to the assignment, can take such interest only as she possessed, which interest will terminate if she predeceases her husband.[20] Where a husband insured his life for the benefit of his wife, and in case she died before he did for the benefit of the children, it was held, she having died and also one of her children having died prior to his death, that the grandchild inherited such share in the proceeds of the policy as its parent would have been entitled to if living.[1] If a policy is effected by a wife upon her husband's life payable to her, or in case of her death before his then to their children, without any reserved right to change the beneficiary or to surrender the policies at his option for their cash value, he has no pecuniary interest which he can assign, and the interest of the wife, where both joined in the assignment, will pass to the assignee, but upon the happening of her death before his neither her personal representatives nor assigns acquire any title to the policy proceeds, and their surviving children, not having joined in the assignment, will take, as their rights are not defeated by said prior assignment.[2] If under the terms of the policy, a wife's interest is only a contingent one dependent upon her surviving her husband, so that the assignee, even though the assignment is made with the husband's

[19] Rathborne v. Hutch, 85 N. Y. Supp. 775, 90 App. Div. 151, 85 N. Y. Supp. 768, 90 App. Div. 161, 80 N. Y. Supp. 347, 80 App. Div. 115.

[20] Hagerman v. Mutual Life Ins. Co. of N. Y. 45 Colo. 459, 103 Pac. 276. See §§ 827–829 herein.

[1] Continental Life Ins. Co. v. Palmer, 42 Conn. 60, 64, 19 Am. Rep. 530; Connecticut Mutual Life Ins. Co. v. Baldwin, 15 R. I. 106, 23 Atl. 105, 14 Ins. L. J. 813.

[2] Wilde v. Wilde, 209 Mass. 205, 95 N. E. 295, 40 Ins. L. J. 1538.

consent, takes only such interest as the wife possessed, the act of the assignee, after her decease before her husband and the vesting of the policy interest in their children, in obtaining a paid-up policy after lapse for nonpayment of premiums, does not estop assurer, although it had consented thereto from asserting that the assignee had no interest in the policy.[3] But where the sufficiency of an assignment by a husband of his wife's interest under a policy payable to her if living, otherwise to her children, is warranted by her and he expressly consents thereto by an endorsement upon the policy, her interest will pass, even though she died before her husband leaving no children.[4] And where a policy was issued for the benefit of the wife in case she survived her husband, but if not to inure to the benefit of the children, and during the life of the husband she assigned the policy, to be held in trust for the children, it was held that such assignment was a valid one, and could not be defeated by a judgment creditor.[5] In Missouri, under the statute providing that a policy of life insurance for the benefit of a married woman shall inure to her use and benefit and that of her children, it has been held that the clause as to the children refers to the manner of descent and distribution, and does not vest in them any rights which an assignment of the policy by the wife would violate, her rights as to the control of the policy not being restrained in any way. The clause is held to mean that after the money has been reduced to possession by the wife, the proceeds shall go to the children at her decease; the object of the statute is simply to protect her.[6]

§ 2348. **Assignment by wife of policy on husband's life: continued.**—It has been held that the wife may assign a policy of insurance upon her husband's life where the purpose of such assignment is to procure the necessary means with which to keep the policy alive.[7] So a wife's interest in a policy on her husband's life may be assigned by her as security for his debts.[8] And a policy on a husband's life will stand as collateral for loans actually made to him and his wife at separate times, where the first one is made to the wife on her absolute and general assignment, and the second one is thereafter made to him by the same assignee on his applica-

[3] Hagerman v. Mutual Life Ins. Co. of N. Y. 45 Colo. 459, 103 Pac. 276.

[4] Henry v. Thompson, 78 N. J. Eq. 142, 78 Atl. 14.

[5] Smillie v. Quinn, 25 Hun (N. Y.) 332, 90 N. Y. 492.

[6] Baker v. Young, 47 Mo. 453; Connecticut Mutual Life Ins. Co. v. Ryan, 8 Mo. App. 535, 10 Ins. L. J. 72.

[7] Robinson v. Mutual Benefit Ins. Co. 16 Blatchf. (U. S. C. C.) 194, Fed. Cas. No. 11,961, 9 Ins. L. J. 23.

[8] Herr v. Reinoehl, 209 Pa. 483, 58 Atl. 862, aff'g 21 Lanc. L. Rev. 291.

tion.[9] And if, under a statute, a wife's interest in a policy is her separate estate, and a married woman is permitted by statute to dispose of her separate estate, an assignment by her to secure certain of his notes, where the policy is for her sole use and benefit and she survives him, is such a pledge of her interest as will be enforced.[10] But where the by-laws of the New York Produce Exchange provide for a quarterly fund to be paid to the widow, children, or next of kin, or other dependent upon a member, and it is also provided that nothing in said laws shall be construed to constitute an estate in esse which can be mortgaged or pledged, a member's wife has no such interest in the fund as to enable her to assign it during her husband's life.[11]

A policy for the benefit of assured's legal representatives which is assigned by assured to his wife, and by the latter's administrator is not within a statute necessitating the husband's assent to an assignment or surrender of a policy issued upon husbands' lives for their benefit.[12] So, where a "ten-payment policy" issued originally upon assured's application and payable to his legal representatives, was assigned by him to his wife and thereafter a paid-up policy was issued in lieu thereof, payable to said wife "assignee or her legal representatives," and she assigned the same to a third party, and he in turn assigned the same to his wife, who thereafter made still another assignment thereof, it was held that said original policy was not a "wife's" policy within the New York statute permitting policies upon husbands' lives for the benefit and use of their wives to be assigned by a wife with her husband's written consent, and also that the paid-up policy was not a new contract but simply a continuation of the original contract,—that is, a change in the mere form of the contract provided for by its own terms, and therefore the husband's written consent was not necessary to a valid assignment.[13] And an assignment by a husband to his wife of a policy on his life payable to his legal representative and assigned by her administrator after her death, is not within the statute of New York of 1879, requiring her husband's consent to her assignment of a policy issued to her, etc.[14]

A married woman may sell and convey her right to recover upon

[9] Upshaw v. Mutual Loan Assoc. 60 N. Y. Supp. 242, 29 Misc. 143.

[10] Troendle v. Highleyman, — Ky. —, 113 S. W. 912.

[11] McCord v. McCord, 57 N. Y. Supp. 1049, 40 App. Div. 275.

[12] Morschauser's Admr. v. Pierce, 72 N. Y. Supp. 328, 64 App. Div. 558; Laws N. Y. 1879, c. 248.

[13] Dannhausen v. Wallenstein, 169 N. Y. 199, 62 N. E. 160, 31 Ins. L. J. 367 (statutes down to 1879, c. 248, reviewed by the court) 65 N. Y. Supp. 219, 52 App. Div. 312, 60 N. Y. Supp. 50, 28 Misc. 690.

[14] Morschauser Admr. v. Pierce, 72 N. Y. Supp. 328, 64 App. Div. 558.

life policies made payable to her without the intervention of a trustee, under a statute,[15] authorizing her to sell and convey any of her personal property other than that described in said statute [16] with the same effect as though she was unmarried.[17] In Pennsylvania only the contract of indorsement, guaranty, or suretyship is within the intent of a statute forbidding a married woman from becoming an accommodation indorser, maker, guarantor, or surety for another.[18]

The right of a wife to assign a policy on the life of her husband, under the New York Statute of 1879 [19] when the policy is issued for her benefit and the husband gives his written consent, is not limited to policies issued or delivered within the state, but extends to those issued by a foreign company in another state.[20] It is also held that if the statute of the state in which the policy is issued prohibits an assignment of the policy by the wife, no assignment of her interest, though made in another state, will be deemed valid in the state where the policy was issued.[1] And it has been decided that where the policies were issued prior to the enactment of the statute, such statute did not apply to a policy payable to the wife "or her assigns." [2]

**§ 2349. Assignment by husband and wife jointly of policy on husband's life: joint assignment by husband, wife and children.**—If the policy on the life of the husband is, either under a statute or by the express terms of the policy itself, for the benefit of the children as well as the wife, it cannot be assigned by the joint act of the husband and wife. The interest of the children has become a vested interest, of which they cannot be deprived. The general rules applicable to assignment by the wife alone of such a policy control here, and the decisions upon the right of the wife to assign the policy where the interests of the children are vested contain the same principles of law as involved in the joint act of the husband and wife.[3] It has been held, however, that where the children join

[15] R. I. Pub. Stat. c. 166, sec. 6.

[16] Sec. 5.

[17] Supreme Assembly Royal Society of Good Fellows v. Campbell, 17 R. I. 402, 13 L.R.A. 601, 22 Atl. 307.

[18] Herr v. Reinoehl, 209 Pa. 483, 58 Atl. 862, aff'g 21 Laws Rev. 291, Pa. act June 8, 1893, P. L. 344. *Compare* Union Central Life Ins. Co. v. Woods, 11 Ind. App. 335, 37 N. E. 189.

[19] N. Y. Laws 1879, c. 248.

[20] Spencer v. Myers, 150 N. Y. 269, 34 L.R.A. 175, 44 N. E. 942. See § 232 herein.

[1] Mutual Life Ins. Co. v. Terry, 62 How. Pr. (N. Y.) 325.

[2] Robinson v. Mutual Life Ins. Co. 16 Blatchf. (U. S. C. C.) 194, Fed. Cas. No. 11,961.

[3] Godfrey v. Wilson, 70 Ind. 50; Appeal of Brown, 125 Pa. St. 303, 11 Am. St. Rep. 900, 17 Atl. 419.

As to vested rights, etc., of beneficiary. See §§ 730 et seq., 740 et seq., 858 et seq. herein.

in such an assignment, the assignee will be entitled to the proceeds in preference to the children.[4] Under a Wisconsin decision if a policy is procured by a person on his life, payable to his wife, or her executors, administrators, or assigns, it may be validly assigned by him and his wife with insurer's consent.[5] In Missouri a life insurance policy taken out by a husband on his own life for the benefit of his wife is assignable during his life, with her consent, as collateral security for his debts where there is no statute directly prohibiting it, and she is debarred by the assignment from recovering the proceeds of the policy.[6] In the Missouri case it appeared that the amount of premiums paid could not bring the case within the statute, but in subsequent cases in that state the right of the wife to assign has been distinctly affirmed.[7] If a wife is a beneficiary under a straight life policy upon her husband's life in which a power is reserved to change the beneficiary and she joins her husband in an assignment of the policy as security for his debts, it is held not necessary that she should receive a consideration therefor in order to bind her, because she has no property right in the policy and parts with nothing of appreciable value by such act and the assignee becomes the qualified owner to the full extent necessary to satisfy the husband's indebtedness out of the proceeds, nor does she, by such assignment, become a surety for him. It was also decided that it was not necessary to determine whether the assignment, in that the debt exceeded the policy amount, was in effect a change of beneficiary, for the reason that they were not the same but different things, in that an assignment is the transfer by one of his rights or interest in property to another, rests upon contract and generally requires the delivery of the thing assigned, while the right to change the beneficiary is the power to appoint which must be exercised in the manner specified in the contract and no change of beneficiary was made, although she was left nothing to take as the assignment absorbed the entire policy proceeds.[8] An indorse-

[4] Ferndon v. Canfield, 39 Hun (N. Y.) 571, Daniels, J., dissenting.

[5] Canterbury v. Northwestern Mutual Life Ins. Co. 124 Wis. 169, 102 N. W. 1096; Rev. Stat. 1878, sec. 2347, as am'd by Laws 1889, c. 271, sec. 1, p. 299.

[6] Charter Oak Life Ins. Co. v. Brandt, 47 Mo. 419, 4 Am. Rep. 328.

[7] Baker v. Young, 47 Mo. 453. See also Ford v. Travelers' Ins. Co. 6 Mackey (D. C.) 384, 13 Cent. Rep. 168, 16 Nash. L. Rep. 382; DeRonge v. Elliot, 23 N. J. Eq. 486, 495; Bayles v. Hillsborough Ins. Co. 27 N. J. L. 163, 166; Archibald v. Mutual Life Ins. Co. 38 Wis. 542. *Compare* Kase v. Hartford Fire Ins. Co. 58 N. J. Law 34, 32 Atl. 1057; De Jonge v. Goldsmith, 14 Jones & Spen. (46 N. Y. Super.) 131, holding endowment policy payable to wife not assignable, aff'd (mem.) 86 N. Y. 614.

[8] Mutual Benefit Life Ins. Co. v. Swett, 222 Fed. 200, 137 C. C. A. 640, 46 Ins. L. J. 111. But see §§ 730 et seq., 740 et seq., 843, 853, 858 et seq. herein.

ment in blank by a wife on a policy on her husband's life, in order that he may assign the same as collateral security for a certain loan, has been held valid. But if the husband use the indorsement for other purposes of assignment than that specified, it is not binding upon the wife, for any purpose other than that contemplated.[9] And although a policy is assigned by insured, the consent of his wife to the assignment by letter to the assignee is void as to her.[10] And even though assured's wife as beneficiary, joins with her husband in an assignment to secure his debts, and he also, without his wife's knowledge, executes a separate absolute assignment of the policy and delivers the same as collateral security for the payment of certain individual firm debts then due, or which might become due, such assignee can hold as to the wife's interest, no greater amount of the policy proceeds than that of which she had knowledge and for which she understood the assignment was made.[11] Where the wife insured the life of her husband and they joined in an assignment to a trustee for the benefit of the children, it was held that the wife could not question the trustee's right to the fund.[12] And if an assignee holder of policies as collateral security upon their expiration and surrender, obtains with insured renewal policies payable to it, its successors, or assigns, said contract subject to whatever equities insured and his wife may possess, becomes one between insurer and said assignee, and where such renewals recite that they are issued pursuant to the original contract which provides for certain options to exchange for other policies, including endowment policies, such rights are vested in the assignee alone, so that it is entitled to demand specific performance as to the endowment policies without being obligated to show the acquiescence of insured and his wife in the exercise of said options.[13]

Where the insured, the wife and children, including a minor child, joined in an assignment of a policy for the benefit of the wife and children, it was held that the assignee was entitled to the share of the wife and the three children who had reached their majority, but that the interest of the minor child was not transferred by such assignment, but was, however, subject to an equitable charge for one-fifth of the premium paid by the assignees with interest.[14]

[9] Connecticut Mutual Life Ins. Co. v. Westervelt, 57 Conn. 586.

[10] Crawford v. Canadian, 29 Canadian L. T. 638, 13 O. W. R. 957.

[11] Aldrich v. Brinker (U. S. D. C.) 143 Fed. 563.

[12] Bond v. Mutual Benefit Life Ins. Co. 9 Phila. (Pa.) 149, 30 Leg. Int. 304.

[13] State Mutual Bank of Springfield v. United States Life Ins. Co. 238 Ill. 148, 87 N. E. 396.

[14] Scobey v. Waters, 10 Lea (78 Tenn.) 551.

Under the New York laws[15] policies of insurance upon the lives of husbands for the benefit of their wives are "assignable by said wife with the written consent of her husband." Under the statute it is held that the joinder of the husband with the wife in making a written assignment constituted a sufficient consent of the husband. The fact that the children have a contingent interest dependent upon the death of the wife before the husband does not render an assignment void when made under this statute.[16] Under this statute it has also been held that endowment policies payable to the wife may be assigned by the husband and wife jointly.[17]

In Massachusetts, if a policy is effected upon her husband's life payable to her, or in case she predeceases him, then to her children without any reserved right to change the beneficiary or to surrender the policies at his option for their cash value, he has no assignable interest and the interest of the wife, where both join in the assignment, passes to the assignee, but if he survives her, neither her personal representatives nor assigns acquire any title to the policy proceeds, and their surviving children, not having joined in the assignment, will take, as their rights are not defeated by said prior assignment.[18] Under a Pennsylvania decision a life policy provided that the proceeds thereof should be paid to the wife, if she survived her husband, otherwise to the children, but if insured survived wife and children, then to his legal representatives, the balance of the year's premiums and any other indebtedness to insurer, either on the part of the insured or assured, being first deducted therefrom. Another clause provided that the policy could be converted into cash at the option of the holder at any time after the expiration of fifteen years from the date thereof, for the amount indorsed on the back of the policy, corresponding to the age of the insured at the time of such conversion, "provided that the policy shall have been first paid up by the payment of ten full annual premiums." After ten full annual payments had been made, and when the children were living, the husband and wife joined in an assignment of the policy, and the assignee demanded the cash balance on the ground that he was the "holder" of the policy. His demand was refused because the children had an interest. It was decided that not only the wife, but insured's children were the beneficiaries or "holders" of the policy, that neither the husband nor

[15] Laws 1879, c. 248. See §§ 2347–2348 herein.

[16] Anderson v. Goldsmith, 103 N. Y. 617, 9 N. E. 495. But *compare* §§ 2247–2248 herein. See §§ 730 et seq., 740 et seq., 858 et seq. herein.

[17] Brummer v. Cohn, 9 Daly (N. Y.) 36, 58 How. Pr. (N. Y.) 239, 6 Abb. N. C. (N. Y.) 409.

[18] Wilde v. Wilde, 209 Mass. 205, 95 N. E. 295, 40 Ins. L. J. 1358.

the wife, nor both together had power to destroy the children's vested interest; and that the demand of the wife's assignee was properly refused.[19] In another case in that state a New York insurance company issued a policy upon the life of a citizen of Pennsylvania, payable to the wife of the insured for her sole use, but providing that in case of her death before the decease of the insured, the amount of the insurance should be payable to her children. Both the insured and his wife joined in an assignment of the policy, and afterward the wife died, leaving the insured and seven children to survive her. After the death of the insured, the assignee of the policy, and the children of the deceased wife of the insured, made claim to the amount of the policy, and an interpleader was instituted by the company to determine the right to the fund. In such case, the contest being over a fund paid by a foreign corporation into the court of the common domicil of the claimants, its adjudication would depend upon the construction of the policy itself, under which the parties claimed, and not upon the question whether the lex fori or the lex loci ought to prevail; and the wife's interest in the policy having been extinguished by her death in the lifetime of her husband, and her assignee being in no better position than she herself occupied at the time of the assignment, the amount of the insurance was payable to her children.[20]

If the wife joins with her husband in an assignment of the policy and it is otherwise valid, the assignee's rights thereunder are not affected by claimed duress and coercion on the part of the husband to induce her to sign said assignment, where it does not appear that the assignee had any knowledge of said alleged acts of the husband or was in any way connected therewith.[1]

A beneficial association may waive limitations and restrictions in its constitution and laws as to surrender and cancelation of the certificate upon its assignment, so that if the husband and wife, who is the beneficiary, join in assigning the certificate, she is precluded from repudiating her agreement and contesting it as against the assignee who has performed his part thereof, and it also appears that insurer has not contested the assignment but has paid the money into court.[2]

§ 2349a. **Assignment to husband and wife: joint ownership: survivor's rights.**—A joint ownership is created by the assignment of a policy to a husband and wife and the interest thereunder becomes

[19] Entwhistle v. Travelers' Ins. Co. 202 Pa. 141, 31 Atl. 759, rev'g 17 Super. Ct. 180.

[20] Brown's Appeal, 125 Pa. St. 303, 11 Am. St. Rep. 900, 17 Atl. 419.

[1] Ely v. Hartford Life Ins. Co. 128 Ky. 799, 110 S. W. 265.

[2] Kimball v. Lester, 59 N. Y. Supp. 540, 43 App. Div. 27.

vested in the survivor, and if the husband's administrator collects the policy proceeds he is liable to her assignee as for money had and received.[3]

**§ 2349b. Assignment of employers' liability policy.**—A policy of indemnity insurance cannot be assigned without consent of the insurer,[4] and an assignment with insurer's consent of an employer's liability insurance policy operates as a new contract between it and the assignee, subject to the policy terms.[5] But a class of the transferee's employees which the policy does not include at the time of its execution are not included by a transfer of the policy.[6] Where the policy is solely one of reimbursement to the employer precluding suit against the insurer until the judgment has been paid, the execution of its notes by an insolvent insured in alleged satisfaction of a judgment in favor of the widow of deceased employee, is but a subterfuge when said notes are immediately returned, but an assignment of the indemnity policy given at the same time is not void but only voidable and being voidable the insurer cannot complain.[7]

**§ 2350. Assignment and transfer of marine policy: generally.**—The strict rules controlling the assignment of policies of fire insurance do not prevail in the assignment of marine policies. The latter is not so strictly a personal contract as is a fire policy. It is not, however, on the other hand, an incident of the property insured, so that it passes to a vendee or successive owners of the property without an express assignment of the policy. The fact that a person is the assignee of the insurable interest is not sufficient. He must also be assignee of the policy, or equitably entitled to the proceeds thereof under an agreement to assign by the insured. It is not necessary to procure the insurer's consent, unless required by the terms of the policy. The reason for the distinction between fire and marine policies is due to commercial necessities and convenience, and the fact, as we have stated above, that mere personal consideration is not such an important factor in marine policies.[7a] In England in the last century, policies were issued in blank to a great extent, and were transferable much the

[3] Arn v. Arn, 81 Mo. App. 133.
As to joint tenancy; tenants in common, see § 874 herein.

[4] White v. Maryland Casualty Co. 122 N. Y. Supp. 840, 137 App. Div. 905, 39 Ins. L. J. 1357.

[5] Standard Life & Accident Ins. Co. v. Bambrick Bros. Construction Co. 163 Mo. App. 504, 143 S. W. 845.

[6] Maryland Casualty Co. v. Little Rock Railway & Electric Co. 92 Ark. 306, 122 S. W. 994.

[7] Davies v. Maryland Casualty Co. 89 Wash. 571, L.R.A.1916D, 395, 154 Pac. 1116, 155 Pac. 1035.

[7a] See American Bonding & Trust Co. v. Baltimore & Ohio Southwestern Ry. Co. 124 Fed. 866, 882, 60 C. C. A. 52, 58.

same as any negotiable instrument, although subsequent statutes were passed requiring the insertion, at the time of the issuance of the policy, of the signature of one or more of the persons interested.[8] The object of such statute was not to interfere with the transfer of the policy, but simply to prohibit the issuance of policies in blank.[9] The marine insurance act of England provides that: "Where assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to his assignee his right under the contract of insurance unless there be an express or implied agreement with the assignee to that effect. But the provisions of this section do not affect a transmission of interest by operation of law." [10]

It is generally considered that policies of marine insurance are assignable, unless an assignment is prohibited by the terms of the policy, but that they do not pass from the mere fact of the sale of the insured property.[11] The liability of the insurers is

[8] 25 Geo. III. c. 44, repealed 28 Geo. III. c. 56. See 17 Earl of Halsbury's Laws of England, p. 360.

"A marine policy may be assigned by endorsement thereon or in other customary manner." Marine insurance act 1906 (6 Edw. VII. c. 41) sec. 50(3); Butterworth's Twentieth Century Stat. (1900–1909) p. 411; 15 Chitty's Stats. (1902–1907) p. 893.

[9] See cases decided under this act: Wolf v. Horncastle, 1 Bos. & P. 316, 4 R. R. 808, 13 Eng. Rul. Cas. 265; De Viguier v. Swanson, 1 Bos. & P. 346n, 4 R. R. 825n; Ebbsworth v. Alliance Marine Ins. Co. L. R. 8 Com. P. 596, 29 L. T. 479, 2 Asp. M. 125, 13 Eng. Rul. Cas. 215.

[10] Marine ins. act 1906 (6 Edw. VII. c. 41) sec. 15 (under division relating to insurable interest, "assignment of interest"); Butterworth's Twentieth Century Stats. (1900–1909) p. 401; 15 Chitty's Stats. (1902–1907) p. 884. *Citing* Powles v. Inness, 11 Mees. & W. 10, 12 L. J. Ex. 163, 63 R. R. 496, 13 Eng. Rul. Cas. 356; North of England Co. v. Archangel Mar. Ins. Co. L. R. 10 Q. B. 249, 13 Eng. Rul. Cas. 360.

[11] *United States.*—Spring v. South Carolina Ins. Co. 8 Wheat. (21 U. S.) 268, 5 L. ed. 614; Columbian Ins. Co. v. Lawrence, 2 Pet. (27 U. S.) 25, 7 L. ed. 335.

*Massachusetts.* — Cleveland v. Clapp, 5 Mass. 201; Wakefield v. Martin, 3 Mass. 558.

*New York.*—Earl v. Shaw, 1 Johns. Cas. (N. Y.) 313, 314, 1 Am. Dec. 117.

*Ohio.*—Walker v. Fireman's Ins. Co. 2 Handy (Ohio) 256, 12 Ohio Dec. 431.

*Pennsylvania.*—Wells v. Archer, 10 Serg. & R. (Pa.) 412, 432, 13 Am. Dec. 682; Rousset v. Insurance Co. of North America, 1 Binn. (Pa.) 429.

*England.*—Delaney v. Stoddard, 1 Term Rep. 22, 1 R. R. 139; Powles v. Innes, 11 Mees. & W. 10, 12 L. J. Ex. 163, 13 Eng. Rul. Cas. 356; Alexander v. Campbell, 41 L. J. Ch. 478, 27 L. J. N. S. 417; Crozier v. Phœnix Ins. Co. 2 Han. (N. B.) 200; Motteaux v. London Assurance Co. 1 Atk. 545, 547, 13 Eng. Rul. Cas. 467; Pellas v. Neptune Marine Ins. Co. 5 C. P. D. 34, 49 L. J. C. P. 153, 42 L. T. 35, 28 W. R. 405, 4 Asp. M. C. 213; Lloyd v. Fleming, L. R. 7 Q. B. 299–302, 41 L. J. Q. B. 93, 25 L. T. 824, 20 W. R. 296, 1 Asp. M. C. 192. See § 904 herein.

"A marine policy is assignable unless it contains terms expressly pro-

practically the same as if the assignee had in fact procured the insurance in his own name, though he must sue in the name of his assignor, unless by statute permitted to sue in his own name.[12] When an agent procures an insurance in his own name for the benefit of "whom it may concern," a person to whom the policy is assigned takes it subject to such claims as exist against the assignor at the time of the assignment.[13] The terms of the policy itself or the statutes of a state may permit the assignor to maintain a suit in his own name. Where, however, he is not so authorized, he should, though his rights are equitable in their nature, bring an action in the name of his assignor in a court of law, and recover thereon.[14] The consent by insurer to a transfer of the policy, is a sufficient consideration for an indorsement by the transferee of a note given for the premium.[15]

**§ 2351. Assignment of marine policy where assignor has parted with entire interest in property insured.**—If the insured parts with his interest in the policy, but agrees with the vendee that he will act as trustee of the subject of insurance, it has been held that he will then hold the policy for the benefit of the assignee.[16] That it is a personal contract is true. It is, however, clearly not subject to the same stringent rules applicable to fire policies. Mere personal consideration is not the controlling element. The policy may in all other cases be assigned without the insurer's consent,

hibiting assignment. It may be assigned either before or after loss." Marine insurance act 1906 (6 Edw. VII. c. 41) sec. 50(2); Butterworth's Twentieth Century Stat. (1900–1909) p. 411; 15 Chitty's Stat. (1902–1907) p. 893.

[12] Insurance Co. of Pennsylvania v. Trask, 8 Phila. (Pa.) 32; Tuttle v. Beebe, 8 Johns. (N. Y.) 152.

[13] Waters v. Allen, 5 Hill (N. Y.) 421.

[14] "Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defense arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected." Marine ins. act 1906 (6 Edw. VII. c. 41) sec. 50(2); Butterworth's Twentieth Century Stat. (1900–1909) p. 411; 15 Chitty's Stats. (1902–1907) p. 893. The above quoted section is substantially the same wording as sec. 1, c. 86, of policies of marine assurance act 1868 (31 & 32 Vict.) 3 L. Rep. Stat. (1868) p. 610, although this entire act is repealed by the mar. ins. act, Id. sec. 92, 2d sched. Policies of marine insurance act 1868, sec. 1, and difference between two acts, extent of repeal by marine ins. act 1906, and construction of same, *considered* in Pickersgill & Sons, Ltd. v. London & Provincial Marine & General Ins. Co. Ltd. [1912] 3 K. B. 614, 620, 107 L. T. 305, 82 L. J. K. B. 130, 18 Com. Cas. 1, 57 S. J. 11, 28 T. L. R. 591, per Hamilton, J.

[15] Equitable Marine Ins. Co. v. Adams, 173 Mass. 436, 53 N. E. 883.

[16] Powles v. Innes, 11 Mees. & W. 10, 12 L. J. Ex. 163, 63 R. R. 496, 13 Eng. Rul. Cas. 356.

unless it is expressly required by the terms of the contract. Necessities of trade and commerce and commercial usage have created a distinction between the rules applicable to fire and marine policies. But if the insured not only parts with his interest in the policy, but also delivers to the vendee actual possession of the insured property, can the policy be also assigned, either at the time of the sale or by a subsequent assignment before the loss, so as to permit the assignee to recover thereon? Or does the policy become entirely inoperative from the moment of such sale, both in the hands of the vendor and the vendee? It has been said that the policy of insurance is strictly a personal contract, and that in case of an absolute sale and delivery of a subject of insurance it becomes inoperative, because the vendor has no longer any interest in the contract, and because the insurer did not contract with the vendee. This view is taken by Mr. Parsons.[17]

Mr. Arnould says, in connection with the subject of assignment of marine policies[18] "If after the policy be effected, but before the loss, he assigns away his interest in the thing insured, he cannot sue on the policy except as trustee for the assignee, and that only in cases where the policy is handed over to him on the assignment, or there is an agreement that it shall be kept alive for his benefit." And Mr. Maclachlan says[19] "An absolute sale and transfer by the party originally insured of all his interest in the insured property incapacitates him, or the party who has effected the insurance for him, from recovering on the policy on his account. Nor can he or the party who has so effected the policy sue thereon as trustee, unless there has been either an assignment of the policy, or something which the courts will consider as equivalent thereto, or evidence of an agreement between the vendor and vendee that the policy should be kept alive for the benefit of the latter." And substantially the same statement is made in the last edition of Arnould's treatise.[20] Mr. Duer also says[1] "The purchaser may cover

[17] 1 Parsons on Ins. 56–58.

[18] 2 Arnould on Ins. (Perkins' ed. 1850) 1265.

[19] 1 Arnould on Marine Ins. (Maclachlan's ed. 1887) 115.

[20] 17 Earl of Halsbury's Laws of England, sec. 711, p. 360; Arnould on Marine Ins. (8th ed. Hart & Simey) sec. 178, p. 236, it is there said: "An absolute sale or transfer by the party originally insured of all his interest in the insured property before the loss, incapacitates him, or the party who has effected the insurance for him, from recovering on the policy on his own account; nor can he, or the party who has so effected the policy, sue thereon as trustee for the purchaser, unless there have been either an assignment of the policy, or something which the courts will consider as equivalent thereto, or as evidence of an agreement or understanding between the vendor and vendee that the policy should be kept alive for the benefit of the latter." See also Id. sec. 179–237.

[1] 2 Duer on Ins. (ed. 1846) 55.

the risk he assumes by a new insurance, but has no claim to the benefit of a prior insurance not assigned to him." So Mr. Phillips says[2] "Where the insured interest is assignable, whether in a marine, fire, or life insurance, the policy is assignable in equity to the assignee to whom the subject-matter or interest thereby assured is assigned, provided it contains no provision to the contrary." From a consideration of the foregoing, we find Mr. Phillips declaring that the policy is assignable in such a case, while we have Mr. Arnould, Mr. Duer, and Mr. Maclachlan stating principles as applicable to the assignment of marine policies, in which it may clearly be seen that it is asserted by these learned authors that marine policies in such a case are assignable, and in two cases in the United States the same view was evidently assumed to be law.[3] In Powles v. Innes, Parke, J., said: "If the policy had been handed over with the bill of sale, or there had been an order to the broker to hand it over, the case would be different. Then the parties might sue as trustee for the purchaser." In this case there was an actual transfer of the property insured.

From a consideration of this question it seems clear that where there has been an absolute sale and transfer of the property insured, the policy may at the same time be assigned to the vendee, so that a recovery may be had. While we find no cases expressly declaring that the policy may be so assigned aside from those already examined, yet we find many decisions in which such a rule is assumed to exist, and wherein the conclusions arrived at are evidently based upon such assumption.[4] Under the Marine Insurance Act of England: "Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative:

[2] 1 Phillips on Ins. (3d ed.) 58.

[3] Spring v. South Carolina Ins. Co. 8 Wheat. (21 U. S.) 268, 5 L. ed. 614; Rousett v. Insurance Co. of North America, 1 Binn. (Pa.) 429; Powles v. Innes, 11 Mees. & W. 10, 12 L. J. Ex. 163, 13 Eng. Rul. Cas. 356.

[4] Spring v. South Carolina Ins. Co. 8 Wheat. (21 U. S.) 268, 5 L. ed. 614; Hibbert v. Carter, 1 Fed. 745; Earle v. Shaw, 1 Johns. Cas. (N. Y.) 313, 1 Am. Dec. 117; Rogers v. Traders' Ins. Co. 6 Paige Ch. (N. Y.) 583; Insurance Co. of Pennsylvania v. Trask, 8 Phila. (Pa.) 32; Roussett v. Insurance Co. of North America, 7 Binn. (Pa.) 429; Gourdon v. Insurance Co. of North America, 3 Yeates (Pa.) 327; Dhegetoff v. London Assur. Co. Mosely, 83; North of England Oil Cake Co. v. Archangel Maritime Ins. Co. 44 L. J. Q. B. 121, L. R. 10 Q. B. 249, 32 L. T. 561, 24 W. R. 162, 13 Eng. Rul. Cas. 360; Powles v. Innes, 11 Mees. & W. 10, 12 L. J. Ex. 163, 13 Eng. Rul. Cas. 356; Sparkes v. Marshall, 2 Bing. N. C. 761, 774, 5 L. J. C. P. 286, 2 Hodges, 44, 42 R. R. 725, 3 Scott, 172; Delany v. Stoddart, 1 Term Rep. 22, 1 R. R. 139.

Provided that nothing in this section affects the assignment of a policy after loss." [5]

**§ 2352. Assignment of marine policy subsequent to absolute sale and transfer of subject of insurance.**—Another question arises in connection with that raised in the preceding section. Can the vendor, where there has been an absolute sale and transfer of the property insured without any assignment of the policy, subsequently assign the same so that a recovery may be had thereunder? Can the assignor by a subsequent possession of the insurable interest recover on the policy? To recover upon the policy there must be an interest in the insurance and in the property insured. The underwriter contracts for a certain length of time. If during this time the policy is inoperative, because there is no union of interests, the policy not passing by the mere sale of the property, and the vendor having no interest covered by the policy after an absolute sale and transfer, then no recovery can be had. The insurer suffers no damage from the suspension of the policy during that time. It is rather an advantage to him. Consequently, it would not seem that the underwriter could, in the absence of any stipulation in the policy forbidding such a transfer, claim that from the fact of a suspension of the liability the policy is thereby avoided, where it appears that the underwriter has not been prejudiced in any way by such transfer, and that the revival of the policy by the union of the interests would be simply a continuation of the exact risk he assumed. We think that, under such circumstances, the policy would revive, and fully protect the interest of the originally insured upon the ownership of the property being again vested in him. It would seem, therefore, that the insurer would be liable for losses occurring after the revival of the policy by the union of the interest, but not for any occurring during the time the policy was suspended.[6] Consequently, such being the case, the original insured, though he has no interest in the property, still has an interest in the policy; therefore, it would follow that such interest would be assignable in equity to the vendee of the goods, and that the policy would revive exactly the same as if the union of interest was in the vendor. Mr. Phillips says, after considering this question: "I conclude, therefore, that though the subject may have

[5] Marine insurance act 1906 (6 Edw. VII. c. 41) sec. 51; Butterworth's Twentieth Century Stats. (1900–1909) p. 411; 15 Chitty's Stats. (1902–1907) p. 894. As to assignment after loss, see sec. 50(2) of said act, given in note to § 2350 herein.

[6] Howard v. Albany Ins. Co. 3 Denio (N. Y.) 301, per Bronson, J.; Carroll v. Boston Mutual Ins. Co. 8 Mass. 515; Power v. Ocean Ins. Co. 19 La. 28, 36 Am. Dec. 655. See § 903 herein.

been absolutely transferred pending the risk, and the risk may have been thus interrupted, it will revive by an assignment of the policy to the vendee of the subject, and cover subsequent losses, but not intermediate ones." [7]

§ 2353. **Assignment of marine policy: delivery to assignee.**—Though delivery of the policy is not requisite to the validity of the assignment as between the assignor and assignee, yet if the assignee permits the assignor to retain possession, and the latter makes a subsequent assignment thereof to another person who accepts such assignment in good faith with no knowledge of a prior assignment, he will have a superior equity to that of the prior assignee.[7a] In construing the marine insurance act of 1906, of England, which provides that "a marine policy may be assigned by indorsement thereon, or in other customary manner" it is declared that what is a customary method of assignment is a matter of evidence and quære whether an assignment of a policy of marine insurance by mere delivery was a customary method of assignment. The court, per Hamilton, J., considers the statements in the several editions of Arnould on Marine Insurance and concludes: "I am not satisfied in the present case, in the absence of evidence, that it is now, within the words of the marine insurance act, a customary manner of assigning a marine policy simply by handing it over." [8]

§ 2354. **Notice of assignment of marine policy.**—It is not necessary to render the assignment valid that notice thereof should be given to the insurer. The assignee should, however, for the better security of his own interests, and to prevent any set-off of claims against the assignor accruing subsequently to the assignment, notify the underwriters of the assignment to him. Notice being given, it is held that the rights of the assignee cannot in any way be prejudiced or defeated by subsequent acts of the assignor, and no set-off of any claims accruing prior thereto will be allowed where the underwriter has failed to give notice thereof to the assignee.[9] And where notice has been given, any subsequent release by the assignor will not be binding upon the assignee,[10] nor will payment

[7] 1 Phillips on Ins. (3d ed.) 64.

[7a] Wells v. Archer, 10 Serg. & R. (Pa.) 412, 13 Am. Dec. 682.

[8] Baker v. Adam, 102 L. T. Rep. 248, 15 Ann. Cas. 227, 11 Asp. M. C. 368.

[9] Winchester v. Hackley, 2 Cranch (6 U. S.) 342, 2 L. ed. 299; Mandeville v. Welch, 1 Wheat. (14 U. S.) 233, 4 L. ed. 79, 5 Wheat. (18 U. S.) 277, 5 L. ed. 87; Lyon v. Summers, 7 Conn. 399; Jones v. Witter, 13 Mass. 304; Johnson v. Bloodgood, 1 Johns. Cas. (N. Y.) 51; Weston v. Barker, 12 Johns. (N. Y.) 276. But see Wiggin v. American Ins. Co. 18 Pick. (35 Mass.) 145, 158, 29 Am. Dec. 576.

[10] Andrews v. Beecker, 1 Johns. Cas. (N. Y.) 411; Martin v. Hawks, 15 Johns. Cas. (N. Y.) 405.

to the assignor discharge the insurer.[11] The defense of nondisclosure of material facts as to over-insurances on disbursements by the original assured may be availed of as against a bona fide assignee, for value without notice.[12]

§ 2355. **Prohibition in marine policy as to assignment.**—Though the assignment of a marine policy without the consent of the company is valid at common law, yet if the policy contains a provision forbidding assignment, and declaring that it shall be void if assigned, such a provision, like any other agreement or stipulation of the contract, is valid, and will be binding.[13] The deposit of the policy as collateral has, however, been held not to be in violation of such a provision where no actual assignment is made.[14] A provision in a policy forbidding assignment of the vessel does not prevent an assignment of the policy.[15]

§ 2356. **Rights of insurers to set-off against assignee.**—An assignment of a policy assented to by the insurers by a memorandum reserving to themselves all rights expressed therein "regarding premium notes, debts," etc., where by the terms of the policy such assent is made necessary to an assignment, entitles the insurers to deduct from a loss payable to the assignee all premium notes and other debts then due them from the assignor, which according to the provisions of the policy they might have deducted if there had been no assignment.[16] Where there has been an equitable assignment of a right to the proceeds in a policy of insurance, the insurer is, as a general rule, entitled to set off all claims due from insured, and which he might have been entitled to set off against him if there had been no assignment. If, however, the insurer is called upon as to any claims against the insured, and does not disclose them, he is held estopped from claiming a set-off based on any such claims thereafter.[17] If the assured assigns his rights under the

[11] Wardell v. Eden, 2 Johns. Cas. (N. Y.) 258.

[12] Pickersgill & Sons' Ltd. v. London & Provincial Marine & General Ins. Co. Ltd. [1912] 3 K. B. 614, 107 L. T. 305, 82 L. J. K. B. 130, 18 Com. Cas. 1, 57 S. J. 11, 28 T. L. R. 591; marine insurance act 1906 (6 Edw. VII. c. 41) sec. 50(2); Butterworth's Twentieth Century Stat. (1900–1909) p. 411.

[13] Lazarus v. Commonwealth Ins. Co. 5 Pick. (22 Mass.) 76.

[14] Hitchcock v. Northwestern Ins. Co. 26 N. Y. 68; Insurance Co. of Pennsylvania v. Phœnix Ins. Co. 71 Pa. St. 31.

[15] Alexander v. Campbell, 41 L. J. Ch. 478, 27 L. T. N. S. 417.

[16] Wiggin v. Suffolk Ins. Co. 18 Pick. (35 Mass.) 145, 29 Am. Dec. 576; Wiggin v. American Ins. Co. 18 Pick. (35 Mass.) 158. As to set-off generally, see §§ 3736, 3737 herein.

[17] Baltimore Ins. Co. v. McFadon, 4 Har. & J. (Md.) 31; Rousett v. Insurance Co. of North America, 1 Binn. (Pa.) 429; Gourdon v. Insurance Co. of North America, 1 Binn. (Pa.) 430, 3 Yeates (Pa.) 327.

policy after a loss, the assignee of the claim takes it subject to the rights of setoff by the company of claims against the assignor.[18]

**§ 2357. What constitutes assignment: cases generally.**—Where the policy has been assigned, and the assignment forwarded to the office of the company and accepted by it, a copy being kept filed at the office and the original returned and attached to the policy, and notice sent to the assignee of the assignment, this is held to vest the title in the assignee. A delivery to a third person to hold for the assignee will be sufficient, as such a delivery devests the assignor of such possession. It is not necessary to deliver the policy to the assignee or donee.[19] Under a clause in a policy providing that it shall be void, in case of suicide, unless it be in the hands of a bona fide assignee, it has been held that a deposit with a letter agreeing to assign will constitute a valid assignment.[20] An assignee of a life policy who reassigns a portion thereof to the insured, to whom he delivers the policy with the assignment attached thereto in such a manner that it can be easily removed, cannot recover the insurance, as against a bona fide assignee of a paid-up insurance issued by the company, on the surrender of the policy without notice of the former assignment.[1]

**§ 2358. What is not an assignment: cases generally.**—A delivery of a policy to an attorney after a loss, with the instructions to collect and apply the proceeds to the payment of a debt due to a third person from the insured, is not an assignment of the policy to the creditors.[2] The giving of a chattel mortgage is not an assignment of the policy, and is not in violation of a condition that the policy shall not be assigned without the consent of the company.[3] It has been held that an unexecuted parol or written agreement to assign does not constitute an assignment of the policy,[4] nor does a mere declaration in a letter where no delivery of the policy has been made.[5] An alienation of the property does not operate as an assignment of the policy,[6] though

[18] Archer v. Merchants' & Manufacturers' Ins. Co. 43 Mo. 434.

[19] Hurlburt v. Hurlburt, 49 Hun (N. Y.) 189, 1 N. Y. Supp. 854.

[20] In re Styan, 1 Phill. Ch. 105. See also Moore v. Woolsey, 4 El. & B. 243, 3 C. L. R. 207, 24 L. J. Q. B. 40, 1 Jur. (N. S.) 468, 3 W. R. 66, s. c. 28 Eng. L. & Eq. 248; Cook v. Black, 1 Hare, 390, 11 L. J. Ch. 268, 6 Jur. 164.

[1] Bridge v. Wheeler, 152 Mass. 343, 25 N. E. 612.

[2] Altman v. McConnell, 34 Fed. 724.

[3] Prows v. Ohio Ins. Co. 2 Cinc. R. (Ohio) 14, 13 Ohio Dec. 739.

[4] Smith v. Monmouth Mutual Fire Ins. Co. 50 Me. 96; Cromwell v. Brooklyn Fire Ins. Co. 39 Barb. (N. Y.) 227, aff'd 44 N. Y. 42, 4 Am. Rep. 641.

[5] In re Webb's Estate, 49 Cal. 542.

[6] Phillips v. Merrimack Mutual Fire Ins. Co. 10 Cush. (64 Mass.) 350.

coupled with an agreement to assign.[7] The execution of an assignment, which is to be delivered only after the company has given its assent, which the policy requires does not operate as an assignment so as to in any way affect the rights of the parties.[8] Where an executor of an estate placed a policy of insurance on his own life among other papers of the estate in a box, together with a writing stating that the policy was as collateral for a deficiency due from him to the estate, and retained the box and papers in his possession, and upon the trial testified that he thus deposited the policy so that in case he died the estate might receive the benefit of the security, it was held that this did not constitute an assignment to the estate, or give it any lien which would defeat the rights of a creditor.[9] It has been held that where the policy does not expressly provide to the contrary, the owner of insured goods which are in transit may give the carrier the benefit of his policy, and that this action on his part will not be in violation of a provision in the policy forbidding a sale, assignment, pledge, or transfer of interest.[10]

[7] Pierce v. Nashua Fire Ins. Co. 50 N. H. 297, 9 Am. Rep. 235.

[8] Smith v. Monmouth Mutual Fire Ins. Co. 50 Me. 96.

[9] Falk v. James, 49 N. J. Eq. 484, 23 Atl. 813.

[10] Jackson County v. Boylston Mutual Ins. Co. 139 Mass. 508, 52 Am. Rep. 728.

# CHAPTER LXVI.

## CHANGE OF VOYAGE—DEVIATION—LIBERTY CLAUSES.


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**§ 2365. Description of the voyage.**—The policy should describe the voyage by termini, or by specifying the extremes or places of beginning and termination, which are the terminus a quo and the terminus ad quem; the former being the place whence the ship is to depart, and the latter the place where she is to end the risk and discharge. In time policies the two extremes of the risk are designated by time when the risk attaches and terminates, and this is true whether the risk be on ship or goods. If a deviation under a voyage policy is intended, it should be provided for by apt and proper words. Sometimes the policy specifically prescribes the course of the voyage, which precludes following any other course, even though it be the usual one established by usage.[11] Although the fact that specific termini and certain intermediate ports are mentioned, this does not preclude stopping at intermediate ports other than those mentioned where such stopping is by

[11] See on this last point, Eliot v. table Marine Ins. Co. 126 Mass. 70, Wilson, 7 Brown Parl. C. 459, 4 30 Am. Rep. 654, per Endicott, J. Brown, P. C. 478; Burgess v. Equi-

the usage of trade usually permitted.[12] An insurance "from" a port must be referred to a sailing therefrom; while under a policy "at and from" the risk attaches in port. This form is peculiarly applicable to risks when effecting a policy from an outport, and is adopted at a home port when it is desired to protect the ship in port. The description of the voyage depends, however, largely upon the character of the risk and the voyage. It may be a direct voyage from port to port, or may consist of several passages, or be a trading voyage, or a liberty to call at intermediate ports may be given, or certain ports may be prohibited, or it may be an entire voyage out and home, although there are separate passages. We have, however, fully considered these points elsewhere under the several heads, to which they may be appropriately referred. The purpose for which a voyage is to be conducted, whether as a trading, fishing, or freighting voyage, is often mentioned in the policy. But this designation cannot vary or extend a description, route, or termini of the voyage when definitely specified in the policy, except some usage connected with the particular trade or adventure justifies such change.[13] In certain cases the description of the voyage must be construed with reference to the extent of port or ports and place or places designated, and also with reference to the sense or meaning which certain places have acquired by usage, which is their commercial sense or meaning, as opposed to their geographical sense.[14] If the course of the vessel as insured and its actual course differ, so that the port of destination is not that agreed upon, there is such a deviation as avoids the insurance, even though loss occurs while the vessel is in the course covered by the policy.[15]

§ 2366. **Distinction between voyage of ship and voyage insured.**—A clear distinction exists between the voyage insured and the voyage of the ship. In voyage policies there are designated extremes, being the terminus a quo and the terminus ad quem. This is the voyage insured. The route that is taken to make this voyage is the voyage of the ship, but the route taken may not be identical with, and may differ from, that required by the voyage insured. It is then, nevertheless, the voyage of the ship, for it is the course actually sailed by the ship. In all voyages insured

[12] See McCall v. Sun Mutual Ins. Co. 66 N. Y. 506.

[13] Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654, per Endicott, J. See Child v. Sun Mutual Ins. Co. 3 Sandf. (N. Y.) 26.

[14] See Robertson v. Clark, 1 Bing. 445, 8 Moore, 622, 2 L. J. (O. S.) C. p. 71. See attachment and duration of risk, §§ 1483 et seq., 1562 et seq. herein.

[15] Atlantic & L. S. Co. v. Empress Assur. Corp. (Rap. Jud. Queb.) 15 C. Sup. 469.

in the absence of usage or contrary stipulation, it is an implied binding condition that the ship will follow that usual and regular course which mercantile usage and custom has fixed upon as the safest, most expeditious, and direct course to the place of destination, except a departure therefrom be warranted by necessity, or there is some permissive stipulation or other justifying excuse. If the departure from the usual prescribed course be not warranted by a reasonable and justifiable cause, the insurer is discharged, for the risk is changed and differs from that assumed under the contract. The assured has no right to substitute a different risk without consent of the insurer.[16]

**§ 2367. Where course of voyage insured is not fixed by mercantile usage.**—If the course of the voyage insured is not fixed by mercantile usage, the ship would nevertheless, by custom and usage, be obligated to reach the place of destination as soon and as safely as possible by the direct course, without being permitted to stop or deviate therefrom without necessity or justifying excuse;[17] but in such case it would seem that the judgment of a

[16] "The Ordonnance distinguishes the route from the voyage. It means to speak of the voyage insured and of the route which is proper to this voyage insured. The route may in several cases be changed or altered without the voyage insured being so, and reciprocally the voyage insured may be entirely broken up, although the vessel does not deviate from the route of the voyage indicated in the policy:" Emerigon on Ins. (Meredith's (ed. 1850) c. xiii. sec. 4, p. 548. "The route is the way that one takes to make the voyage insured: est iter viaggi. . . . The word 'iter' is ordinarily employed . . . to designate the route and direction of the voyage insured, rather than to designate the voyage itself. The captain's duty is to reach the place of his destination as soon and as safely as possible. He is bound to follow the direct course, and to make sail recta navigatione without its being permitted to him to stop without necessity. . . . The general rule then is, that the captain should follow the straight course, the customary route, and the most sure:" Emerigon on Ins. (Meredith's ed. 1850) c. xiii. sec. 5, p. 550. "The voyage insured (viaggium) is a transit at sea from the terminus a quo to the terminus ad quem in a prescribed course of navigation (iter viaggii), which is never set out in any policy, but virtually forms part of all policies, and is as binding upon the parties thereto as though it were minutely detailed. The voyage of the ship (iter navis) is the course of navigation on and in which the ship actually sails:" 1 Arnould on Marine Ins. (Perkins' ed. 1850) 339, *333 et seq.; Id. (Maclachlan's ed. 1887) 365 et seq.: Id. (8th ed. Hart & Simey) sec. 369, p. 486. When the voyage contemplated by a policy is described by the places of beginning and ending, the voyage insured is one which conforms to the course of sailing fixed by mercantile usage between the places: Deering's Annot. Civ. Code Cal. sec. 2692. See Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654, per Endicott, J.; Clason v. Simmonds, 6 Term Rep. 533n, 3 R. R. 260, 9 Eng. Rul. Cas. 384.

[17] See Emerigon on Ins. (Mere-

master of ordinary skill and discretion must be relied on to determine what shall be the safest, most natural, direct, advantageous, and expeditious route. While this is not so expressly decided, yet such a rule would be in conformity with that which would permit a master, acting in good faith, in case of necessity to conduct the vessel by the safest and shortest course to her destination, or to a port for necessary repairs, and which makes the controlling consideration the safety of lives and the security of property.[18] The rule above stated is, however, substantially that of the California code.[19]

§ 2368. **Determination as to which of two routes is usual one: case of several routes.**—In determining which of two routes to the port of destination is the usual one, reference must be had to the fact whether one of the routes has acquired by mercantile usage such an ascendency over the other as to have become the customary route. If it has, the master must follow it, unless necessity or other justifiable cause warrants sailing on the other course.[20] But if neither route has acquired such ascendency, the case would probably come within the rule stated under the last section. If there are several routes to the same destination, with certain advantages and disadvantages to each, dependent upon winds, weather, or other circumstances, the master may choose, there being a custom allowing such election.[1]

§ 2369. **Deviation defined.**—Deviation is the voluntary departure without reasonable necessity or justifying excuse, from the usual and regular course of the voyage insured, or from the usual or agreed mode of proceeding upon or conducting the same, whereby the risk is varied, irrespective of the fact whether or not it is increased thereby. It may also consist of delay in commencing or proceeding on said voyage.[2]

dith's ed. 1850) c. xiii. sec. 5, p. 550, noted in note in last section.

[18] Turner v. Protection Ins. Co. 25 Me. 515, 43 Am. Dec. 294; Wiggin v. Amory, 13 Mass. 118.

[19] Deering's Annot. Civ. Code Cal. sec. 2693.

[20] Brazier v. Clapp, 5 Mass. 1.

[1] 1 Marshall on Ins. (ed. 1810) 203 a, 328, *citing* and reporting Middlewood v. Blakes, 7 Term Rep. 162, 4 R. R. 405. In this case, however, the question of concealment was involved, as well also as that of whether there was a deviation or change of voyage originally intended. See 2 Duer on Marine Ins. (ed. 1846) 491 et seq. 672; 1 Phillips on Ins. (3d ed.) 319, sec. 582, p. 550. See Talcot v. Marine Ins. Co. 2 Johns. (N. Y.) 130; Reade v. Commercial Ins. Co. 3 Johns. (N. Y.) 352, 3 Am. Dec. 495.

[2] *United States.*—Seamen's Ins. Co. v. Loring, 1 Mason (U. S. C. C.) 127, Fed. Cas. No. 12,583; Oliver v. Maryland Ins. Co. 7 Cranch (11 U. S.) 487, 3 L. ed. 414; Crousillat v. Ball, 3 Yeates (Pa.), 375, 2 Am. Dec. 375, 4 Dall. (4 U. S.) 294, 1 L. ed. 843.

*Louisiana.*—Bell v. Western Fire

This definition may be also extended to cover lake and river

Ins. Co. 5 Rob. (La.) 423, 39 Am. Dec. 542.

*Massachusetts.*—Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654, per Endicott, J.; Coffin v. Newburyport Ins. Co. 9 Mass. 436; Cleveland v. Union Ins. Co. 8 Mass. 308.

*Pennsylvania.*—Merchants' Ins. Co. v. Algeo, 32 Pa. St. 330.

"Any unnecessary or unexcused departure from the usual course or general mode of carrying on the voyage insured by which the risk is altered, though the original terminus ad quem of the voyage insured is still kept in view:" 1 Arnould on Marine Ins. (Perkins' ed. 1850) 347; *341 et seq. See also 2 Id. (Maclachlan's ed. 1887) 450 et seq.; Id. (8th ed. Hart & Simey) secs. 376 et seq.; 2 Parsons on Marine Ins. (ed. 1868) 1.

"Deviation is a departure from the course of the voyage insured" which conforms to the course of sailing fixed by mercantile usage, or in case there is no usual route, then from that course which a master of ordinary skill and judgment would deem the most natural, direct, and advantageous. "Or an unreasonable delay in pursuing the voyage, or the commencement of an entirely different voyage:" Deering's Annot. Civ. Code Cal. secs. 2692–94.

The marine insurance act of England provides: "There is a deviation from the voyage contemplated by the policy (a) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or (b) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from." Marine insurance act 1906 (6 Edw. VII. c. 41) sec. 46 (2); Butterworth's Twentieth Century Stats. (1900–1909) p. 409; 15 Chitty's Stats (1902–1907) p. 892.

"The term 'deviation' in the law of shipping has at the present day a varied meaning and wide significance. It was originally employed, no doubt, for the purpose its lexicographical definition implies, namely, to express the wandering or straying of a vessel from the customary course of voyage; but it seems now to comprehend in general every conduct of a ship or other vehicle used in commerce tending to vary or increase the risk incident to a shipment. Thus delay in starting a shipment, when unreasonable or unexcused, came to be regarded as a deviation, not because the vehicle employed departed from the usual route of travel, but because the risk of shipment was changed or increased, and became, in effect, not the same as the one with reference to which the parties contracted. 3 Kent's Com. 315; Coffin v. Marine Ins. Co. 9 Mass. 436; Phillips v. Irving, 49 E. C. L. 325; 9 Eng. Rul. Cas. 396; Mount v. Larkins, 8 Bing. 108, 21 E. C. L. 214. The reason for grafting this meaning upon the word is stated in this last case to be:

"'Because the voyage, commenced after an unreasonable interval of time, would have become a voyage at a different period of the year, at a more advanced age of the ship, and, in short, a different voyage than if it had been prosecuted with proper and ordinary diligence; that is, the risk, would have been altered from that which was intended by all parties when the policy was effected.'

"So also for like reasons towing or being towed was added to the list of acts to which is properly imputable an element of risk not contemplated by the contract, and therefore constituting a deviation. Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 340, 41 Am. Dec. 592; Scarmonga v. Stamp, 5 C. P. Div. 295; Crocker v. Jackson, 1 Sp. 141, Fed. Cas. No. 3,398; Stewart v. Tennessee Marine Ins. Co. 1 Humph. (Tenn.) 242. In consonance with the enlargement of the meaning of

navigation.[3] It is said, however, that a deviation is an increasing or varying the risks insured against without reasonable cause.[4]

'deviation' in maritime law to meet the exigencies of commerce, it seems a just estimate of its present scope that the supreme court of Ohio made in Wilkins v. Ins. Co. 30 Ohio St. 317, 341, 27 Am. Rep. 455, namely:

"'Strictly speaking a "deviation" originally meant only a departure from the course of the voyage, but now it is always understood in the sense of a material departure from or change in the risk insured against, without just cause'—*quoting* 2 Parsons, Mar. Ins. p. 1.

"The same broad meaning is recognized and sanctioned in Audenreid v. Mercantile Ins. Co. 60 N. Y. 482, 19 Am. Rep. 204:

"'It (deviation) is not confined to a departure from or going out of the direct or usual course of a voyage; but it comprehends unusual or unnecessary delay or any act of the charterer or his agent which, without necessity or just cause, increases or changes the risk included in the policy.'

"And in Bulkley v. Ins. Co. 2 Paine (U. S.) 82, Fed. Cas. No. 2,-118, Thompson, J., said:

"'The shortness of time or distance of deviation is immaterial if voluntary and without necessity, and not justified by usage.'

"A case of value in this discussion is Amsinck v. American. Ins. Co. 129 Mass. 185, 186, where we find the following statement of the law:

"'Any departure from the route named in the policy to a port or place not named, and any delay in prosecuting the voyage, without necessity or just cause, or any delay at a port named in the policy, for the prosecution of business not connected with the business of the voyage, or any unreasonable delay at such port in prosecuting the business of the voyage, is a deviation. Whether the risk is increased thereby is immaterial. The assured has no right to substitute a different voyage from that which is insured, and can only recover for a loss sustained while the ship is prosecuting the voyage named in the policy; and, if she has deviated prior to the loss, she is not then prosecuting the voyage for which she was insured. Whenever, therefore, she departs from the route, or delays in the prosecution of it, it is incumbent on the assured to show that the departure was caused by necessity, or that the delay at a port named in the policy was reasonable under the circumstances in order to accomplish the objects of the voyage. Burgess v. Equitable Ins. Co. 126 Mass. 70, 30 Am. Rep. 654, and cases cited; African Merchants v. British Ins. Co. L. R. 8 Ex. 154.'

"The significance of the term 'deviation' thus developed has peculiar adaptability and relation to the law of insurance. As applied to the relation of carrier and shipper, shorn of all obligation entailed by reason of insurance of cargo or freight, the term is not applied in so strict a sense as will appear further on in the discussion of this controversy. At least, it would seem that there exists in legal contemplation and consequence a difference between a deviation proper, that is, an unwarranted digression from a fixed and contemplated route, or course, and an unnecessary and inexcusable delay or interruption in forwarding freight from point where received to point of destination." The Indrapura, 171 Fed. 929, 38 Ins. L. J. 1163, 1165,—Wolverton, D. J.

[3] See Jolly v. Ohio Ins. Co. Wright (Ohio) 539; Natchez Ins. Co. v. Stanton, 2 Smedes & M. (10 Miss.) 340, 41 Am. Dec. 592; Herman v. Western Marine & Fire Ins. Co. 13 La. 516.

[4] Bell v. Western Ins. Co. 5 Rob. (La.) 423, 39 Am. Dec. 542. And it was held in this case that if a mar-

So far as such a rule extends the meaning of "deviation" to include increasing the risk, it is not justified by authority, nor consistent with the principles upon which a "deviation" is based. A deviation does not avoid the policy because the risk has been increased, but because the risk or voyage insured is ended or varied by the deviation. It thereby becomes a different risk from that assumed under the contract; a different voyage is substituted, and the assurer is discharged, even though the actual risks are diminished by the deviation.[5]

**§ 2370. Effect of deviation and basis of underwriter's discharge.**—It is an implied warranty that the vessel shall not deviate. Any voluntary deviation is a change of risk and a departure from the contract, discharging insurers from liability for loss happening after said deviation.[6] The assured is protected by his policy while the vessel pursues the usual and customary route described by mercantile usage, but he must not depart therefrom voluntarily by even the smallest deviation, except necessity or some justifying cause warrant it. If he does, the insurer is released from the time of the deviation. The courts have strictly held the insured to a compliance with this implied warranty. The purpose of the voyage must be had in view, however, and those cases where delay constitutes a deviation generally may be referred to the ship's being in port, or at some place or port to which the ship has been permitted to go in pursuit of the business of the voyage, and if the ship is at a place permitted, the delay will not be a deviation if it is necessary and must have been reasonably contemplated as proper in the prosecution of the business of the voyage. These are general governing principles.[7]

shal of the United States takes possession of a boat under a libel filed, and carries her across the river, and puts her in charge of his deputy, it does not constitute a deviation.

[5] See next section herein.

[6] Schroeder v. Schweizer Lloyd Transport Gesellschaft, 66 Cal. 294.

The marine insurance act of England provides: "Sec. 48. In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable dispatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable." Marine insurance act 1906 (6 Edw. VII. c. 41) sec. 48; Butterworth's Twentieth Century Stats. (1900–1909) p. 410; 15 Chitty's Stats. (1902–1907) p. 893.

[7] *United States.*—Columbian Ins. Co. v. Catlett, 12 Wheat. (25 U. S.) 383; Martin v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 254, Fed. Cas. No. 9,161.

*Massachusetts.*—Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Dec. 664, per Endicott, J.; Dodge v. Essex Ins. Co. 12 Gray (78 Mass.) 65; Wiggin v. Amory, 14 Mass. 1, 7 Am. Dec. 175; Kettel v. Wiggin, 13 Mass. 68; Coffin v. Newburyport Ins. Co. 9 Mass. 436.

*Mississippi.*—Natchez Ins. Co. v. Stanton, 2 Smedes & M. (10 Miss.) 340, 41 Am. Dec. 592.

In applying the rule that a deviation avoids the contract, there is no distinction between moral and physical necessity in justifying a departure from the usual route of the voyage insured,[8] and in determining whether a departure from the course constitutes a deviation such as vacates the policy, the motives, ends, and consequences of the act enter as a factor in arriving at a determination.[9] The underwriter is not discharged because the risk is increased. It is not material that the risk is rendered greater by the deviation; no importance is attached to the degree of the risk. The point is that the risk is different. Its nature is altered by the deviation. It is an attempt to substitute another agreement than that undertaken by the contract, and the insurer is released the moment the deviation takes place, and this rule applies without regard to the shortness of time occupied by the deviation, nor does the distance sailed off the usual course affect the contract. The only question is whether the deviation be voluntary or justifiable.[10] So the discharge of underwriters from lia-

*New York.*—Fernandez v. Great Western Ins. Co. 48 N. Y. 571, 8 Am. Rep. 571; Robertson v. Columbian Ins. Co. 8 Johns. (N. Y.) 491.

*Ohio.*—Jolly v. Ohio Ins. Co. Wright (Ohio) 539.

*Pennsylvania.* — Merchants' Ins. Co. v. Algeo, 32 Pa. St. 330.

*England.*—Brown v. Tayleur, 4 Ad. & E. 241, 5 N. & M. 472, 1 H. & Walms, 578, 5 L. J. K. B. 57; Williams v. Shee, 3 Camp. 469, 14 R. R. 811; Noble v. Kenneway, 2 Doug. 510–13; Middlewood v. Blakes, 7 Term Rep. 162, 4 R. R. 405.

[8] Riggin v. Patapsco Ins. Co. 7 Har. & J. (Md.) 279, 16 Am. Dec. 302. "Between cases of physical and moral necessity as justifications for departure from the course of the voyage, the books make no distinction, and in reason and on principle there is none," per the court.

[9] Enderby v. Fletcher, per Lord Mansfield, *cited* in 1 Marshall on Ins. (ed. 1810) 205, and 2 Park on Ins. 246; Foster v. Jackson Marine Ins. Co. 1 Edm. Sel. Cas. (N. Y.) 290.

[10] Maryland Ins. Co. v. Le Roy, 7 Cranch (11 U. S.) 26, 3 L. ed. 257, per Johnson, J.; Coffin v. Newburyport Marine Ins. Co. 9 Mass. 436; per Sedgwick, J.; Natchez Ins. Co. v. Stanton, 2 Smedes & M. (10 Miss.) 340, 41 Am. Dec. 592; Winthrop v. Union Ins. Co. 2 Wash. (U. S. C. C.) 7, Fed. Cas. No. 17,901, per Washington, J.; Larabre v. Wilson, 1 Doug. 284, per Lord Mansfield; Hartley v. Buggin, 3 Doug. 39, per Lord Mansfield; Middlewood v. Blakes, 7 Term Rep. 162, 4 R. R. 405, per Ashurst, J., who says: "It was unnecessary to consider whether the risk was or was not materially varied. It is simply on the ground of an alteration of the risk that a deviation discharges the underwriter, so that he may be discharged even where the actual risks are diminished." "Whether the degree or period of the risk is increased is unimportant, as the assured has no right to substitute a different risk:" Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654, per Endicott, J. "It is not the increase of the risk, but the substitution of another risk which governs the case:" Fireman's Ins. Co. v. Lawrence, 14 Johns. (N. Y.) 46–50, per Kent, Ch. "It suffices that there has been a voluntary change of route or voyage in order that the insurers should be discharged from their risks.

bility in case of taking additional cargo, depends, not on the increase of the risk, but wholly on departure from the contract. The consequences of such a deviation are per se a discharge of the underwriters; and the degree of the variation is immaterial.[11]

§ 2371. **Insurer liable for prior loss.**—The deviation of a vessel does not have a retrospective effect so as to release the insurer from a loss occurring prior thereto. The contract, so far as the deviation is concerned, remains binding upon the assurer up to the moment of deviation.[12]

§ 2372. **Temporary deviation and return to course prior to loss.**—Where a vessel voluntarily deviates without necessity or justifying excuse, the assurer is none the less released because the vessel subsequently returns to the usual course before a loss occurs, for the risk is not suspended by the temporary deviation; neither the length of time of the deviation nor the distance the vessel goes from the course makes it the less a deviation discharging the underwriter. So Emerigon says the risk is not merely suspended: "the places of the risk once abandoned through a voluntary deviation do not again present themselves to the eyes of the law. A contract once dissolved can be renewed only by the respective consent of the parties. Pothier establishes it as a principle that 'the insurers are not bound for the risks when there is a departure from what is borne by the policy, if it be not with their consent or in case of necessity.' "[13] So a wilful deviation from the usual

From that moment the voyage determined by the contract is definitely broken up:" Emerigon on Ins. (Meredith's ed. 1850) c. xiii. sec. 16, pp. 578, 579.

[11] Maryland Ins. Co. v. LeRoy, 7 Cranch (11 U. S.) 26, 3 L. ed. 257. *Cited* in:

*California.*—Schroeder v. Schweizer Lloyd Transport Versicherung's Gesellschaft, 66 Cal. 294, 297, 5 Pac. 478.

*Maine.*—Turner v. Protection Ins. Co. 25 Me. 515, 524, 43 Am. Dec. 294.

*Massachusetts.* — Thorndike v. Bordman, 4 Pick. (21 Mass.) 47, 49.

*Mississippi.*—Natchez Ins. Co. v. Stanton, 2 Smedes & M. 340, 375, 41 Am. Dec. 592.

*New Hampshire.*—Moore v. Phœnix Ins. Co. 62 N. H. 243, 13 Am. St. Rep. 566.

*New York.*—Leitch v. Atlantic Mutual Ins. Co. 66 N. Y. 100, 108.

*Tennessee.*—Stewart v. Tennessee Marine & Fire Ins. Co. 1 Humph. 242, 250.

[12] Richardson v. Maine Fire & Marine Ins. Co. 6 Mass. 102, 4 Am. Dec. 92. "When the master discontinued his voyage, by which is understood an abandonment of it, with an intention in him no further to pursue it, and sailed for his original port, from that time the policy was discharged. For all sea damages happening before, the plaintiffs can recover," per the court. See also Coffin v. Newburyport Ins. Co. 9 Mass. 436, 447; Hare v. Travis, 7 Barn. & C. 14, 15, 9 D. & R. 748, 5 L. J. (O. S.) K. B. 348, 31 R. R. 139; 9 Eng. Rul. Cas. 357; Lee v. Gray, 7 Mass. 349, 352; Green v. Young, 2 Salk. 444, 2 Ld. Raym. 840.

[13] Martin v. Delaware Ins. Co. 2

and customary course of the voyage determines the insurance from the moment of deviation, and it is immaterial from what cause or from what place a subsequent loss happens.[14] Mr. Phillips is of the opinion that if a deviation be temporary without subsequently affecting the risk, the risk is merely suspended, and that the law does not regard such inconsiderable circumstance as the delay of an hour or a deviation of a mile, but is satisfied by reasonable diligence and despatch.[15] Concerning this statement the answer is that the question of deviation does not depend upon whether the risk is increased or not, but whether the risk has been varied and another substituted, and if it did not depend upon such fact, it is difficult to conceive a case where after a temporary deviation everything can be restored to the same order as before, although it might be within the range of possibilities. If the condition has any force, the contract is dissolved by the breach. A different risk has been voluntarily substituted by the assured without the assurer's consent, and without necessity or justifying excuse. Mr. Phillips' statement is also misleading for it may be admitted without changing the rule, that where the question is purely one of delay in port or ports, the law inquires whether the delay is reasonable, and whether it is justified by the nature and purposes of the voyage or the circumstances of the case. A reasonable delay or departure from the course, if warranted by necessity or otherwise legally justified, is not a deviation, but a voluntary departure or delay not justified is declared by a court of high authority to be a deviation avoiding the policy, whether the degree or period of the risk is increased or not, and the discussion of the question of deviation and its effect by the court in this case is of itself impliedly a complete answer in itself of Mr. Phillips' position.[16] We would also add that if in

Wash. (U. S. C. C.) 254, Fed. Cas. No. 9,161; Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654; Coffin v. Newburyport Ins. Co. 9 Mass. 449; Emerigon on Ins. (Meredith's ed. 1850) c. 13, sec. 16, pp. 578, 579; Townson v. Guyon, and Fox v. Black, 2 Park Ins. (8th ed.) 620; Beawes, 315, both noted in 1 Marshall on Ins. (ed. 1810) 186; Clason v. Simmonds, *cited* by Lawrence, J., 6 Term Rep. 533n, 3 R. R. 260, 9 Eng. Rul. Cas. 384.

The marine insurance act of England provides: "Sec. 46 (1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs." Marine insurance act 1906 (6 Edw. VII. c. 41) sec. 46(1); Butterworth's Twentieth Cent. Stats. (1900–1909) p. 409; 15 Chitty's Stats. (1902–1907) p. 892.

[14] Elliot v. Wilson, 7 Brown Parl. C. 459.

[15] 1 Phillips on Ins. (3d ed.) 548, sec. 989.

[16] Burgess v. Equitable Marine Ins.

practice a temporary deviation may be allowed by the assurer, yet such practice does not establish the rule of law claimed, unless perhaps the practice is of such a character, and so long continued, as to import under the circumstances the condition that a certain discretion was vested in the master in the particular case.

The above rule, however, does not preclude such reasonable delay in port or ports as may be necessary or justifiable in the proper prosecuting of the business of the voyage, so far as the same may reasonably be presumed to have been contemplated by the parties.[17]

**§ 2373. Same subject: certain class of cases distinguishable.**—There is, however, a certain class of cases sometimes cited as supporting the doctrine that there may be a temporary deviation, but they differ in principle, and can be readily distinguished from those above noted, and do not impair the force of the rule above given, being time policies or dependent upon special clauses, for "deviation" rests upon the description of the voyage insured, and relates to a departure from the usual course thereof, or mode of conducting the same, or to a delay in commencing or prosecuting said voyage. As an illustration of the class of cases referred to, it is held that an insurance on a tugboat in port and while engaged in towing is not avoided by the going outside of the prescribed limits of the contract, where the boat returns within said limits before loss;[18] and where the contract of insurance on a steamboat stipulates for its continuance for one year, "unless it is terminated or made void by conditions hereinafter expressed," and contains a "permission to navigate the Ohio and Mississippi rivers below Cairo," but contains no condition expressly avoiding the policy for navigating the boat outside of the permitted waters, and the boat makes a trip outside of these permitted waters and returns in safety, but she is afterwards destroyed by fire in no way caused or contributed to by such departure, it is held that the only effect of such deviation was to relieve the insurer from any loss happening outside of the permitted waters, and that said policy was not avoided thereby, and that after temporary departure and return in safety to the permitted waters the insurers were liable for a subsequent loss covered by the policy not caused or contributed to by such deviation.[19] A time policy of insur-

Co. 126 Mass. 70, 30 Am. Rep. 654. —Endicott, J.

[17] Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654, per Endicott, J., and cases cited. See also Tasker v. Cunninghame, 1 Bligh, 87, 100, 20 R. R. 33, per Lord Eldon.

[18] Hennesey v. Manhattan Fire Ins. Co. 28 Hun (N. Y.) 98.

[19] Wilkins v. Tobacco Ins. Co. 30

ance on a ship with permission to navigate all the tributaries of a river except a few named is not avoided by the ships navigating an excepted tributary, so that the insurance company would not be liable for a loss occurring after such tributary had been left, as the exception does not amount to a prohibition or a warranty.[20]

§ 2374. **Time policy: navigation limited.**—As we have seen, the termini under a purely time policy are fixed by time. The policy limits the vessel to no geographical or prescribed track. It insures no specific voyage within the prescribed term.[1] The nature of the contract, therefore, precludes a deviation, as that term is generally understood. If it covers all voyages within certain limits, there can be no deviation, nor can any particular trip or voyage have the effect of a deviation, unless it be in fraud of the policy,[2] although in case the time is specified the vessel may be limited by the terms of the contract to the navigation of certain waters, or to a trading between certain designated ports or places, and such designation may operate as a limitation of the voyages of the ship within those waters, and not permit of a passage or trading outside the same.[3]

A liberty "to navigate the Atlantic Ocean between Europe and America" includes the right to navigate the Gulf of Mexico, it being a part of the Atlantic Ocean.[4] A liberty given a steamboat insured under a time policy to navigate the Mississippi and such tributaries as are suitable to her class does not permit the towing of vessels, for such business is separate from and not incidental to river navigation by steamboats, and therefore changes the risk assumed by assurers.[5] And if a steamer is insured on time to be used between certain ports by way of a designated bay and its tributaries, it is thereby confined to voyages between the specified places over the designated route.[6] So under a time policy certain waters may be prohibited, and entering such waters is a breach of

Ohio St. 317, 27 Am. Rep. 455, overruling 2 Cinc. (Ohio) 204.

[20] Greenleaf v. St. Louis Ins. Co. 37 Mo. 25. And see also Odiorne v. New England Mutual Marine Ins. Co. 101 Mass. 551, 3 Am. Rep. 401, noted in next section; Hathaway v. Sun Mutual Ins. Co. 8 Bosw. (N. Y.) 33; Snow v. Columbian Ins. Co. 48 N. Y. 624, 48 Barb. (N. Y.) 469. See also § 2402 herein; Anon. v. Westmore, 6 Esp. 109.

[1] Bradley v. Maryland Ins. Co. 12 Pet. (37 U. S.) 378, 9 L. ed. 1123.

[2] Keeler v. Fireman's Ins. Co. 3 Hill (N. Y.) 250, per Cowen, J.; Union Ins. Co. v. Tysen, 3 Hill (N. Y.) 118. See Stuart v. Columbian Ins. Co. 2 Cranch (C. C.) 442, Fed. Cas. No. 13,554.

[3] Lippincott v. Louisiana Ins. Co. 2 La. (O. S.) 399, 400.

[4] The Orient, 16 Fed. 916, aff'd 121 U. S. 67, 30 L. ed. 858, 7 Sup. Ct. 821.

[5] Hermann v. Western Marine & Fire Ins. Co. 13 La. (O. S.) 516.

[6] Dallam v. Insurance Co. 6 Phila. (Pa.) 15. See Commonwealth Ins. Co. v. Cropper, 21 Md. 311.

the condition, although the insurers are liable in such case for loss occasioned prior thereto.[7] So where a policy on plaintiff's vessel contained the following clause, "Prohibited from the river and gulf of St. Lawrence, Northumberland Straits, or Cape Breton, and the Black Sea," between specified dates, and the vessel was in one of the prohibited ports soon after the insurance was effected, and was lost at sea many months afterward, it was held that the implied warranty had been broken, and plaintiff could not recover.[8] But where a vessel is insured from Boston to all ports and places on the globe and until her return to Boston, for a period not exceeding two years, no deviation arises from the fact that the vessel arrives in Boston Bay within two years and puts into Salem, and is damaged while there undergoing repairs.[9]

**§ 2375. Intention to deviate: change of voyage.**—There is, as we have noted, a distinction between deviation and a change of voyage.[10] If a mere intention to deviate is abandoned, and the master holds to the usual course of the voyage insured, the underwriters are not discharged. A mere intention to deviate, or even instructions to deviate where the intention is not carried into effect, does not release the insurer. The policy nevertheless continues in force until the deviation be once begun; that is, until the ship reaches the dividing point.[11] If the voyage is commenced under

[7] Bearns v. Columbian Ins. Co. 48 Barb. (N. Y.) 445.

[8] Odiorne v. New England Mutual Ins. Co. 101 Mass. 551, 3 Am. Rep. 401.

[9] Ellery v. New England Ins. Co. 8 Pick. (25 Mass.) 14.

[10] § 1488 herein.

The marine insurance act of England provides: "sec. 45 (1) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage. (2) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs." Marine insurance act 1906 (6 Edw. VII. c. 41) sec. 45; Butterworth's Twentieth Century Stats. (1900–1909) p. 409; 15 Chitty's Stats. (1902–1907) p. 892.

[11] *United States.* — Maryland Ins. Co. v. Woods, 6 Cranch (10 U. S.) 29, 3 L. ed. 143.

*Massachusetts.* — Lee v. Gray, 7 Mass. 349.

*New York.*—Arnold v. Pacific Mutual Ins. Co. 78 N. Y. 7; Henshaw v. Marine Ins. Co. 2 Caines (N. Y.) 274.

*South Carolina.*—M'Fee v. South Carolina Ins. Co. 2 McCord (S. C.) 503, 13 Am. Dec. 757.

*England.*—Thellusson v. Fergusson, 1 Doug. 361; Kewley v. Ryan, 2 H. Black. 343, 3 R. R. 408; Heselton v. Allnutt, 1 Maule & S. 46; Foster v. Wilmer, 2 Str. 1249; Hare v. Travis, 7 Barn. & C. 14, 5 L. J. K. B. 348, 9 D. & R. 748, 31 R. R. 139, 9 Eng. Rul. Cas. 357; Emerigon on Ins. (Meredith's ed. 1850) c. 13, sec. 14, pp. 574 et seq.

An intended deviation will not

a fluctuating purpose to deviate if certain facts shall be found to exist, the insurers are liable for a loss before actual deviation; as where the master's orders were to go to a certain port for information and she was captured before the dividing line was reached.[12] So the master's intention to put into an intermediate port, the terminus ad quem being kept in view, is merely an intention to deviate, and is not a change of voyage.[13] And if the master intends to deviate by going to a certain port, but is forced to put into such port by necessity this is not a deviation.[14]

If the vessel sails to another destination than that specified at the terminus ad quem of the voyage insured, or if in the execution of an original intention the captain or master ceases to pursue the usual course, and abandons or loses sight of such original destination, or if it appears by the vessel's papers that a different voyage was had in view from the beginning, and the ship is lost before the dividing point is reached, these are cases of a change of voyage, and not merely of intended deviation, and the insurance is void from the time the purpose is definitely formed to change the voyage. The general test is, whether the original destination is still kept in view or lost sight of; if the latter, the identity of the voyage is gone.[15] If a vessel sails to a port within the policy with intent to go to a port not within the policy in case the former should be blockaded, this is not a deviation.[16]

avoid a policy until the deviation becomes actual. Marine Ins. Co. v. Tucker, 3 Cranch (7 U. S.) 357, 2 L. ed. 466. *Cited* in Thames & Mersey Marine Ins. Co. v. O'Connell, 68 Fed. 150, 154, 29 C. C. A. 624, 627, 56 U. S. App. 676; Bearns v. Columbian Ins. Co. 48 Barb. (N. Y.) 445, 453; Lawrence v. Ocean Ins. Co. 11 Johns. (N. Y.) 241, 261; Snow v. Columbian Ins. Co. 48 N. Y. 624, 630, 8 Am. Rep. 578. *Distinguished* in Merrill v. Boylston Fire & Marine Ins. Co. 3 Allen (85 Mass.) 247, 252.

The marine insurance act of England provides: "The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract." Marine insurance act 1906 (6 Edw. VII. c. 41, sec. 46 (3); Butterworth's Twentieth Century Stats. (1900–1909) p. 409; 15 Chitty's Stats. (1902–1907) p. 892.

[12] Heselton v. Allnutt, 1 Maule & S. 46.

[13] Hobart v. Norton, 8 Pick. (25 Mass.) 159. See Henshaw v. Marine Ins. Co. 2 Caines (N. Y.) 274; Silva v. Low, 1 Johns. (N. Y.) 184.

[14] Hobart v. Norton, 8 Pick. (25 Mass.) 159.

[15] New York Firemen's Ins. Co. v. Lawrence, 14 Johns. (N. Y.) 46; Henshaw v. Marine Ins. Co. 2 Caines (N. Y.) 274; Silva v. Low, 1 Johns. (N. Y.) 184, *criticized* in 1 Phillips on Ins. (3d ed.) 558, sec. 1001; Merchants' Ins. Co. v. Algeo, 32 Pa. St. 330; Wooldridge v. Boydell, 1 Doug. 16 a, per Lord Mansfield; Emerigon on Ins. (Meredith's ed. 1850) c. 13, sec. 14, pp. 574 et seq. See marine insurance act of England, under first note to this section.

[16] Maryland Ins. Co. v. Woods, 6 Cranch (10 U. S.) 29, 3 L. ed. 143 (*cited* in Bearns v. Columbian Ins.

It is apparent, therefore, that if the ship in a voyage "from" sails on an entirely different voyage from that insured, the risk never attaches, whatever may be the intention, and assured in such case would not be aided by the fact that the intention to abandon, so manifested, is changed, and the ship sails thereafter into the usual route of the voyage insured, and then proceeds to the destination designated in the policy. But where the intention at the time of sailing is to deviate at some future time from the usual route, and the ship sails on the voyage insured and pursues the customary course, keeping in view the terminus ad quem specified, the insurance, having attached, remains in force until there is a departure from said course, or, in the usual words, until the dividing point is reached. Again, a policy may be "at and from," but a delay in port in preparation for a different voyage and the taking of a cargo for a different destination substitutes another risk which the assurers did not assume, and they are therefore discharged.[17]

In determining, however, whether at the time of loss there is an intent definitely formed whereby the terminus ad quem is definitely lost sight of or abandoned, the circumstances are to be taken as evidence, and undoubtedly there must be clearer evidence than a mere meditated change of voyage. While the intention is manifested by the acts of the insured or his authorized agent

Co. 48 Barb. (N. Y.) 445, 453); M'Fee v. Insurance Co. 2 McCord (S. C.) 503, 13 Am. Dec. 757; Coffin v. Newburyport Ins. Co. 9 Mass. 436; Winter v. Delaware Ins. Co. 30 Pa. St. 334.

[17] The above illustrations, as well as others, are supported by the following authorities:

*United States.*—Marine Ins. Co. v. Tucker, 3 Cranch (7 U. S.) 357, 2 L. ed. 466.

*Massachusetts.*—Stocker v. Harris, 3 Mass. 409; Merrill v. Boylston Fire & Marine Ins. Co. 3 Allen (85 Mass.) 247.

*New York.*—New York Firemen's Ins. Co. v. Lawrence, 14 Johns. (N. Y.) 46; Lawrence v. Ocean Ins. Co. 11 Johns. (N. Y.) 241; Forbes v. Church, 3 Johns. Cas. (N. Y.) 159; Henshaw v. Marine Ins. Co. 2 Caines (N. Y.) 274.

*Pennsylvania.* — Winter v. Delaware Mutual Ins. Co. 30 Pa. St. 334.

*Virginia.* — Marine Ins. Co. v. Stras, 1 Munf. (Va.) 408.

*England.*—Tasker v. Cunningham, 1 Bligh, 87, 20 R. R. 33, per Lord Eldon; Way v. Modigliani, 2 Term Rep. 30, 1 R. R. 412; Sellar v. McVicar, 4 Bos. & P. 23, 1 Bos. & P. (N. R.) 23, 8 R. R. 744; Bottomley v. Bovill, 5 Barn. & C. 210, 7 D. & R. 702, 4 L. J. (O. S.) K. B. 237, 29 R. R. 221; Foster v. Wilmer, 2 Strange, 1249; Hall v. Brown, 2 Dow Parl. C. 367. See also authorities under this section, and § 1488 herein. But Emerigon says Roccus is of opinion that "the voyage is changed so soon as the captain freights his vessel for another place; vel convenerit aspotare alias merces in alium locum. I am not of this opinion, and I consider that if before the departure of the vessel the captain, abandoning his new project, holds to the voyage determined by the policy, all returns into order, and the

before the voyage is commenced, the determination of the point is comparatively clear of ascertainment.[18]

**§ 2376. Abandonment of voyage: peril not insured against.**—It may be stated as a general rule that the insured is not justified in an abandonment of the voyage to avoid a peril not insured against, and in substituting therefor an entirely different one.[19]

**§ 2377. Effect of intention fixed at or after sailing to change destination.**—In case the ship sails on her voyage and the intention to go to another terminus ad quem is then formed, but the ship is lost before the dividing point is reached, the United States supreme court has held that this is substantially an intention to deviate, and not a change of voyage. In brief, that the assurer is liable until the intention is consummated by some act changing the risk.[20] In a New York case, however, a vessel was insured from New York to Gothenburg, and thence to a port of discharge in the Baltic Sea. The vessel sailed from Gothenburg with the intention of proceeding to St. Petersburg, which had been elected as the port of discharge. She was, however, forced into Carlsand, whence the assured's agent directed her to proceed to Stockholm, which port was reached by a route common to that to St. Petersburg for a part of the way. Before the vessel arrived at the point of divergence she was captured, and it was held that there was an abandonment, and not an intention to deviate.[1] So in a Massachusetts case the insurance was under a time policy on a fishing vessel, wherein she was prohibited from sailing on a voyage from

insurance remains in force:" Emerigon on Ins. (Meredith's ed. 1850) c. xiii. sec. 14, p. 575. And see Taylor v. Lowell, 3 Mass. 331, 3 Am. Dec. 441; Merchants' Ins. Co. v. Clapp, 11 Pick. (28 Mass.) 56; Henkle v. Royal Exch. Assur. Co. 1 Ves. 317; Kewley v. Ryan, 2 H. Black. 343; Planchette v. Fletcher, 1 Doug. 251.

[18] See Tasker v. Cunningham, 1 Bligh, 87, 100, 2 L. ed. 466, per Lord Eldon; Marine Ins. Co. v. Tucker, 3 Cranch (7 U. S.) 357, 20 R. R. 33; Marsden v. Reid, 3 East, 572, 7 R. R. 516; Wooldridge v. Boydell. 1 Doug. 16; Hall v. Brown, 2 Dow Parl. C. 367; Silva v. Low, 1 Johns. (N. Y.) 184, *criticized* as being only a case of intended deviation in 1 Phillips on Ins. (3d ed.) 558, sec. 1001.

[19] Lee v. Gray, 7 Mass. 349. See King v. Delaware Ins. Co. 6 Cranch (20 U. S.) 71, 3 L. ed. 155, aff'd 2 Wash. (U. S. C. C.) 300; Richardson v. Maine Marine & Fire Ins. Co. 6 Mass. 102, 4 Am. Dec. 92.

[20] Marine Ins. Co. v. Tucker, 3 Cranch (7 U. S.) 357, 2 L. ed. 466. See also Winter v. Delaware Mutual S. Ins. Co. 30 Pa. St. 334, 15 L. I. 172, 5 P. L. I. 274.

[1] Firemen's Ins. Co. v. Lawrence, 14 Johns. (N. Y.) 46. *Examine* Winthrop v. Union Ins. Co. 2 Wash. (U. S. C. C.) 7, Fed. Cas. No. 17,901; Lawrence v. Ocean Ins. Co. 11 Johns. (N. Y.) 241; Silva v. Low, 1 Johns. (N. Y.) 184; Smith v. Steinbach, 2 Caines Cas. (N. Y.) 158, 172; Henshaw v. Marine Ins. Co. 2 Caines (N. Y.) 274; 3 Kent's Commentaries (5th ed.) 317.

beyond E after a certain date. She sailed to E after the date for the purpose of procuring "bait" for a fishing trip, and was lost before reaching E, and the court rested the decision upon the point whether the vessel left G with the intent to proceed beyond E, or merely to go to E, and holding that the assured must show that the ship was not on a prohibited voyage. The court also determined that in this case the word "voyage" meant enterprise.[2] The United States supreme court case first above noted is also opposed to the English rule as stated by Mr. Arnould and Mr. Maclachlan, according to whom, if the assured either before the ship sails had a determination to abandon the original port of destination and fix upon another, the underwriter is thereby discharged in case of loss happening after such purpose becomes fixed, even though the loss occurs while the vessel is on the common route of both voyages, or even under a policy "at" and "from" before she sails from the port of commencement of the risk.[3] The main difficulty in formulating a positive rule arises from the fact that the route to the original and changed destination is over the same course for that part of the voyage on which the vessel is sailing when lost, and before the intention to abandon is consummated by some act. If the question be held to be one of intention merely, there would be some force in the argument that there was room for repentance before the dividing line was reached, whether the intention be to abandon or to deviate, except perhaps where the master is sailing under instructions.[4] If, however, it is clear that from all the circumstances the intention has been definitely fixed to change the destination, the vessel might reasonably be held to be sailing on the voyage to the changed destination, even though the route is over the same course a part of the way. It would seem, therefore, as heretofore stated[5] that it would be a question of evidence whether the terminus ad quem of the original voyage has been so far lost sight of as to constitute a change of voyage.[6]

[2] Friend v. Gloucester, 113 Mass. 326. See also Merrill v. Boylston Fire & Marine Ins. Co. 3 Allen (85 Mass.) 247.

[3] 1 Arnould on Marine Ins. (Perkins' ed. 1850) 357, *351 et seq.; Id. (Maclachlan's ed. 1887) 457–59; Id. (8th ed. Hart & Simey) sec. 385, p. 505, *citing* Tasker v. Cunningham, 1 Bligh, 87–100, 20 R. R. 33, per Lord Eldon.

[4] See as to instructions to master, Middlewood v. Blakes, 7 Term Rep. 162, 4 R. R. 405, per Lord Kenyon; New York Firemen's Ins. Co. v. Lawrence, 14 Johns. (N. Y.) 46, per Kent, Ch.

[5] § 2375 herein.

[6] See 2 Parsons on Marine Ins. (ed. 1868) 41, who says: "In general, that if the proposed change in the voyage was sufficient in extent, quantity, and importance to make it a change of the whole voyage, then here was an abandonment of the voyage intended, and the substitution of another." Otherwise it is only an intended deviation, and this writer is

§ 2378. **Voyage shortened.**—If the assured has commenced the voyage insured, but voluntarily and without necessity or justifying excuse returns to the place of sailing, the insurers would probably be discharged.[7] Mr. Arnould, relying upon Emerigon, says that a mere shortening of the voyage does not avoid the policy where the voyage is not abandoned at the outset by a change of destination, and he adds that where the ship is insured to successive ports, she may terminate the voyage at a nearer port without vitiating the policy, but if the voyage is to a single port, she sails with an intent to go to a nearer, which is done, the contract is avoided.[8]

§ 2379. **Voyage "at and from" port or ports.**—If a voyage is to commence "at and from" a specified port, with liberty to touch at other ports, such liberty does not permit the assured to begin the adventure at any one of said ports. The voyage must commence at the terminus a quo designated, or at some place that is properly a part thereof, otherwise it will not be the voyage insured. This rule is subject to such exceptions as may arise from usage, or which may exist in case of an island or district with several ports.[9] But if an insurance is on goods "at and from" a designated port, and all or any of the ports in said district, even though said port be out of the usual or direct course between the port named and the port of final destination, going to said port of

also inclined to the opinion that sailing with an intention to go to another than the original terminus of the insured voyage, even though the vessel sails over a larger part of the same course, is an abandonment, or change of voyage.

[7] Emerigon on Ins. (Meredith's ed. 1850) c. xiii. sec. 12, p. 571.

[8] 1 Arnould on Marine Ins. (Perkins' ed. 1850) 359, *353; Id. (Maclachlan's ed. 1887) 460. The rule differs somewhat in Mr. Maclachlan's edition from that given in Mr. Perkins' edition, (*citing* Emerigon on Ins. c. xiii. sec. 12, see Id. [Meredith's ed. 1850] p. 570). See Id. (8th ed. Hart & Simey) secs. 388 et seq., pp. 508 et seq. See Hadkinson v. Robinson, 3 Bos. & P. 388, 7 R. R. 786; Lubbock v. Rowcroft, 5 Esp. 50, 8 R. R. 830; Middlewood v. Blakes, 7 Term Rep. 162, 4 R. R. 405.

[9] Murray v. Columbian Ins. Co. 4 Johns. (N. Y.) 443; Maryland Ins. Co. v. Bossiere, 9 Gill & J. (Md.) 121; Park v. Hammond, 6 Taunt. 495, 4 Camp. 344, 1 Holt, 80, 2 Marsh. 189. As to attachment and duration of risk, see §§ 1483 et seq., 1562 et seq. herein.

"(1) Where the subject-matter is insured by a voyage policy 'at and from' or 'from' a particular place it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and then if the adventure be not so commenced the insurer may avoid the contract. (2) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition." Marine insurance act 1906 (6 Edw. VII. c. 41) sec. 42; 2 Butterworth's Twentieth Century Stats. (1900–1909) p. 409; 15 Chitty's Stats. (1902–1907) p. 892.

loading is not a deviation.[10] A policy containing the following clause: "At and from Teneriffe to Havana, and from thence to New York," held, the taking in of a cargo at Havana did not avoid the contract.[11]

§ 2380. **Preliminary voyage: completing loading at different ports.**—A deviation may arise from a preliminary voyage, as in case where a risk is an indivisible one "at and from" a port where the vessel is lying to another, and there is a departure from the port on a voyage other than that insured. This is illustrated by the following case: A policy of insurance was issued on a vessel undergoing repairs in New York, "at and from" New York to Havana. On the completion of the repairs the vessel went on a trial trip to Elizabethport, sixteen miles distant, to take in coal. She returned to New York and sailed thence to Havana. It was held a deviation so as to avoid the policy.[12] If the risk is to commence from the ship's port of loading under a policy "at and from," it is a deviation for the vessel to go to a different port and there complete her loading commenced at the port designated, unless such second place of loading be within the limits of a port or the first port; as in the case of moving from one pier or wharf at the same port or place, but sailing to a place seven miles distant although in the same bay, is a deviation, though the vessel returns to the port of loading and sails therefrom.[13]

§ 2381. **Alternative ports of destination.**—If a voyage is described as "at and from" a specified port to ports in the alternative, as A or B, it constitutes a deviation for the vessel to go to both ports, except it be warranted by usage so certain, uniform, and notorious as to raise the presumption that the contract was made in view thereof.[14]

§ 2382. **The word "thence" from port or ports of discharge in two specified localities will cover either locality.**—If a vessel be insured "at and from" to all or any ports or places in two specified localities, "thence home," the word "thence" will refer to ports or places in either locality, and permit her after she has left the port in one of the specified localities to return a second time to a

[10] Bragg v. Anderson, 4 Taunt. 229, 13 R. R. 584; Lambert v. Liddard, 5 Taunt. 480, 1 Marsh. 149, 15 R. R. 557. See §§ 1483 et seq., 1562 et seq. herein.

[11] Hughes v. Union Ins. Co. 8 Wheat. (21 U. S.) 294, 5 L. ed. 620.

[12] Fernandez v. Great Western Ins. Co. 48 N. Y. 571, 8 Am. Rep. 571.

[13] Brown v. Tayleur, 4 Ad. & E. 241, 5 Nev. & M. 472, 1 H. & Walms. 578, 5 L. J. K. B. 57.

[14] Bulkley v. Protection Ins. Co. 2 Paine (U. S. C. C.) 82, Fed. Cas. No. 2,118; Dodge v. Essex Ins. Co. 12 Gray (78 Mass.) 65.

port in the other specified locality, in order to complete her lading for the home voyage, for the word "thence" is of general application.[15]

**§ 2383. Election of ports: specified or geographical order of visiting ports of discharge.**—If several ports or places are specifically named in the policy, and the assured intends to visit but one of them, that one is at his election. If, however, he purposes to stop at more than one, the ship must go to those intended to be visited in the order specified in the policy, with reference to the route to the ulterior port of destination selected, unless, perhaps, there is a usage to the contrary. This rule does not preclude dropping some of the places specified. If there is no order designated by the policy, then the ports of discharge must be visited in their geographical order as governed by their relative distance from the port of departure, reference also being had to the route to the ulterior port of destination selected, unless the geographical order be controlled and varied by usage, in which case the order established by usage may be followed.[16] Thus in case of an insurance policy to A, thence to C, the vessel may go directly to C, and is not obligated to stop at A.[17]

[15] Ashley v. Pratt, 16 Mees. & W. 471, 17 L. J. Ex. 135, aff'd 1 Exch. 257. See Perkins v. Augusta Banking Ins. Co. 10 Gray (76 Mass.) 312, 71 Am. Dec. 654. Contra, Marine Ins. Co. v. Stras, 1 Munf. (Va.) 408. The rule in the text seems the better one, however.

[16] Hale v. Merchants Mutual Ins. Co. 6 Pick. (23 Mass.) 172; Kane v. Columbian Ins. Co. 2 Johns. (N. Y.) 264; Hunter v. Leathley, 10 Barn. & C. 858, 873, 8 L. J. (O. S.) K. B. 274, aff'd 5 M. & P. 457, 7 Bing. 517, per Tindall, C. J.; Beatson v. Haworth, 6 Term Rep. 531, 3 R. R. 258, 9 Eng. Rul. Cas. 385, and opinion of Lord Ellenborough therein; Marsden v. Reed, 3 East, 517, 7 R. R. 516; Clason v. Simmonds, 6 Term Rep. 533n, 3 R. R. 260, 9 Eng. Rul. Cas. 384; Gardiner v. Senhouse, 3 Taunt. 16, 12 R. R. 573. But see Marine Ins. Co. v. Stras, 1 Munf. (Va.) 408.

The marine insurance act of England provides: "sec. 47 (1) Where several ports of discharge are specified by the policy, the ship may proceed to all of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation. (2) Where the policy is to 'ports of discharge,' within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation." Marine insurance act 1906 (6 Edw. VII. c. 41) sec. 47; Butterworth's Twentieth Century Stats. (1900–1909) p. 410; 15 Chitty's Stats. 1902–1907) p. 892.

[17] Kane v. Columbian Ins. Co. 2 Johns. (N. Y.) 264, 265. See Stone v. Ocean Marine Ins. Co. of Gothenburg, 1 Exch. Div. 81, 45 L. J. Ex. 361, 34 L. T. 490, 24 W. R. 55, 3 Asp. M. C. 152; Hale v. Merchants Ins. Co. 6 Pick. (23 Mass.) 172.

Cases of the character indicated by this rule are to be distinguished from those where it is evident that the specification of port is descriptive of the limits of the voyage, rather than of the order in which the ports are to be visited.[18] And if the policy be "at and from," with liberty to touch at all or any of a group of islands, the vessel is not obligated to visit them in their geographical order, but may go from island to island for purposes connected with the voyage;[19] unless some one of said islands be elected as the port of discharge.[20] It is not a deviation, however, if the ship be compelled by necessity or other justifying cause to alter the order of visiting ports or places.[1]

**§ 2384. Ports of discharge: revisiting or returning to port.**[2]—In the absence of an express or implied liberty so to do in the policy, or implied by construction from the character of the voyage or nature of the risk as described in the policy, a ship insured to ports of discharge, and having elected her port of discharge, may not sail backward and forward, nor revisit a port at which she has touched in the direct course of the voyage, or return to one she has passed in proceeding to a port elected as the port of discharge.[3] A return to a port on a voyage, owing to stress of weather, the ultimate destination not being abandoned and the route not being departed from, is not a change of risk releasing the insurers.[4]

Where a vessel was insured from certain loading ports at and to ports and places to discharge freight, it being contemplated that the only deviations would be stoppages at intermediate ports between the last place of landing and that of the terminus, to discharge cargo, and that when the vessel was there safely anchored the risk insured against would be determined, it constitutes a deviation not covered by the policy, in the absence of a subsequent consent by insurer, if the vessel departs from said terminus for the purpose of delivering freight, and is wrecked, although it was intended that she would return.[5]

[18] See Ashley v. Pratt, 16 Mees. & W. 471, 17 L. J. Ex. 135, affirmed 1 Exch. 257, per Denman, J. *Examine* Commonwealth Ins. Co. v. Cropper, 21 Md. 311.

[19] Metcalf v. Parry, 4 Camp. 125, 15 R. R. 734.

[20] Gairdner v. Senhouse, 3 Taunt. 16, 12 R. R. 573.

[1] 1 Marshall on Ins. (ed. 1810) *191; Driscoll v. Bovil, 1 Bos. & P. 313.

[2] See §§ 2387, 2388 herein.

[3] Gairdner v. Senhouse, 3 Taunt. 16, 12 R. R. 573; Clason v. Simmonds, 6 Term Rep. 533n, 3 R. R. 260; Andrews v. Mellish, 5 Taunt. 496, per Gibbs, C. J., *explaining* the last case cited; 16 East, 312, 2 Maule & S. 27, 15 East, 4. See also Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654.

[4] Winter v. Delaware Mutual Safety Ins. Co. 30 Pa. 334.

[5] Alaska Banking & Deposit Co. v. Maritime Ins. Co. (U. S. D. C.) 156 Fed. 710.

**§ 2385. Returning to terminus a quo for clearance.**—If a vessel is insured "at and from" a designated port to an island, thence to a specified port in an island, she may be warranted by usage in returning to the terminus a quo for clearance, where none can be obtained at the island or place of loading, and such act is not a deviation. This was so held in a case of insurance at and from Callao to the Chincha Islands, thence to New York.[6] But where a vessel was insured "at and from" Port Plata to New York, it was held a deviation to go to Susa, from whence the ship would have been obligated to return to Port Plata for clearance, although Susa was a bay or open road distant four leagues east of La Plata, but a part of the district of Port Plata.[7] And it is a deviation for the vessel to go out of her course to obtain sailing papers.[8]

**§ 2386. "Near open port" refers to geographical order.**—The term "near open port" must be construed with reference to the geographical order of the ports, exclusive of such ports as are closed or which may not be safely entered. But the facility of reaching a more distant port than the one geographically near, by reason of favorable winds or currents, does not of itself make such distant port a "near open port." The construction of this term has arisen under policies giving liberty to proceed to such a port if turned away from the specified destination, and an attempt to make a more distant port when one is nearer, in the sense above stated, constitutes a deviation.[9]

**§ 2387. To an Island and a market.**—If the vessel is insured to an island in the West Indies and a market, she may sail bona fide from island to island or place to place, backward and forward, in search of a market, and is not compelled to visit them in their geographical order, nor is it a deviation in such case though the vessel revisits or returns to a place.[10]

The master of a vessel insured "to Kingston and market in Jamaica" was ordered when off the east end of the island, if in season to fulfil a contract to deliver goods at Port Maria, to proceed thither, otherwise to put into Kingston. She went to Port Maria and not to Kingston and was lost on her return voyage,

[6] Parsons v. Manufacturers' Ins. Co. 16 Gray (82 Mass.) 463; Moxon v. Atkins, 3 Camp. 200, 13 R. R. 789, 13 Eng. Rul. Cas. 590.

[7] Vos v. Robinson, 9 Johns. (N. Y.) 192.

[8] Stocker v. Harris, 3 Mass. 409.

[9] Tenet v. Phœnix Ins. Co. 7 Johns. (N. Y.) 363, *cited* in 1 Daly 16; Ferguson v. Phœnix Ins. Co. 5 Binn. (Pa.) 544. See Snowden v. Phœnix Ins. Co. 3 Binn. (Pa.) 457.

[10] Houston v. New England Ins. Co. 5 Pick. (22 Mass.) 89; De Blois v. Ocean Ins. Co. 16 Pick. (33 Mass.) 303, 28 Am. Dec. 245; Maxwell v. Robinson, 1 Johns. (N. Y.) 333. See § 2384 herein.

and it was held that there was an inception of the voyage insured, and no deviation.[11]

A vessel insured to a certain port and a market need not stop at said port.[12] In a policy on a vessel, the terms "at and from" an island authorize her to sail from port to port of the island to complete her cargo.[13]

§ 2388. **To a port in an Island or district, thence to a port of advice or discharge.**—If a vessel is insured to a port in an island or district, thence to a port of advice or discharge, she may not, after visiting a port in said island or district and discharging her cargo, depart to another port therein, obtain a cargo, and proceed thence to a port of discharge within the limits originally specified; such act constitutes a deviation.[14]

§ 2389. **Vessel captured and carried out of her course: false papers.**—It is said that a deviation may arise from the vessel's being captured and carried out of her course by reason of carrying false papers.[15]

§ 2390. **Deviation to supply or repair defect in fitting for original voyage.**—It is assumed that the vessel must be seaworthy for her voyage, and if a vessel is not properly fitted for her voyage and sails in such a condition under a policy "from," a deviation to supply such defects is not justifiable, as the ship should have been properly fitted for the voyage at the time of sailing.[16] So where a policy was issued on a codfishing vessel for the voyage from Plymouth to the Banks and back, and, after arriving at the Banks, the vessel got out of bait and put into St. Peters, the nearest practicable port, for a supply, it was held, in the absence of proof of usage, a fatal deviation.[17] Again, a steamboat was insured for a voyage between two ports, with liberty to "touch and stay at any

[11] Houston v. New England Ins. Co. 5 Pick. (22 Mass.) 89.

[12] Houston v. New England Ins. Co. 5 Pick. (22 Mass.) 89.

[13] Dickey v. Baltimore Ins. Co. 7 Cranch (11 U. S.) 327, 3 L. ed. 360. *Cited* in Equitable Safety Ins. Co. v. Hearne, 20 Wall. (87 U. S.) 488, 490, 22 L. ed. 395; Hearne v. New England Mutual Marine Ins. Co. 3 Cliff. 318, 325, Fed. Cas. No. 6,301.

[14] Hearne v. Marine Ins. Co. 20 Wall. (87 U. S.) 488, 22 L. ed. 395.

[15] Goix v. Low, 1 Johns. (N. Y.) 341, 346, per Kent, J. *Examine* Maryland Ins. Co. v. Bathurst, 5 Gill & J. (Md.) 159; Livingston v. Maryland Ins. Co. 7 Cranch (11 U. S.) 506, 3 L. ed. 421, per Marshall, C. J.; Galbraith v. Gray, 1 Wash. (U. S. C. C.) 191, 192, Fed. Cas. No. 6,117.

[16] Cruder v. Philadelphia Ins. Co. 2 Wash. (U. S. C. C.) 339, Fed. Cas. No. 3,452; Kettell v. Wiggin, 13 Mass. 68; Copeland v. New England Marine Ins. Co. 2 Met. (43 Mass.) 432, 444; Wolff v. Claggett, 3 Esp. 257, 6 R. R. 830; Forshaw v. Chabert, 3 Brod. & B. 158, 6 J. B. Moore, 369, 23 R. R. 596.

[17] Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 54.

ports and places if thereunto obliged by stress of weather or other unavoidable accident." On her voyage she stopped at an intermediate port to repair a defect in her chimney, which existed and which was known to her owners before she left the port of departure. While thus waiting for repairs she was destroyed by a peril insured against, and it was held that the stoppage was such a deviation as to avoid the policy.[18]

But where a vessel was insured from Stockholm to New York, having on board a cargo of sheep for which she had not taken sufficient provender for the voyage, it being understood that she was to touch at Elsinore, where she stopped for convoy and to pay sound dues, and while there, and without delaying the voyage, she obtained sufficient provender, it was held no deviation.[19] There is a question, however, whether a slight defect in the vessel's seaworthiness may not be remedied before loss; so also in cases of a policy "at and from." These points have, however, been discussed fully elsewhere.[20] But it is held no deviation to put into port to unload where the vessel is overloaded,[1] or, having insufficient ballast, to put into the nearest port to remedy the defect.[2]

Such a rule as that first above stated would not, however, be applicable to a case where a port is called at to obtain a pilot according to usage;[3] nor to a case where the vessel runs short of water, and being fairly in need thereof puts into a port to obtain a necessary supply, the vessel having originally been fitted out with a sufficient quantity of water, such as an ordinary voyage of the character of that insured would require;[4] nor where the vessel puts ashore for provisions, being compelled to delay the voyage by head winds;[5] nor would the rule apply to a case where the vessel, having sailed with a sufficient crew for the voyage, but needing two more men for the purposes of fishing, proceeded to another port to complete the fishing crew in accordance with a usage justifying such act, although it was also held that stopping for more men would be a deviation except for the usage;[6] nor to a case where

[18] Audenreid v. Mercantile Mutual Ins. Co. 60 N. Y. 482, 19 Am. Rep. 204.

[19] Cormack v. Gladstone, 11 East, 347, 10 R. R. 518.

[20] See §§ 2166, 2181–83 herein.

[1] Weir v. Aberdein, 2 Barn. & Ald. 320, 20 R. R. 450; Chase v. Eagle Ins. Co. 5 Pick. (22 Mass.) 51.

[2] Gilbert v. Redshaw, reported in 1 Marshall on Ins. (ed. 1810) 208. The above were the facts, although the grounds on which this decision rested was a necessity for repairs.

[3] Pouverin v. Louisiana State Ins. Co. 4 Rob. (La.) 234.

[4] Wood v. Plessants, 3 Wash. (U. S. C. C.) 201, Fed. Cas. No. 17,961.

[5] Thomas v. Royal Exch. Assur. Co. 1 Price, 195.

[6] Folsom v. Merchants' Ins. Co. 38 Me. 414; Cruder v. Pennsylvania Ins. Co. 2 Wash. (U. S. C. C.) 339, Fed. Cas. No. 3,452. See § 2166 herein.

all the superior officers of a ship on a long voyage have died;[7] nor to a departure from the route to procure men to supply a deficiency as to the numbers of a crew originally sufficient, brought about by sickness, disability, or death.[8]

§ 2390a. **Placing vessel in dry-dock without maritime necessity.**—It constitutes a deviation for the owner of a vessel laden with transshipped cargo, covered by marine insurance, to place the vessel, at the port where the cargo was received, in dry dock, without maritime necessity, to have her bottom painted. In such case, where the cargo is lost by fire, through the negligence of the officers and crew, while the vessel is in dry dock, the vessel is liable, unless it is shown affirmatively that the deviation was not the contributory cause, to an assignee of assured, but such recovery must be had on the right of the shipper against the carrier and not by virtue of any contractual relation based upon the contract of insurance, although the governing principle is that the usual and customary course to the port of delivery, or the course agreed upon in the contract must be followed without unnecessary deviation or delay.[9]

§ 2391. **Reshipment of goods on the voyage not of itself a deviation under liberty to reship.**—The reshipment of goods on the voyage to be carried in another vessel to the port of destination is not of itself a deviation avoiding the policy, where liberty is given by the contract to reship at all times and places. It might be a question, however, whether the point of delay or abandonment of the voyage would not be a defense.[10]

§ 2392. **Transshipment.**—If a cargo is insured in a voyage direct from one port to another, a transshipment before reaching the port of destination is a deviation, and releases the insurers if they have not contracted with reference thereto, and it is immaterial whether such transshipment is authorized by the bill of lading or not. This rule would, however, be subject to such exceptions as arise in cases of transshipment occasioned by necessity;[11] but the vessel, when compelled to return to her port of lading for repairs, is held justified in unloading her cargo and then shipping

[7] Winthrop v. Union Ins. Co. 2 Wash. (U. S. C. C.) 1, Fed. Cas. No. 11,948.

[8] Wolff v. Claggett. 3 Esp. 257, 6 R. R. 830, per Lord Eldon.

[9] The Indrapura (U. S. D. C.) 171 Fed. 929, 38 Ins. L. J. 1163. This case is also noteworthy for its thorough discussion of the points as to a shipowner's duty, liability and his statutory exemptions.

[10] Fletcher v. St. Louis Mutual Ins. Co. 18 Mo. 193.

[11] Schroeder v. Schweitzer Lloyd Transport Gesellschaft, 66 Cal. 294, 60 Cal. 467, 44 Am. Rep. 61; Settle v. St. Louis Perpetual Ins. Co. 7 Mo. 379; Bold v. Rotheram, 8 Q. B.

it by land to another port, not on the direct course for passage, and going there subsequently to take it.[12]

§ 2393. **Liberty of port and places: purposes of voyage.**—The clauses under which a liberty to stop at or use ports and places is given are various, but the scope of the permission depends not so much upon the construction of the clauses themselves as upon the purposes of the voyage, and, as a general rule, the permission in a policy to go to, or to touch at, or to call at, or to touch and stay at, certain ports and places must be construed with reference to the real objects and purposes of the voyage contemplated, and accordingly these clauses will not be literally construed and confined to the exact meaning of the terms used, irrespective of what must have been clearly intended as within the scope and purpose of that particular voyage covered by that policy.[13]

So, where a policy upon a whaling voyage permitted a vessel "to stop at all ports and places for trade, refreshment, and recruits," it appeared that taking sea elephants was within the scope of such a voyage, and it was held that the clause did not restrict her from going into bays and along coasts and islands and staying there to take them.[14] So a liberty to proceed to certain islands for salt does not justify the vessel, after she has arrived at one of the said islands where salt may be obtained, in going thence to another island for the purpose of earning freight, even though she would have been compelled to wait four or five weeks for her turn in taking a cargo of salt, and by undertaking the voyage for freight she would be enabled to expedite her original voyage.[15] Although

781, 797, 15 L. J. Q. B. 274, 1 Car. & K. 360, 10 Jur. 875; Salisbury v. St. Louis Ins. Co. 23 Mo. 553, 66 Am. Dec. 687. See §§ 1594–96, 1769 herein.

[12] Wiggin v. Amory, 13 Mass. 118.

[13] Columbian Ins. Co. v. Cattlett, 12 Wheat. (25 U. S.) 383, 6 L. ed. 664; Seccomb v. Provincial Ins. Co. 10 Allen (92 Mass.) 305; Child v. Sun Mutual Ins. Co. 3 Sand. (N. Y.) 26; Metcalf v. Parry, 4 Camp. 125, 15 R. R. 734; Williams v. Shee, 3 Camp. 469, 14 R. R. 811, per Lord Ellenborough; Phillips v. Irving, 7 Man. & G. 325, 8 Scott (N. R.) 3, 13 L. J. C. P. 145, 9 Eng. Rul. Cas. 396; Bottomley v. Bovill, 5 Barn. & C. 210, 7 Dowl. & R. 702, 4 L. J. (O. S.) K. B. 237, 29 R. R. 221; Urquhart v. Barnard, 1 Taunt. 450, 10 R. R. 574; Noble v. Kenneway, 2 Doug. 510–13; Hammond v. Reid, 4 Barn. & Ald. 72, 22 R. R. 629, 9 Eng. Rul. Cas. 372. See also United States v. Shearman, Pet. (U. S. C. C.) 98, Fed. Cas. No. 16,012; Perkins v. Augusta, etc., Ins. Co. 10 Gray (76 Mass.) 312, 71 Am. Dec. 654; Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654, per Endicott, J.; Chase v. Eagle Ins. Co. 5 Pick. (22 Mass.) 51; Thorndike v. Boardman, 6 Pick. (26 Mass.) 375.

[14] Child v. Sun Mutual Ins. Co. 3 Sand. (N. Y.) 26.

[15] Kettell v. Wiggin, 13 Mass. 68. Mr. Phillips, however, criticizes this case as one for the jury rather than the court, and says the opinion has not "predominating weight" for said reason: 1 Phillips on Ins. (3d ed.)

it is not a deviation to touch at a port at which the vessel has liberty to touch,[16] yet a liberty to touch, or to touch for all purposes, means a purpose connected with the voyage or in furtherance of the objects of the adventure, even though the port or place touched at be within the terms of the policy.[17]

**§ 2394. Distinction between purposes of voyage and acts done to insure success of adventure.**—As substantially stated elsewhere, in all trading voyages the ship is, as a general rule, confined to the ports, places, or coasts designated in the policy, and cannot depart to other places merely because she can better prosecute the trade elsewhere. There is a difference between departure as the result of a necessity, or for the purposes of the voyage, and a departure from the route to insure the success of a trading adventure, or the success of any mercantile or fishing voyage; such latter departure is not permitted, and, in the absence of a provision so to do in the policy, permission cannot be implied.[18]

In Massachusetts it is held that a vessel which had sailed from Plymouth on a fishing voyage to the Banks was not justified in departing to St. Peters, the nearest available port, for that purpose, in order to procure bait, though she returned again to the Banks and did not suffer loss until after her return, and that such deviation avoided the policy. The case was distinguished by the court from those where the deviation is justified by necessity, and also from cases of delay in port or ports named or permitted in the policy, or delay necessary to accomplish the objects of the voyage.[19]

580, sec. 1026. Notwithstanding this criticism, the case seems clearly one of deviation. The voyage undertaken was not for any purpose connected with the voyage insured and contemplated by the parties. The departure changed the risk, and substituted another voyage. Again, a departure cannot be justified to insure the success of the adventure. See Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654.

[16] Cross v. Shutliffe, 2 Bay (S. C.) 220, 1 Am. Dec. 645.

[17] Sully v. Whittemore, 5 Barn. & A. 45 (*compare* this case with Armet v. Innes, 4 J. B. Moore, 150); Langhorne v. Allnott, 4 Taunt. 511, 519, 12 R. R. 660, per Gibbs, J.; Hammond v. Reed, 4 Barn. & Ald. 72, 22 R. R. 629; Violet v. Allnutt, 3 Taunt. 419, 13 R. R. 676; Williams v. Shee, 3 Camp. 469, 14 R. R. 811, per Lord Ellenborough.

[18] Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654, per Endicott, J., *citing* Kettell v. Wiggin, 13 Mass. 68; Robertson v. Columbia Ins. Co. 8 Johns. (N. Y.) 491.

[19] Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654, per Endicott, J., *citing* Columbian Ins. Co. v. Cattlett, 12 Wheat. (25 U. S.) 383, 6 L. ed. 664; Folsom v. Merchants' Ins. Co. 38 Me. 414; Clark v. United Ins. Co. 7 Mass. 365, 5 Am. Dec. 50; Elton v. Brogden, 2 Str. 1264, 9 Eng. Rul. Cas. 413; Driscol v. Passmore, 1 Bos. & P. 200, 4 R. R. 782; Driscol v. Bovil, 1 Bos. & P. 313; Phillips v. Irving, 7 Man. &

**§ 2395. When trading, etc., at port may be allowed, although not in furtherance of adventure.**—There is a distinction between stopping at a port for a purpose not connected with or in furtherance of the main objects or purposes of the original adventure, and a case where the stopping was justified in the first instance, but some act is subsequently done which is foreign to the purposes of the main voyage or adventure. In the latter case, the rule may be thus generally stated: If a vessel under a liberty sufficiently broad, or through necessity, or for the purpose of necessary repairs and supplies, or for other sufficient cause, is so far justified, under the terms of the policy, in stopping at a port or place that such act is not a deviation or change of voyage, she may subsequently, whether the insurance is on the ship, goods, or freight, engage at said port or place in trade, load, or discharge goods and the like during such period as the purposes justifying her visit permit her to lawfully stay at said port or place, and this is so even though said acts of trading, etc., are not connected with or in furtherance of the main objects of the original adventure, nor within the express permission of the policy. In determining, however, whether such acts of trading, etc., are justified, it must be carefully considered whether the risk was thereby increased in whole or in part, or whether the stay was in whole or in part protracted thereby beyond the time during which the vessel would otherwise have been justified in remaining at such port or place. If there is any increase of risk or additional delay occasioned thereby, the policy is avoided, and it would also be proper, in ascertaining whether the risk has been increased, to weigh all the advantages and disadvantages, and if it was increased in one particular, but diminished in another of equal or greater degree, the policy might not be avoided.[20] But if a vessel which has been carried by capture

G. 325, 8 Scott (N. R.) 3, 13 L. J. C. P. 145, 9 Eng. Rul. Cas. 396; Noble v. Kenneway, 2 Doug. 510–13.

[20] In Lapham v. Atlas Ins. Co. 24 Pick. (41 Mass.) 1, it appeared that a vessel was insured from West Indies to "port of discharge in the United States." The vessel sailed from West Indies for Savannah for the purpose of disposing of her cargo. She sustained some damage, stopped at Savannah, but did not discharge the cargo, but took on instead forty bales of cotton, and sailed for Boston, as a port of discharge. The court said: "It appears that while the vessel was at Savannah the master took on board forty bales of cotton on freight, and this, it is urged, released the defendants from their responsibility, but it has been settled by this court that the mere fact of putting goods on board a vessel at a port where she has a right to touch, if it neither increase the risk nor occasion delay, does not discharge the underwriter:"

*United States.*—Hughes v. Union Ins. Co. 3 Wheat. (16 U. S.) 159, 4 L. ed. 357; Kingston v. Girard, 4 Dall. (4 U. S.) 274, 1 L. ed. 831.

*Massachusetts.* — Chase v. Eagle Ins. Co. 5 Pick. (22 Mass.) 51.

into a port remains there for the purposes of trading, and for a longer time than is necessary to prepare for her voyage, it is a deviation.[1]

**§ 2396. Liberty of ports: course of voyage: change of voyage.**—A liberty of ports is also governed by the principle that the vessel in visiting a port or ports must be confined to those properly in the course of the voyage described and embraced in the termini specified, as well also as for purposes connected with the objects of the voyage, and however general the liberty given may be as to its terms, it does not authorize changing the voyage.[2] And a liberty of ports and places does not justify making a distinct intermediate voyage, however wide the terms of such clauses may be.[3]

The general words of the policy may extend the liberty to both the outward and the homeward voyage, and to all places whatsoever in the usual course thereof to and from the place mentioned,[4] or the permission to stop at uncertain ports may be limited to the homeward voyage by the terms of the policy, and by the words in which the permission is indorsed on the policy.[5] The liberty may be of such a character, in connection with the words of the policy,

*New York.*—Kane v. Colorado Ins. Co. 2 Johns. (N. Y.) 264.

*England.*—Inglis v. Vaux, 3 Camp. 447; Delaney v. Stoddart, 1 Term Rep. 22, 1 R. R. 139; Laroche v. Oswin, 12 East, 131, 11 R. R. 337; Raine v. Bell, 9 East, 195, 9 R. R. 533, 9 Eng. Rul. Cas. 365; Hamilton v. Sheddon, 3 Mees. & W. 49, M. & H. 334, 7 L. J. Ex. 1; Warre v. Miller, 7 Dowl. & R. 1, 1 Car. & P. 237, 4 B. & C. 538, 4 L. J. (O. S.) K. B. 8; Cormack v. Gladstone, 11 East, 347. 10 R. R. 518. The rule formerly contra, Hughes v. Union Ins. Co. 3 Wheat. (16 U. S.) 159, 4 L. ed. 357; Perkins v. Augusta Banking Ins. Co. 10 Gray (76 Mass.) 312, 71 Am. Dec. 654; Thomas v. Royal Exch. Assur. Co. 1 Price, 195; Sheriff v. Potts, 5 Esp. 96; Stitt v. Wardwell, 1 Esp. 610.

[1] Kingston v. Girard, 4 Dall. (4 U. S.) 274, 1 L. ed. 831.

[2] Lavabre v. Wilson, 1 Doug. 284; Hogg v. Horner, reported with the last case in 1 Marshall on Ins. (ed. 1810) 192, *191; Gairdner v. Senhouse, 3 Taunt. 16, 12 R. R. 573; Seccomb v. Provincial Ins. Co. 10 Allen (92 Mass.) 305, *citing* Stocker v. Harris, 3 Mass. 409; Bottomley v. Bovill, 5 Barn. & C. 210, 7 D. & R. 702, 4 L. J. (O. S.) K. B. 237, 29 R. R. 221; Solly v. Whittemore, 5 Barn. & A. 45; Kettell v. Wiggin, 13 Mass. 68. "Such clauses, however wide their terms may be, never give the right of changing the voyage insured. . . . Caesarigis well remarks that the captain in using the liberty given him in the policy is never to lose sight of the voyage entered upon:" Emerigon on Ins. (Meredith's ed. 1850) c. xiii. sec. 6, p. 553.

[3] Bottomley v. Bovill, 5 Barn. & C. 210, 7 D. & R. 702, 4 L. J. (O. S.) K. B. 237, 29 R. R. 221; Robertson v. Columbian Ins. Co. 8 Johns. (N. Y.) 491; Seccomb v. Provincial Ins. Co. 10 Allen (92 Mass.) 305.

[4] Lavabre v. Wilson, 1 Doug. 284, reported also in 1 Marshall on Ins. (ed. 1810) 192.

[5] Perkins v. Augusta Banking Ins. Co. 10 Gray (76 Mass.) 312, 71 Am. Dec. 654.

that the vessel is limited to a particular port of an island; as where the insurance was "at and from" a designated port, "thence to a port on the north side of Cuba, with liberty of a second port thereon," here the latter clause will be construed to mean a second port on the north side of the island, and visiting a port on the south side discharges the underwriters.[6] And it is held that the vessel may not deviate from the course even for a purpose connected with the voyage insured,[7] although a departure from the course may, as will be seen from the cases noted elsewhere, be justified under a sufficiently extensive liberty when done for a purpose connected with the voyage insured. Thus, the limited construction of the liberty given in the above cases will not be followed, however, where it is clearly evident from the whole policy that a broader or more extensive liberty was intended, and a policy may be so worded that the vessel may stop at ports or places in either of two routes, or sail backward or forward upon some intermediate voyage for the purpose of accomplishing a voyage to the terminus of either route, but even in such case, if the vessel was upon neither route of the two contemplated, nor upon an intermediate voyage with a view to accomplish a voyage to the terminus of either route, the insurers are discharged.[8] And in cases of insurances at and from or to the West Indies Islands, thence home, the liberty to call at, or touch and stay at, all or any of the islands or ports or places therein, is not so strictly limited, in view of the character of the voyage, as in those instances first above noted, reference, however, being had to the purposes of the voyage in determining whether there has been a deviation.[9]

[6] Nicholson v. Marine Ins. Co. 106 Mass. 399.

[7] Hogg v. Horner, reported in 1 Marshall on Ins. (ed. 1810) 192, *191.

[8] Bottomley v. Bovill, 5 Barn. & C. 210, 7 Dowl. & R. 702, 4 L. J. (O. S.) K. B. 237, 29 R. R. 221. Emerigon says that Pothier "thus expresses himself: 'When a policy contains a clause that it shall be permitted the master of the vessel to navigate to the right or to the left to make a port, to go and to return, this clause certainly allows the assured to turn aside from the route, to touch on the right or on the left, to discharge goods there, and to ship others in their stead, to go and return from one port to the other even in retrograding, or that the vessel shall return to its route for the purpose of reaching the destination expressed in the policy, but it does not allow him to entirely change the voyage.'" And he adds: "The contract must be interpreted in view of the principal object that has dictated it, and in doubt it must be understood with reference to principles of law and to the practice of commerce:" Emerigon on Ins. (Meredith's ed. 1850) c. xiii. sec. 6, pp. 554, 555.

[9] See Metcalf v. Parry, 4 Camp. 123, 15 R. R. 734; Bragg v. Anderson, 4 Taunt. 229, 13 R. R. 584; Barclay v. Stirling, 5 Maule & S. 6, 17 R. R. 245.

Again, where a vessel was insured "at and from" Santa Marca, a port on the Spanish main, to New York, with a liberty to use "three additional ports from the Spanish main to New York," it was held that the vessel might touch at three ports on the main within the limits of the voyage insured, and was not confined to ports on the homeward voyage after leaving the main.[10] So a liberty of ports and places coupled with the purposes and nature of the voyage may justify sailing backward and forward from port to ports or places, and warrant intermediate voyages.[11]

**§ 2397. Liberty of ports: trading, discharging, or taking in cargo.**—Trading, discharging, or taking in cargo under a liberty of ports or places must be governed by the principles stated under the last section, reference always being had to the extent of the liberty given and construed with reference to the principal object that has dictated the contract, as well as the practice of commerce. But if the clauses are precise and clear, interpretation becomes unnecessary, and the parties must be bound by the terms stipulated, for it is lawful to insert clauses permitting extensive liberty to navigate in any direction, even though the vessel under them may go out of the usual course, provided the departure is in the prosecution of the original adventure or for the voyage insured, or for the accomplishment of the purposes of the voyage insured.[12]

If a liberty is given to touch one or more times at ports beyond the Cape of Good Hope to sell the outward and procure a homeward cargo, thence to the port of final discharge, the vessel may go to the port, sail thence to another to sell her cargo, return to the first port to trade, and may also sell the homeward cargo at one port and proceed thence to another to take in a whole cargo, such acts being done in good faith, and in furtherance of purposes of the voyage, and not changing the risk.[13] So, also, where a vessel was insured under a policy which gave a liberty to sail forward and

[10] De Peyster v. Sun Mutual Ins. Co. 19 N. Y. 272, 17 Barb. (N. Y.) 306, 307, aff'd 75 Am. Dec. 331.

[11] Ashley v. Pratt, 16 Mees. & W. 471, 17 L. J. Ex. 135, aff'd 1 Exch. 257; Armet v. Innes, 4 J. B. Moore, 150, 21 R. R. 737. See §§ 2387, 2395 herein.

[12] See Armet v. Innes, 4 J. B. Moore, 150, 21 R. R. 737, per Park, J.; Williams v. Shee, 3 Camp. 469, 14 R. R. 811, per Lord Ellenborough; Hammond v. Reed, 4 Barn. & Ald. 72, 22 R. R. 629, 9 Eng. Rul. Cas. 372; Bottomley v. Bovill, 5 Barn. & C. 210, 7 D. & R. 702, 4 L. J. (O. S.) K. B. 237, 29 R. R. 221. "If the parties have explained themselves on the point in a precise, special and clear manner, interpretation becomes superfluous; cum in verbis nulla est ambiguitas non debit admittii voluntatis quæstio; and the stipulated agreement must be adhered to. The indefinite clause of being at liberty to navigate in any direction is lawful:" Emerigon on Ins. (Meredith's ed. 1850) c. xiii. sec. 6, pp. 555, 556.

[13] Thorndike v. Bordman, 4 Pick. (21 Mass.) 47.

backward to the ship's loading ports in designated localities, but which also gave permission to proceed and sail, touch and stay, at any ports or places whatsoever and wheresoever, for any purpose whatsoever, it was held that the ship might trade at any ports or places within the limit designated, even though out of the limits of the direct course, and also exchange part of her homeward cargo for other goods, such acts being in pursuance of and consistent with the purposes of the voyage. It was also decided that the terms of the policy, coupled with the relative geographical distances of the designated ports and places and the order specified in the policy, evidenced that such liberty to trade and discharge must have been contemplated in the case.[14]

A mere liberty to touch gives a liberty to trade where it is evident that the parties so intended, or where the nature of the voyage renders it necessary.[15] If the liberty given only extends the protection of the policy to the loading of goods on board, the vessel is not justified in stopping to deliver goods, for such purpose is wholly unconnected with the main object of the adventure, although if she had gone to the same port to see if she could get a cargo it would not have been a deviation.[16]

If under an insurance on a return cargo "from and immediately after the loading thereof" at the port of destination, a liberty of intermediate ports will not protect the outward cargo from the port of destination to one of the intermediate ports, where the vessel is refused admission at the port of destination.[17] In another case a vessel was insured from New York to Teneriffe, and, for an additional premium, permission was given to proceed from Teneriffe to the Isle of May and Bonavista and at and from thence to New York, but she was refused permission to enter or land any part of the cargo until after performing a quarantine of forty days, which the master, not choosing to do, went to Madeira, the nearest point where he could enter and land his cargo, and then sold and de-

[14] Armet v. Innes, 4 J. B. Moore, 150, 21 R. R. 737; Solly v. Whitmore, 5 Barn. & A. 45, 24 R. R. 274, noted below in text, and criticism thereon in note below.

[15] Urquhart v. Barnard, 1 Taunt. 450, 10 R. R. 574; Chase v. Eagle Ins. Co. 5 Pick. (22 Mass.) 51; Metcalf v. Parny, 4 Camp. 125, 15 R. R. 734. Formerly contra, United States v. The Paul Shearman, Pet. (U. S. C. C.) 98, Fed. Cas. No. 16,012.

[16] Solly v. Whitmore, 5 Barn. & A. 45, 24 R. R. 274. Mr. Phillips criticises the application of the doctrine of this case as questionable, on the ground that it could not have been intended that the ship should go out empty, and that the delivery of a cargo must have been deemed as one of the probable purposes for touching (1 Phillips on Ins. (3d ed.) 566, sec. 1007), and there is much force in this criticism. See Armet v. Innes, 4 J. B. Moore, 150, 21 R. R. 737 noted above.

[17] Graves v. Marine Ins. Co. 2 Caines (N. Y.) 339.

livered the cargo and proceeded to the Isle of May, and it was held that the going from Teneriffe to Madeira was a deviation.[18] In this last case the voyage undertaken was for the purpose of benefiting the assured, and not to further any purpose connected with the voyage. But the vessel is not confined to the usual and direct course of the voyage between the termini, but may take in goods at a port so outside the course where the main object of the adventure is to be furthered and the liberty is sufficiently broad; as in a case where permission was given to touch, stay, and trade at all or any places whatsoever and wheresoever, and to touch and stay at any ports or places whatsoever in any direction and for any purpose, necessary or otherwise.[19]

**§ 2398. Liberty of ports and to tow and assist vessels.**—A liberty to visit any port or ports for any purpose whatever and to tow and assist vessels in all situations must be construed to mean all ports in the course of the voyage described, or to tow and assist all vessels to be met with in such course. This was so held in the case of a chartered vessel where the liberty was given in the bill of lading and not in the charter.[20]

**§ 2399. Liberty to touch and stay or of port or ports may be limited by other words in policy.**—Although the voyage be described and a general liberty be given to touch and stay at any and all points and places, this liberty may be limited by other words in the policy so as to expressly confine the ship to ports and places in the usual course of the entire voyage; as where the insurance was from L. to P., M., and C., and back, with liberty to touch at designated ports, and also at all and any ports and places whatsoever, and these words are followed by the clause "and in the outward and homeward bound voyage" to touch and stay at any ports and places, the latter clause will control the former, and limit the liberty as above stated.[1] So where the insurance was on cargo to Bremen, with liberty to enter a Dutch port, when informed on arriving on that coast that it could be done in safety, limits the privilege of departing from the course except under strict compliance with the terms of the limitation.[2] In another case a vessel was insured upon a voyage described as "from New York to Gibraltar, at and from thence to Tarragona, with the liberty of using one port between Tarragona and Gibraltar, and at and from thence

[18] Robertson v. Columbian Ins. Co. 8 Johns. (N. Y.) 491.

[19] Hunter v. Leathley, 10 Barn. & C. 858, 8 L. J. (O. S.) K. B. 274, aff'd 7 Bing. 517, 5 M. & P. 457, 1 C. & J. 423, 1 Tyr. 355, 9 L. J. (O. S.) Ex. 118.

[20] Arden S. S. Co. v. Thebaud, 35 Fed. 620. See § 2427 herein.

[1] Lavabre v. Wilson, 1 Doug. 284.

[2] Duerhagen v. United States Ins. Co. 2 Serg. & R. (Pa.) 309.

to New York." Four months later permission was indorsed on the policy "to stop at one other port between Tarragona and Gibraltar." It was held that, considering the manner of expression used in giving the permission and the time it was given, the permission was to be availed of on the homeward voyage; that the assured was privileged to stop at one port between Tarragona and Gibraltar, but that he had no right to stop at Gibraltar.[3]

§ 2400. **Prohibited ports or waters: restricted waters.**—If certain waters or ports are prohibited between certain dates, this constitutes a warranty that the ship will not enter said waters nor use those ports during the period specified.[4] But although a warranty not to use a certain prohibited port means not to go into it, it does not prevent going near to, or in the direction of said port, even with an intent to enter it, for a mere intention to use a prohibited port does not violate the warranty.[5]

If the printed part of a policy warrants that certain ports, places, and designated waters shall not be used, among them ports and places in Texas, except Galveston, and foreign ports and places in the Gulf of Mexico, and by indorsement in writing on the policy the vessel is permitted to be "employed in the coasting trade on the United States Atlantic coast," and also to use gulf ports not west of New Orleans, this does not permit of a voyage from Maine to a port in the Gulf of Mexico, west of New Orleans, so as to enable assured to recover for a loss on said voyage occurring west of New Orleans.[6]

Again, a vessel insured on time, with a warranty in the policy not to use any ports of Mexico except Laguna, touched there, and in order to enter there, in accordance with the commercial regulations of Mexico, went to another port to enter and pay tonnage duties. It was held that there was such a deviation and breach of warranty as to avoid the policy.[7]

There can be no recovery for a loss while a vessel is navigating waters other than those where she is permitted to navigate.[8]

[3] Perkins v. Augusta Banking Ins. Co. 10 Gray (76 Mass.) 312, 71 Am. Dec. 654.

[4] Odiorne v. New England Marine Ins. Co. 101 Mass. 551, 3 Am. Rep. 401; Cobb v. Lime Rock Ins. Co. 58 Me. 326. See §§ 2372–74 herein. See Canton Ins. Co. v. Independent Transportation Co. L.R.A.1915C, 408, 217 Fed. 213, 113 C. C. A. 207, 45 Ins. L. J. 206; Thames & Mersey Marine Ins. Co. v. O'Connell, 86 Fed. 150, 29 C. C. A. 624; Lovett v. China Mutual Ins. Co. 174 Mass. 708, 54 N. E. 338.

[5] Snow v. Columbian Ins. Co. 48 N. Y. 624, 8 Am. Rep. 578.

[6] New Haven Steam Saw Mill Co. v. Security Ins. Co. 20 Blatchf. (U. S. C. C.) 192, 9 Fed. 779.

[7] Stevens v. Commercial Mutual Ins. Co. 26 N. Y. 397.

[8] Norris v. China Traders' Ins. Co. 52 Wash. 554, 100 Pac. 1025. See Canton Ins. Co. v. Independent Transportation Co. L.R.A.1915C,

§ 2401. **Liberty of ports where employment of ship is limited by the policy.**—If it is clearly apparent from the terms of the policy that the ship is to be employed for a specific purpose, a liberty of ports and places or to touch and stay must be construed, however broad it may be, with reference to the intended employment, and to engage the ship in a totally different employment, whereby the risk is changed, is a deviation. This was so held in a case where it was evident that the ship was to be employed as a tender to other ships in a certain trade.[9]

§ 2402. **Not touching at privileged port.**—It is not a deviation for a vessel not to stop at a port at which she has a privilege to call in the course of the voyage, because such a privilege was intended as a benefit for the insured, which he may waive for the general interests of all concerned, if he sees fit.[10] If a policy of insurance authorizes the ship to stop at a particular port, the insured need not disclose that the ship will call there, although he has information of the fact.[11]

§ 2403. **River navigation: departure from river channel.**—It is not a deviation to depart from the usual channel in sailing up a river.[12]

§ 2404. **River navigation: vessel may make usual stops for landing and loading goods, etc.**—A vessel may undoubtedly be permitted to make such usual stops for landing or loading goods, discharging or taking on passengers, and the like, as are necessary and contemplated from the character of the voyage.[13]

408, 217 Fed. 213, 113 C. C. A. 207, 45 Ins. L. J. 206; Thames & Mersey Marine Ins. Co. v. O'Connell, 86 Fed. 150, 29 C. C. A. 624; Lovett v. China Mutual Ins. Co. 174 Mass. 108, 54 N. E. 338.

[9] Hamilton v. Shedden, 3 M. & W. 49, M. & H. 334, 7 L. J. Ex. 1. See also Hartley v. Buggin, 3 Doug. 39, 9 Eng. Rul. Cas. 391, reported in 1 Marshall on Ins. (ed. 1810) 200, where Lord Mansfield said: "If a ship insured for a trading voyage be turned into a floating warehouse, or a factory ship, the risk is different. It varies the stay, for while she is used as a warehouse, no cargo can be bought for her. This is the law. The fact is that though this was not a regular thatched factory ship, yet she was used as a thatched factory ship is used. This being clear, it follows that the risk is different in point of length from that which is generally understood in the trade, and consequently from that which was insured." And converting the vessel into a factory ship, or receiving ship for slaves, was therefore held a deviation. The ship was also delayed seven months beyond the usual time of vessels engaged in the trade.

[10] Cross v. Shurtleff, 2 Bay (S. C.) 220, 1 Am. Dec. 645. See Marsden v. Reed, 3 East, 572, 7 R. R. 516; Hale v. Mercantile Mutual Ins. Co. 6 Pick. (23 Mass.) 172.

[11] Hubbard v. Coolidge, 2 Gall. (U. S. C. C.) 353, Fed. Cas. No. 6,816.

[12] Keeler v. Fireman's Ins. Co. 3 Hill (N. Y.) 250.

[13] Lockett v. Merchants' Ins. Co. 10 Rob. (La.) 339; Lowry v. Russel, 8 Pick. (25 Mass.) 360.

**§ 2404a. Vessel constructed for river navigation: trial trips: delay: usual course of voyage.**—Where a vessel was nonseagoing, but was being constructed for use as a river steamer, and the policy was issued for a double premium to cover a voyage from the place where she was being built to that where she was intended to be used, the making of two trial trips, neither of which extended beyond the limits of the port where she was being constructed, did not constitute a deviation, where such trial trips were made to determine whether she was suitable for the voyage intended and were therefore a reasonable part of the preparation therefor, nor, in such case, for the same reason, is a delay in commencing the voyage a deviation as a matter of law; nor is taking an inside course before making the open sea a deviation as a matter of law, having in view the character of the vessel, the purpose for which she was built, and the motive and circumstances attending such act, and therefore the question is one for the jury.[14]

**§ 2405. Masters and mariners: negligence or mismanagement: remote cause.**—If the proximate cause of the loss is one of the perils insured against, the fact that the remote cause may be traced to the masters or mariners does not release the insurers, but a voluntary deviation by the master is not such a remote cause as to bring it within the rule.[15] A departure to obtain water, the necessity for which was caused by the negligence of one of the seamen in losing the water from a cask, is not such a deviation as will avoid the policy, unless, perhaps, it be proven that the neglect occurred during the master's unjustifiable absence.[16] The act of lashing a flat boat, ascending the Mississippi and laden with produce, to a steamer for towing is of itself a violation of the contract of insurance, but if, after a collision with the steamer, the master, with the honest intention of averting imminent danger of loss, causes such flatboat to be lashed to and taken in tow by the steamer to the nearest landing, the underwriters are not thereby discharged.[17]

**§ 2406. Departure from course through ignorance of master.**—A departure from the course, to constitute a deviation, should be voluntary, yet if it takes place through the master's ignorance, it will be deemed voluntary and a deviation, although a mere honest mistake of judgment, where the exercise of a discretion is required in taking the ship out of the course, made by a skilful, discreet, and prudent master, will not constitute a deviation.[18]

[14] Thebaud v. Great Western Ins. Co. 155 N. Y. 516, 50 N. E. 284, 27 Ins. L. J. 756.

[15] Natchez v. Stanton, 2 S. & M. (10 Miss.) 340, 41 Am. Dec. 592. See § 2167 herein.

[16] Lapene v. Sun Mutual Ins. Co. 8 La. Ann. 1, 58 Am. Dec. 668.

[17] Stewart v. Tennessee Marine & Fire Ins. Co. 1 Humph. (20 Tenn.) 242.

[18] Phyn v. Royal Exch. Assur. Co.

§ 2407. **Master's judgment and discretion.**—The master must be the principal judge of the degree of peril to which his ship is exposed, of her ability to withstand the same, of the necessity of departing from the usual course of the voyage, and whether the ship may safely proceed to a nearer or more distant port for repairs, and also which port offers, under the circumstances, the greatest facility for repairs. If he acts in good faith, and has no other purpose but to conduct the vessel by the safest and shortest course to her selected port of necessity, such acts are within the spirit of the contract, and will be protected thereby, and the deviation justified. In brief, if the master, being one of ordinary skill and discretion, acts in good faith and forms the best judgment he can under the existing circumstances, having in view the safety of lives on board and next thereafter the security of the property intrusted to him, it is all that the contract can be reasonably held to require, and, if the safety of life and property require it, the master should seek the nearest land accessible without needless delay or divergence from the course thereto.[19]

So if a master, being obliged to repair his vessel, returns to port and acts with good faith and sound discretion, there is no deviation.[20] And the master may, therefore, depart from the usual course for the purpose of saving life, ship, or property, if necessity or reasonable cause impels him thereto. There is in every policy an implied consent and authority to the masters so to do, whether the urgent danger which it is sought to avoid be a peril insured against or not.[1]

§ 2408. **Instructions to master: generally.**—The master's discretion as to the mode of prosecuting the voyage or of the course to be pursued may be limited to the instructions of the owner of the ship, for it is the master's duty to follow instructions, even though his own judgment might not approve of the course prescribed.[2]

7 Term Rep. 505, 4 R. R. 508; See Tait v. Levi, 14 East, 481, 13 R. R. 289; Brazier v. Clapp, 5 Mass. 1, per Sedgwick, J.; Turner v. Protection Ins. Co. 25 Me. 515, 43 Am. Dec. 294. See the following section.

[19] Turner v. Protection Ins. Co. 25 Me. 515, 43 Am. Dec. 294; Brazier v. Clapp, 5 Mass. 1, 8, per Sedgwick, J.; Silloway v. Neptune Ins. Co. 12 Gray (78 Mass.) 73.

[20] Wiggin v. Amory, 13 Mass. 118.

[1] Goyon v. Pleasants, 3 Wash. (U. S. C. C.) 241, Fed. Cas. No. 5,647; Riggin v. Patapsco Ins. Co. 7 Har. & J. (Md.) 279, 16 Am. Dec. 302; Graham v. Commercial Ins. Co. 11 Johns. (N. Y.) 352; Reade v. Commercial Ins. Co. 3 Johns. (N. Y.) 352, 3 Am. Dec. 495; D'Aguilar v. Tobin, Holt N. P. 185, 2 Marsh. 265. "The deviation is proper when made in good faith and upon reasonable grounds of belief in its necessity to avoid a peril:" Deering's Annot. Civ. Code Cal. sec. 2695, subd. 3.

[2] 2 Duer on Marine Ins. (ed. 1846) 491, sec. 59. See New York Firemen's Ins. Co. v. Lawrence, 14 Johns. (N. Y.) 46, per Kent, Ch.

§ 2409. **Departure from route to avoid seizure in pursuance of instructions.**—If the instructions evidence a prudent exercise of discretion, they may permit the vessel's going out of the most usual and least dangerous route to avoid a peril; as where under an insurance from New York to Bordeaux the owners, being apprehensive of detention by British cruisers, instructed the master to go through the sound, instead of through the narrows, to the Hook, which latter was the usual course and least dangerous. In this case the owners were on the spot, and were probably most competent to judge of a danger, and there was no reason or necessity for consulting the master.[3]

§ 2410. **Liberty of ports for orders: revisiting port.**—A vessel may be insured with liberty of ports for orders, and under such a policy, coupled also with the liberty of ports for any purpose whatever, the ship touched at Carlsham for orders, in pursuance of which she proceeded to Schwinnemunde for orders, off which she arrived, and receiving instructions to return to Carlsham because it was unsafe to land at Schwinnemunde, and while undergoing repairs, her cargo was seized, it was held no deviation.[4]

§ 2411. **Visiting port for information or orders.**—If a vessel is insured to either or both of two ports, and one port is elected as that of the ship's destination, but the vessel is temporarily prevented from entering, it does not constitute a deviation for the master to put into a third port to ascertain to which of the two ports he had better visit.[5] And a ship insured to a port of discharge on a certain coast may stop at a port on said coast for the purpose of ascertaining the state of the market, and to enable the master to determine whether he will discharge there or proceed to another port. And the vessel may proceed thence to that port of discharge which promises the best sales; he is not obliged to discharge at the first port.[6]

But even an extensive liberty to call at certain places must be limited to the calling for purposes connected with that particular voyage, and it is a deviation to call for the purpose of obtaining information to be used for the purpose of another voyage in no way connected with that insured.[7]

[3] Reade v. Commercial Ins. Co. 3 Johns. (N. Y.) 352, 3 Am. Dec. 495. See § 2176 herein.

[4] Andrews v. Mellish, 5 Taunt. 496, aff'g 2 Maule & S. 27, 16 East, 312. See Mellish v. Andrews, 15 East, 13, 13 R. R. 351.

[5] Clark v. United Ins. Co. 7 Mass. 365, 5 Am. Dec. 50.

[6] Laphan v. Atlas Ins. Co. 24 Pick. (41 Mass.) 1; Coolidge v. Gray, 8 Mass. 527.

[7] Hammond v. Reid, 4 Barn. & Ald. 72, 22 R. R. 629, 9 Eng. Rul. Cas. 372.

§ 2412. **Delay or departure from route for political information.**—Delay for a few days at an intermediate port was held not a deviation, when it was for the purpose of obtaining news from Mexico, with which country we were then at war, and the next port was on the Rio Grande, though under the control of our troops.[8]

Under certain English decisions covering what were known as Baltic risks, arising from the political exigencies brought about by Napoleon's continental system, and under which policies the risk was to a port or ports in the Baltic, backward or forward, with liberty to touch and stay at any or all ports or places for all purposes, it was held that the liberty was sufficiently broad to permit putting into a port to ascertain the political state of other ports, and under a very similar policy where the liberty was extended to call for orders, and the vessel had not selected her port of discharge, it was held that she might call twice at the same port for orders.[9]

§ 2413. **Delay to await orders as to port of discharge under permission in policy.**—A vessel may, under terms of the policy, be justified in a delay to await instructions; as where a policy was upon goods consigned to A upon vessels from Santos to New York, Baltimore, or Boston direct, "or via Hampton Roads for orders," and it was held that the vessel was justified in delaying eighteen days at Hampton Roads for orders, and there was no deviation.

It further appeared that the master wired A his arrival, and the former received a letter directing him to await instructions. A and his agents during the period of delay were endeavoring to sell the cargo at either port of discharge, but without success. It was further decided that a reasonable time for selling the cargo was permissible, and the delay therefore excusable. It was also decided that an indorsement of the policy, whereby it was agreed that an extra premium should be paid in case a vessel used a port of call exceeding seven and not over fifteen days, justified a construction of an understanding that there might be a delay of fifteen days at Hampton Roads.[10]

§ 2414. **Instructions to deviate: whether must be disclosed.**—A question has arisen whether the assured is not obligated to disclose to the underwriter instructions given to the master, and whether, in case of failure so to disclose the same, the underwriter is released by the concealment, or only from the time of the actual

[8] Bradley v. National Ins. Co. 3 La. Ann. 708, 48 Am. Dec. 465.

[9] 1 Arnould on Marine Ins. (Perkins' ed. 1850) 374, *369; Id. (Maclachlan's ed. 1887) 475; Id. (8th ed. Hart & Simey) secs. 403 et seq., pp. 525 et seq., *citing* Rucker v. Alnutt, 15 East, 278, 13 R. R. 465; Mellish v. Andrews, 2 Maule & S. 27; Andrews v. Mellish, 5 Taunt. 496. See Id. 15 East, 13, 16 East, 312.

[10] Arnold v. Pacific Mutual Ins. Co. 78 N. Y. 7.

deviation. Mr. Duer is of the opinion that inasmuch as the master is obligated to follow instructions to deviate, and such instructions are concealed from the underwriter, the risk never attaches,[11] and such seems to be substantially the English rule as stated by Mr. Arnould,[12] under which the case relied on is that of a voyage "at and from" London to Jamaica. The master was instructed to touch Cape St. Nicholas mole for the purpose of landing stores. Up to a certain point the voyage was over the same route; from there on there were three courses, two to the southward and one to the north of San Domingo, of which three courses the master was by usage permitted a choice, although the usual and safest of the courses were the southern routes. The vessel was captured on the northern course before she had turned off for St. Nicholas' mole, and it was held that the instructions had taken away the master's discretion, and the concealment of the intention to go to St. Domingo released the underwriters.[13] It is noteworthy that in this case the ship had passed the point of divergence of the three routes before she was lost, and it is doubtful from the general tenor of the opinions given if the court would have released the insurers had the vessel been lost before the dividing point was reached. It is true that the proposition is applicable that the insurers have a right to rely upon the master's judgment and discretion in choosing the safest and most expeditious route, under the circumstances, existing at the time when the dividing line is reached. But it is doubtful if it is necessary to disclose whether it is intended to rely upon the master's judgment or not. Assume that such instructions were withdrawn before the dividing point was reached. In what respect does it then differ from an intention to deviate? Again, is not the fact one of which the insurer waives being informed, and, therefore, to be placed in the same category with cases under the rule which does not require the disclosure of information respecting seaworthiness? It seems most reasonable, in view of the whole tenor of the court's opinion in the above

[11] 2 Duer on Marine Ins. (ed. 1846) 491–99, where he reviews Marine Ins. Co. v. Tucker, 3 Cranch (7 U. S.) 357, 2 L. ed. 466; Talcott v. Marine Ins. Co. 2 Johns. (N. Y.) 130; New York Firemen's Ins. Co. v. Lawrence, 14 Johns. (N. Y.) 46, per Kent, Ch.; Lawrence v. Ocean Ins. Co. 11 Johns. (N. Y.) 241; Silva v. Low, 1 Johns. (N. Y.) 184, 193; 3 Benecke & Rossetti, 92–94; Middlewood v. Blakes, 7 Term Rep. 162, 4 R. R. 405.

[12] 1 Arnould on Marine Ins. (Perkins' ed. 1850) 560, 561, *557; Id. (8th ed. Hart & Simey) sec. 389, pp. 509, 510, *citing* Middlewood v. Blakes, 7 Term Rep. 162, 4 R. R. 405.

[13] Middlewood v. Blakes, 7 Term Rep. 162, 4 R. R. 405, Lawrence, J., however, did not consider this ground tenable.

English case, as well as in consideration of what is declared by eminent authority in this country, to hold that the question is not one of concealment merely, but one as to whether there has been a change of the voyage or mere intention to deviate, as governed by the principles applicable to the determination of the questions.[14]

**§ 2415. Whether an act be deviation, change of voyage, or barratry.**—Whether an act be a deviation or barratrous must, as will be seen from the definition of barratry hereafter given, depend primarily upon whether it was done by the master in his character as such, or by the mariners with a fraudulent or criminal intent to damnify the owners, or the charterers of the ship, who are owners pro hac vice. Where the act is in pursuance of the owners' instructions, or with their knowledge and consent, or for their interest and benefit, this is an important factor. Barratry does not cover acts done through mere ignorance of the master or through his carelessness. It does, however, comprehend gross malversation in office by the master, any wilful cheat or fraud, or wilful act of known illegality, breach of trust with a dishonest purpose to prejudice the owner, and gross negligence amounting to criminality. A willful deviation for the benefit of the owners is not barratry;[15] nor is the conduct of the master barratrous in deviating

[14] Talcot v. Marine Ins. Co. 2 Johns. (N. Y.) 130, 136; New York Firemen's Ins. Co. v. Lawrence, 14 Johns. (N. Y.) 46, per Kent, Ch.; Houston v. New England Ins. Co. 5 Pick. (22 Mass.) 89; Reade v. Commercial Ins. Co. 3 Johns. (N. Y.) 352, 3 Am. Dec. 495. See Henshaw v. Marine Ins. Co. 2 Caines (N. Y.) 274. "It is not necessary to the validity of the insurance at the outset that the assured should disclose his intention to enhance or vary the risk described in the policy at some intermediate stage. Such enhancement or change affects the policy, if at all, as a deviation, and not as a concealment:" 1 Phillips on Ins. (3d ed.) 18, 319, sec. 582. And in another place the same author says: "I do not see how the case (viz., Middlewoods v. Blakes) can be distinguished from any other of an originally intended deviation . . . or unjustifiable delay, or other originally intended forfeiture of the policy." And also that Mr. Arnould's references do not support the construction given this case: Id. p. 550, sec. 992, note 4. See also 1 Parsons on Marine Ins. (ed. 1868) 486, 487, note 1. See §§ 2375, 2377 herein. Mr. Maclachlan says of Middlewood v. Blakes that if the intention to send the ship to St. Nicholas mole was formed after the policy was effected, it was merely an intention to deviate, and not a change of voyage, as Jamaica was not lost sight of as the terminus ad quem, but that if it was formed definitely when the policy was effected, as he inferred it to have been, the policy never attached. "And to call the absence of any mention of St. Nicholas mole a concealment seems, under these circumstances, a misuse of language:" 1 Arnould on Marine Ins. (Maclachlan's ed. 1887) 461, n. 2; Id. (8th ed. Hart & Simey) sec. 389, pp. 509, 510.

[15] Dederer v. Delaware Ins. Co. 2

by directions of the shipowners, notwithstanding the owner might be liable to the owners of goods insured;[16] nor is proceeding on the wrong course, owing to the master's gross ignorance, a barratrous deviation, there being no fraud or criminality.[17] And where a ship had been piratically taken off by its crew, and the master of a vessel was to receive for her recapture a part of a certain sum of money, dependent as to his proportion of said amount upon the owner's pleasure, and departed from his course in pursuit of the sloop, this was held a deviation, and not a barratrous act, there being an absence of fraud or criminal conduct.[18] So if the master, owing to a misunderstanding or mistake as to sailing instructions, sails on a different voyage not warranted by the contract, such act is not barratrous;[19] and delay at a port of distress is not a deviation, but barratry, when the master while there procures forged papers, changing the ship's name and absents himself longer than necessary, and then runs away with the vessel, and the barratrous act commences, in such case, with this delay.[20] A deviation which is the voluntary, illegal, and fraudulent act of the master, done without the knowledge or consent of the owner, pro hac vice is barratrous.[1]

**§ 2416. Vessel forced to deviate by barratrous acts.**—If barratry is one of the perils insured against, it is not a deviation if the vessel is taken out of her course by the barratrous act of her master.[2]

**§ 2417. What justifies deviation generally: statutory or Code provisions.**—As will be apparent from the several sections under this chapter, the terms of the policy may warrant what would otherwise be a deviation. It is, therefore, material to ascertain, in the first

Wash. (U. S. C. C.) 61, Fed. Cas. No. 3,733.

As to barratry, see §§ 2741 et seq. herein.

As to barratry as excuse for deviation, see marine insurance act of England, sec. 49 (1), under § 2417 herein.

[16] Nutt v. Bourdieu, 1 Term Rep. 323, 1 R. R. 211.

[17] Phyn v. Royal Exch. Assur. Co. 7 Term Rep. 505, 4 R. R. 508; Earle v. Rowcroft, 8 East, 126, 139, 9 R. R. 385, 14 Eng. Rul. Cas. 345, per Lord Ellenborough.

[18] Hood v. Nesbit, 2 Dall. (Pa.) 137, 1 Yeates (Pa.) 114, 1 L. ed. 321, 1 Am. Dec. 265. See Hood's Ex'rs v. Nesbit.

[19] Bottomley v. Bovill, 5 Barn. & C. 210, 4 L. J. (O. S.) K. B. 237, 29 R. R. 221, 7 D. & R. 702.

[20] Roscow v. Corson, 8 Taunt. 684, 21 R. R. 507.

[1] Vallezjo v. Wheeler, Cowp. 143, Lofft, 631. See further as to what is a departure from the voyage and what barratry, Martin v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 254, Fed. Cas. No. 9,161; Glidden v. Manufacturers' Ins. Co. 1 Sum. (U. S. C. C.) 232, Fed. Cas. No. 5,482; West v. Columbian Ins. Co. 5 Cranch (U. S. C. C.) 309, Fed. Cas. No. 17,421; Buckley v. Protection Ins. Co. 2 Paine (U. S. C. C.) 82, Fed. Cas. No. 2,118.

[2] McIntyre v. Bowne, 1 Johns. (N.

instance, the exact terms of the policy and the character and nature of the voyage. If the act claimed as a deviation be not one within the permission of the policy, it should be determined whether there is a necessity or other justifying cause, having in view the fact that deviation is a voluntary act. The main question to be considered in all cases is the nature and extent of the necessity, or justifying cause which will warrant a departure from the usual course, or whether the delay has been reasonable and necessary under the particular circumstances or to accomplish the purposes of the voyage. Another point is whether the ship has departed further than the necessity requires, and the judgment and discretion of a master of competent skill and prudence also constitutes an important factor. A deviation will not, as we have seen, be justified to insure the success of the adventure, as distinguished from the purposes of the voyage, nor for mere purposes of commerce. The necessity which justifies a deviation must be a real and inevitable one, or reasonable ground must exist for believing it urgent, and must not be created by the assured or any agent of his.[3] Under the

Y.) 299. In this case the master agreed with the charterers for a stated sum to deviate.

[3] *United States.*—Oliver v. Maryland Ins. Co. 7 Cranch (11 U. S.) 487, 493, 3 L. ed. 414; Cruder v. Philadelphia Ins. Co. 2 Wash. (U. S. C. C.) 262, Fed. Cas. No. 3,453; Crousillat v. Ball, 4 Dall. (U. S.) 294, 1 L. ed. 840, 3 Yeates (Pa.) 375, 2 Am. Dec. 375.

*Louisiana.*—Lapene v. Sun Mutual Ins. Co. 8 La. Ann. 1, 58 Am. Dec. 668.

*Massachusetts.* — Greene v. Pacific Ins. Co. 9 Allen (91 Mass.) 217; Kettel v. Wiggin, 13 Mass. 72; Whitney v. Haven, 13 Mass. 172; Brazier v. Clap, 5 Mass. 1, 9, per Sedgwick, J.

*New York.*—Robinson v. Marine Ins. Co. 2 Johns. (N. Y.) 89, per Kent, Ch.; Neilson v. Columbian Ins. Co. 1 Johns. (N. Y.) 301.

*South Carolina.*—Miller v. Russell, 1 Bay (S. C.) 309.

*England.* — D'Aguilar v. Tobin, Holt N. P. 185, 2 Marsh. 265; Phillips v. Irving, 13 L. J. Com. P. 145, 7 Man. & G. 325, 8 Scott (N. R.) 3, 9 Eng. Rul. Cas. 396; Scott v. Thompson, 1 Bos. & P. (N. R.) 181; Driscol v. Bovil, 1 Bos. & P. 313.

1 Marshall on Ins. (ed. 1810) 205. "A deviation never puts an end to the insurance, unless it be a voluntary act of those who have management of the ship:" Scott v. Thompson, 4 Bos. & P. 181 (1 Bos. & P. [N. R.] 181), per Mansfield, C. J. "Change of route occasioned by tempest, to avoid dangers of ground, to fly an enemy, or through other perils of the sea, alters in no respect the insurance. The loss suffered in the route are at the charge of the insured:" Emerigon on Ins. (Meredith's ed. 1850) c. xiii. sec. 15, p. 576. "In all cases the necessity must be a real and imperative necessity, affecting the vessel, such as actual force preventing the master from exercising his will, peril of the sea, danger of capture, want of repairs, disability of the crew, or unseaworthiness, occurring under such circumstances that the master, acting upon his best judgment for the interest of all parties, has no alternative, and is forced to leave his route or delay its prosecution. Where the departure is caused by such a necessity,

California Code a deviation may be justified, by circumstances over which neither the owner of the ship or the master has any control, in cases where it is necessary to comply with the warranty, or to avoid a peril, whether insured against or not, where reasonable grounds exist that it is necessary to avoid a peril, to save human life, or relieve a vessel in distress, provided that in these last cases it is made in good faith, but is not justified in any other cases than those herein specified.[4]

A deviation will be justified by necessity in case of an insurance against a particular risk, as well as in the case of a general insurance.[5] But where necessity sanctions a deviation, the deviation must be strictly commensurate with the vis major which causes it.[6]

A necessity for a deviation is not in all cases to be tested by the result. If, under the circumstances, there is a justifiable ground, it is sufficient.[7] The master is not obligated to sacrifice a deckload before deviating for a port of necessity.[8] A deviation may, as will be noted hereafter, be justified by compulsion a second time, by the necessity for repairs, to save life, to avoid certain dangers, to relieve ships in distress and in other cases.

The marine insurance act of England provides: "Deviation or delay in prosecuting the voyage contemplated by the policy is excused: (a) Where authorized by any special term in the policy; or (b) Where caused by circumstances beyond the control of the master and his employer; or (c) Where reasonably necessary in order to comply with an express or implied warranty; or (d)

the change of route in no respect alters the insurance, because the course of a sea voyage must at times be necessarily subject to extraordinary perils of the sea and contingencies beyond the control of the master, and in the presence of which he is forced to succumb; and when they occur and he is obliged to depart from the usual course of the voyage, there is no deviation in the legal sense of the term, for the departure is the necessary incident of the route named in the policy as prosecuted at the time by the ship. The probability of such occurrences is well understood; they are known perils of the voyage, and enter into the ordinary contract of marine insurance. And when the master, compelled by the necessity, does that which is for the benefit of all concerned, the act is within the intention of the policy as much as if expressed in terms:" Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654, per Endicott, J. As to "unseaworthiness," noted in this quotation, see §§ 2180–83, 2390 herein.

[4] Deering's Annot. Civ. Code Cal. secs. 2695, 2696.

[5] Robinson v. Marine Ins. Co. 2 Johns. (N. Y.) 89.

[6] Maryland Ins. Co. v. Leroy, 7 Cranch (11 U. S.) 26, 3 L. ed. 257. "The deviation and extent of it must be warranted by the degree of the necessity:" 1 Marshall on Ins. (ed. 1810) 205.

[7] Byrnes v. Louisiana State Ins. Co. 7 Mart. (La.) N. S. 126.

[8] American Ins. Co. v. Francia, 9 Pa. St. 390.

Where reasonably necessary for the safety of the ship or subject-matter insured; or (e) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or (f) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or (g) Where caused by the barratrous conduct of the master or crew if barratry be one of the perils insured against.

"(2) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable dispatch." [9]

**§ 2417a. Agreement or clause permitting deviation: "due notice" of deviation.**—Although an act may be necessarily done in furtherance of the insured journey and so be within the scope of the adventure, and the risk be all the time a transit risk, still if such act be so far continued as to result in an unreasonable delay, it will constitute an unjustifiable deviation which the premium paid does not cover. In such case, however, deviation may be one in the course of the voyage within the intent of a deviation clause covering assured in the event of deviation or change of voyage "at a premium to be hereafter arranged" so as to make the underwriter liable, and this applies where, a box of bullion was insured "at and from" in a specified steamer "including all risks of every description from the mines by escort" to a specified railway station, thence by rail a certain distance to a specified port, thence to the port of destination, and it appeared that the station master at said railway station refused wrongfully to receive the box, except at the owner's risk rate, in consequence of which it was taken for safety to a place at a distance off the route, where it was kept in a safe for a month during negotiations with the railway company, and was then forwarded to its destination by the route prescribed, and upon arrival there it was discovered that a bar of gold had been stolen while the box was delayed as above stated.[10] An agreement that in case of deviation the vessel shall be held covered at a premium to be arranged provided "due notice be given" by assured on receipt of advice of such deviation, "due notice" does not mean that no notice is to be considered as "due" unless it is given in sufficient time to enable the underwriter to still protect himself by reinsurance, but the condition is satisfied and assured is covered by the giving of such notice as he could give after re-

[9] Marine insurance act 1906 (6 Edw. VII. c. 41) sec. 49 (1); Butterworth's Twentieth Century Stats. (1900–1909) p. 410; 15 Chitty's Stats. (1902–1907) p. 893.

[10] Hyderabad (Deccan) Co. v. Willoughby (1899) 2 Q. B. D. L. R. 530, 68 L. J. Q. B. 862.

ceiving advice of the deviation, and even though he is not advised of the deviation until after loss a notice then given is sufficient.[11]

**§ 2418. Effect of usage and exigencies of trade.**—If the deviation is justified by a uniform and well-established usage, or the exigencies of trade, in which the vessel is engaged, are such as must have been in the contemplation of the parties from the character of the trade, or if the mode of trading is usual to vessels of that description, or if the voyage is according to usage, the insurers will not be released, although the deviation might not have been justified in the absence of such usage which, to justify a deviation, must be so certain and generally known as to raise the presumption that it was generally known as the law of that trade.[12]

And although the termini and intermediate ports are named, such description does not preclude stopping at other intermediate ports which by the course of navigation or the usage of trade are usually stopped at in such voyages, unless the terms of the policy expressly exclude the usage.[13] And while deviation is a voluntary departure, without necessity or reasonable cause, from the regular and usual course of a voyage, still, to touch at a port, out of the regular course, to receive part of a cargo, is not a deviation, if within the known usage of trade.[14] So usage may warrant a

[11] Mentz Decker & Co. v. Maritime Ins. Co. [1910] L. R. 1 K. B. 132, 79 L. J. K. B. 104, 101 L. T. 808, 15 Com. Cas. 17, 11 Asp. M. C. 339.

[12] *United States.*—Bulkley v. Protection Ins. Co. 2 Paine (U. S. C. C.) 82, Fed. Cas. No. 2,118.

*Louisiana.*—Lockett v. Merchants' Ins. Co. 10 Rob. (La.) 339.

*Maine.*—Folsom v. Merchants' Ins. Co. 38 Me. 414.

*Massachusetts.*—Parsons v. Manufacturers' Ins. Co. 16 Gray (82 Mass.) 463; Lowry v. Russell, 8 Pick. (25 Mass.) 360.

*Missouri.* — Walsh v. Homer, 10 Mo. 6, 45 Am. Dec. 342.

*New York.*—Child v. Sun Mutual Ins. Co. 3 Sand. (N. Y.) 26; Union Ins. Co. v. Tyson, 3 Hill (N. Y.) 118.

*England.*—Stewart v. Bell, 5 Barn. & A. 238, 24 R. R. 342; Leathley v. Hunter, 1 Tyr. 355, 1 C. & J. 423, aff'g 7 Bing. 517, 9 L. J. (O. S.) Exch. 118, 5 Moore & P. 457; Hunter v. Leathley, 10 B. & C. 858, 8 L. J. (O. S.) K. B. 274; Lindsay v. Janson, 4 Hurl. & N. 699, 28 L. J. Ex. 315; Salvador v. Hopkins, 3 Burr. 1707; Laroche v. Oswin, 12 East, 131, 11 R. R. 337; Bond v. Gonsales, 2 Salk. 445, Holt, 469; Ougier v. Jennings, 1 Camp. 505n, 10 R. R. 739; Vallance v. Dewar, 1 Camp. 503, 10 R. R. 738; Armet v. Innes, 4 Moore, 150, 21 R. R. 737; Cormack v. Gladstone, 11 East, 347, 10 R. R. 518; Kingston v. Knibbs, 1 Camp. 508n, 10 R. R. 742.

[13] McCall v. Sun Mutual Ins. Co. 66 N. Y. 505.

[14] Oliver v. Maryland Ins. Co. 7 Cranch (11 U. S.) 487, 3 L. ed. 414. *Cited* in Hostetter v. Park, 137 U. S. 30, 40, 34 L. ed. 572; 11 Sup. Ct. 1; Constable v. National Steamship Co. 154 U. S. 51, 66, 38 L. ed. 903, 912, 14 Sup. Ct. 1062; Thatcher v. McCulloh, Olcott, 370, Fed. Cas. No. 13,862; Hostetter v. Gray, 11 Fed. 179, 181; Natchez Ins. Co. v. Stanton, 2 Smedes & M. 340, 376, 41 Am. Dec. 592; Morgan v. Dibble, 29 Tex. 120, 94 Am. Dec. 264.

return to a port from which a vessel has sailed; as where custom permits of a return for clearance,[15] and the master may by usage be permitted a choice of certain routes.[16] The usage and course of trade are also material in determining whether the delay of a vessel in taking in her cargo is unreasonable or not.[17] A delay which is necessary, in accordance with the course of trade, to accomplish the purposes of the voyage is not such a deviation as will avoid the insurance on a round voyage.[18] So a considerable delay at a particular port on a voyage, where different ports are to be visited, caused by the efforts of the master to obtain, by sales of the cargo at retail, the price prescribed by the owner, does not, if bona fide and conforming to the ordinary usage, constitute a deviation.[19]

§ 2419. **Necessity for repairs.**—In case an insured vessel is so far injured as to render it unsafe, in the judgment of a master of competent skill, prudence, and discretion, to proceed on the voyage without repairs and refitting, he should seek the nearest port practicable therefor; but the master can deviate only so far as is necessary for the required repairs, and if the peril is not imminent, he is not obligated to seek the nearest port out of the course of the voyage. The master must also, in making repairs, content himself with only such repairs as can be most expeditiously made in order that the ship may continue the voyage insured. Thus, if a vessel sustains damages during a gale, she may, if necessary, seek a port of repair out of the course of the voyage insured. If the voyage has been undertaken for any other purpose than repairs, it is a deviation.[20]

The master should, however, in determining what port to seek

[15] Parsons v. Manufacturers' Ins. Co. 16 Gray (82 Mass.) 463.

[16] See §§ 2367, 2368 herein.

[17] Oliver v. Maryland Ins. Co. 7 Cranch (11 U. S.) 487, 3 L. ed. 414; Columbian Ins. Co. v. Catlett, 12 Wheat. (25 U. S.) 383, 6 L. ed. 664. *Cited* in Hostetter v. Park, 137 U. S. 30, 40, 34 L. ed. 572, 11 Sup. Ct. 1; Constable v. National Steamship Co. 154 U. S. 51, 66, 38 L. ed. 903, 911, 14 Sup. Ct. 1062; Hostetter v. Gray, 11 Fed. 179, 181; Mutual Benefit Life Ins. Co. v. Ruse, 8 Ga. 534, 540; Walsh v. Homer, 10 Mo. 6, 16, 45 Am. Dec. 342.

[18] Columbian Ins. Co. v. Catlett, 12 Wheat. (25 U. S.) 383, 384, 6 L. ed. 664.

[19] Columbian Ins. Co. v. Catlett, 12 Wheat. (25 U. S.) 383, 6 L. ed. 664. *Cited* in Hostetter v. Gray, 11 Fed. 181; The Giulio, 34 Fed. 911; Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 81, 30 Am. Rep. 654; Arnold v. Pacific Mutual Ins. Co. 78 N. Y. 7, 17.

[20] Aiken v. Mississippi Mutual Ins. Co. 14 Mart. (La.) N. S. 661; Turner v. Protection Ins. Co. 25 Me. 515, 43 Am. Dec. 294; Lapham v. Atlas Ins. Co. 24 Pick. (41 Mass.) 1; Motteaux v. London Assur. Co. 1 Atk. 545, 13 Eng. Rul. Cas. 467; O'Reilly v. Gonne, 4 Camp. 249, 16 R. R. 788; Pelly v. Royal Exch. Assur. Co. 1 Burr. 341; 1 Marshall on Ins. (ed. 1810) 207, *209, reporting Lavabre v. Wilson, 1 Doug. 284.

for repairs, consider the extent of the danger, the distance of the port from the course of the voyage, the facilities afforded, and the quickness with which the necessary material can be there procured, and, although there are other nearer ports, the vessel may seek the most proper place for repairs.[1] And if a vessel is driven by stress of weather into a port of distress, or makes a port of necessity, the master is not bound to remain at such port for the needed repairs or refitting, but may in good faith and the exercise of sound judgment, having in view the interests of all concerned, go to a second port more suitable in point of convenience, quickness, and expense, and for refitting; and this rule would also apply in case the necessary repairs cannot be had at the first port.[2] It is held, however, that if a flatboat navigating the Mississippi, after sustaining damage by collision, neglects to make necessary repairs through the master's belief that they are not required, or if repairs not being practicable he neglects to transship the cargo, that the underwriters are released.[3]

After a departure from the course for repairs the master must pursue the new course without deviation, so as to reach the ship's destination in the shortest and most expeditious manner, unless prevented by necessity, some unforeseen obstacle, or other justifying cause, and any wilful departure from the course of the new voyage or unnecessary delay thereon will be a new deviation, releasing the insurer as in the original voyage; although the master is not obligated at all events to enter the new port, as in case the state of the weather renders it dangerous, but he may seek another convenient port without vitiating the insurance.[4] And where a vessel insured to Maderia, and being in sight of it, was prevented by heavy weather from entering, and the master deemed it prudent to run for the Cape de Verde Islands, and might have obtained provisions but not repairs at Mogadore, but might have returned to Madeira, this was held evidence of a deviation without justifying cause.[5]

If the accident happens while the property is at the risk of the underwriters, and the ship cannot be repaired at the port of departure, the vessel may go to the nearest port where the damage

[1] Turner v. Protection Ins. Co. 25 Me. 515, 43 Am. Dec. 294; Morgan v. Oswald, 3 Taunt. 554.

[2] Silloway v. Neptune Ins. Co. 12 Gray (78 Mass.) 73; Hall v. Franklin Ins. Co. 9 Pick. (26 Mass.) 466.

[3] Stewart v. Tennessee Marine & Fire Ins. Co. 1 Humph. (20 Tenn.) 242.

[4] Turner v. Protection Ins. Co. 25 Me. 515, 43 Am. Dec. 294; 1 Marshall on Marine Ins. (ed. 1810) 205, 209.

[5] Neilson v. Columbian Ins. Co. 1 Johns. (N. Y.) 301.

can be repaired without prejudice to the insurance. The deviation is as excusable as if the accident had happened on the voyage, and the case is the same as if the vessel had been repaired at the port of departure, but the burden of proof is on the assured to show the necessity for such act, and also that the vessel was taken to the nearest port at which repairs could be made. A case of this character is, however, to be distinguished from that where the vessel goes out of her course to supply a defect in the vessel's original seaworthiness.[6] So a vessel is not restricted to going into port once for repairs, but may go more than once if the necessity warrants.[7] So a vessel insured "at and from" a foreign port may return after sailing for necessary repairs, and sail again, and the insurer be obligated in port also after the vessel's return and on the subsequent voyage.[8] So a vessel insured from a port of lading may return for repairs necessitated by striking the bar when leaving port.[9] And under a like policy a delay for repairs before the vessel is ready to take in cargo is not voluntary, and therefore justifiable.[10]

§ 2420. **Stress of weather: port of necessity.**—Stress of weather, or a tempest or peril of the sea, which drives the ship out of her course, or forces her to depart from her route to seek a refuge, is a justifying cause for a deviation. The master may also in good faith and in the exercise of such judgment as is required of a master's skill, prudence, or discretion seek refuge from a tempest or wait for a wind.[11] A lighter insured for a voyage from Norwalk, Connecticut, to Jersey City, is not guilty of a deviation because she makes fast to a Brooklyn dock as a proper precaution to overcome the force of the wind and tide.[12]

§ 2421. **Stress of weather: vessel need not return to point whence driven.**—If a vessel is driven out of her course by stress of weather or a peril of the sea into any port, she is only obligated to pro-

[6] Cruder v. Philadelphia Ins. Co. 2 Wash. (U. S. C. C.) 262, Fed. Cas. No. 3,453, per Washington, J. See Hutton v. American Ins. Co. 7 Hill (N. Y.) 321.

[7] Hall v. Franklin Ins. Co. 9 Pick. (26 Mass.) 466; Ellery v. New England Ins. Co. 8 Pick. (25 Mass.) 14.

[8] Taylor v. Lowell, 3 Mass. 331, 3 Am. Dec. 141; Merchants' Ins. Co. v. Clapp, 11 Pick. (28 Mass.) 56.

[9] Wiggin v. Amory, 13 Mass. 118.

[10] Smith v. Surridge, 4 Esp. 25, 6 R. R. 837.

[11] Graham v. Commercial Ins. Co. 11 Johns. (N. Y.) 352; Robinson v. Marine Ins. Co. 2 Johns. (N. Y.) 89; Campbell v. Williamson, 2 Bay (S. C.) 237; Delaney v. Stoddard, 1 Term Rep. 22, 1 R. R. 139; 1 Marshall on Ins. (ed. 1810) 206.

[12] New Jersey Lighterage Co. v. New York Mutual Ins. Co. 49 N. Y. Super. Ct. 165.

ceed thence to her port of destination, and need not turn back to the point whence she was driven.[13]

§ 2422. **Compulsory delay or deviation by superior authority.**—If a vessel is compelled to anchor, in a port not described in the policy, by the military power of a belligerent, it is no deviation.[14] for a delay may be justified when necessitated by physical as well as moral force, which the master could not, or ought not, to resist. But a vessel is not justified in departing from her course in obedience to orders of a ship of war, no force, threats, or remonstrance being used, and no force being exercised which the master as a good subject ought not to have resisted.[15] And a vessel insured to an island and market, and having arrived at the island and discharged as part of her cargo, and taken on ballast necessary to her safety, and while proceeding on her voyage is compelled by the government to put into a port at which there is no market for her cargo, there is no deviation which releases the insurers.[16] And where a neutral ship was carried by a British cruiser out of her course, but she was afterward released and proceeded on her voyage, it was held not a voluntary act, and therefore no deviation, although the vessel was insured against sea and fire risks only.[17]

§ 2423. **Turned away: blockade.**—If a vessel is insured against sea risks only, and is turned away from her port by a ship of war because of a blockade, and departs by reason thereof, and is driven by stress of weather into another port, this is a justifiable deviation.[18] But where a ship is turned away from her port of destination because it is in the enemy's hands, and is unable to unload any part of her cargo or make necessary repairs, and makes for a port of safety, it is held that there is such a deviation as to discharge the insurers from the moment she is so turned away.[19] This question will, however, be more fully considered elsewhere.[20]

§ 2424. **Compulsory delay or deviation by acts of crew.**—If the master is compelled by force to depart from the course of the voy-

[13] Delaney v. Stoddard, 1 Term Rep. 22, 1 R. R. 139, per Lord Mansfield, reported in 1 Marshall on Ins. (ed. 1810) 206 et seq.

[14] Savage v. Pleasants, 5 Binn. (Pa.) 403, 6 Am. Dec. 424.

[15] Phelps v. Auldjo, 2 Camp. 350, 11 R. R. 725, per Lord Ellenborough. See also Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654, per Endicott, J.

[16] Deblois v. Ocean Ins. Co. 16 Pick. (33 Mass.) 303, 28 Am. Dec. 245.

[17] Scott v. Thompson, 4 Bos. & P. 181, 1 Bos. & P. (N. R.) 181.

[18] Robinson v. Marine Ins. Co. 2 Johns. (N. Y.) 89; Snowden v. Phœnix Ins. Co. 3 Binn. (Pa.) 457. See § 2741 herein.

[19] Parkin v. Tunno, 2 Camp. 59, 11 East, 92, 10 R. R. 422.

[20] As to capture, arrest, restraint, detention, etc. See §§ 2737 et seq. herein.

age, or delay the same by acts of his crew, it is an excusable deviation, and it makes no difference whether the master be constrained to deviate by actual physical force on the part of the crew or by their refusal to otherwise navigate the ship. It is sufficient that the acts of the crew create a necessity which leaves the master, in the exercise of a sound judgment and discretion, no alternative but to deviate.[1]

**§ 2425. Departure from route or delay to save life or property.**—A vessel may depart from her course or may delay to save life and succor mariners or passengers destitute or suffering on board distressed vessels, in danger of shipwreck or foundering, but a departure from the course or delay for the purpose of saving property alone is not justifiable. If there is a double motive to save life or relieve distress, and also to save property, there is no deviation, and if the master sees another vessel in apparent distress, he is clearly justified in departing from the course of the voyage or in delaying to ascertain if there are lives to be saved or distress to be relieved. In all such cases the master will have the benefit of any doubt, and a favorable construction be given his motives; for the duty of succoring distressed vessels is imposed by every dictate, not only of policy, but of humanity upon every man who has it in his power to render such aid or relief.[2]

It is not a deviation for a vessel to go out of her course three miles to speak another at sea, on seeing a signal for that purpose,

[1] Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654, per Endicott, J.; Elton v. Brogden, 2 Strange, 1264, 9 Eng. Rul. Cas. 413, per Lee, C. J.; Driscoll v. Bovil, 1 Bos. & P. 313; Driscoll v. Passmore, 1 Bos. & P. 200, 4 R. R. 782. See Brazier v. Clap, 5 Mass. 1.

[2] *United States.*—Mason v. Ship Blaireau, 2 Cranch (6 U. S.) 240, 2 L. ed. 266, per Marshall, J.; Bond v. The Brig Cora, 2 Wash. (U. S. C. C.) 80, Fed. Cas. No. 1,621; Crocker v. Jackson, 1 Sprague (U. S. C. C.) 141, Fed. Cas. No. 3,398; The Schooner Boston, 1 Sum. (U. S. C. C.) 328, Fed. Cas. No. 1,673; per Story, J.; A Box of Bullion, 1 Sprague (U. S. C. C.) 57, Fed. Cas. No. 17,717; The Henry Ewbank, 1 Sum. (U. S. C. C.) 400, Fed. Cas. No. 6,376.

*Louisiana.* — Herman v. Western Ins. Co. 13 La. 523.

*Massachusetts.*—Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654, per Endicott, J.; Perkins v. Augusta Banking Co. 10 Gray (76 Mass.) 312, 71 Am. Dec. 654.

*Missouri.*—Walsh v. Homer, 10 Mo. 6, 45 Am. Dec. 342; Settle v. St. Louis Perpetual Marine Ins. Co. 7 Mo. 379.

*England.*—African Merchants Co. v. British & Foreign Marine Ins. Co. 8 L. R. Ex. 154, 42 L. J. Ex. 60, 28 L. T. 233, 21 W. R. 484, 1 Asp. M. C. 588; The Beaver, 3 C. Rob. 292, per Lord Stowell; Lawrence v. Sydebotham, 6 East, 45, 2 Smith, 214, 8 R. R. 385, 9 Eng. Rul. Cas. 402, per Lawrence, J.

See marine insurance act of England, sec. 49 (1) (e), under § 2417 herein.

nor to delay three hours to take from a foreign ship, bound to a foreign port shipwrecked mariners of the United States, for the purpose of bringing them direct to the United States.[3] It is also held no deviation in the navigation of the Mississippi for one vessel to stop and assist another in distress, even though no lives are in danger.[4] In a federal case under a charter party, it was, however, held an unjustifiable deviation where the vessel proceeded forty miles out of her course to take in tow a disabled vessel, and she was detained seven days, although under the bill of lading the vessel had liberty to call at any ports for any purpose whatsoever, and "to tow and assist vessels in all situations." But this clause was held to refer to ports along the course of the specified route, and the charter gave no such liberty. In this case the vessel was held liable to the charterer for increased premiums and insurance, and for interest on the goods during the delay.[5]

The rule as to saving life is not confined to mariners or passengers so distressed or suffering on board other vessels, but a departure or delay is justifiable to relieve urgent distress, or administer to those on board taken from distressed vessels and suffering from disasters of shipwreck, and also of all other distressed and suffering persons lawfully on board. But in all cases where this last rule is sought to be applied, in determining whether the deviation is justifiable, the extent, degree, and urgency of the necessity which demands the relief, and the adequacy of the present means available should be carefully weighed, as well as the nearness to port, the increased length of the voyage, the delay necessitated, and the danger to the other lives on board, and whether a justifying necessity exists must be one of fact. The following case, however, commends itself, in holding that the vessel was justified in delaying eleven days for necessary medical attendance to the captain's wife, who, being in the third month of her pregnancy, had fallen six feet when about to go down into the cabin. The ship was passing Gibraltar at the time, and she had gone on deck to look at the rocks, and had turned suddenly and missed her footing, and was seriously injured.[6] But a delay of three weeks of a chartered vessel in a port of necessity is not justified by an attack of acute rheumatism of the master, and in such case the charterer is entitled to indemnity for the detention.[7]

[3] A Box of Bullion, 1 Sprague (U. S. C. C.) 57, Fed. Cas. No. 17,717.

[4] Walsh v. Homer, 10 Mo. 6, 45 Am. Dec. 342.

[5] Ardan S. S. Co. v. Thebaud, 35 Fed. 620.

[6] Perkins v. Augusta Banking & Ins. Co. 10 Gray (76 Mass.) 312, 71 Am. Dec. 654.

[7] The Giulio, 34 Fed. 909 (a noteworthy case).

An imminent peril to life and property outweighs all other considerations, and requires the master to instantly depart from the voyage insured and seek the nearest land, nor should the insurer's interest control the master in deciding upon such a deviation.[8]

§ 2426. **Delay at port or place or in prosecuting voyage.**—As we have seen, not only must reference be had to the terms of the policy as to the route or voyage permitted, but also to the character of the voyage and the purposes thereof, and as the risk may be varied by a departure from the route, so also may it be changed by delay in commencing or prosecuting the voyage insured. It is a general rule that an insured ship must proceed on her voyage with reasonable expedition, and without unnecessary delay.[9] The delay may also occur in port after the commencement of the risk, as well as in prosecuting the voyage,[10] and evidence of an unreasonable delay in prosecuting the voyage is admissible.[11] So delay of the vessel at intermediate ports, not stipulated for, where the cargo is insured for a voyage between two designated ports, constitutes such a deviation as to discharge the insurer for a subsequent loss in the absence of a custom or necessity justifying such acts.[12] If a vessel be permitted to go from one port to another to collect her cargo, and she unnecessarily exhaust at one port the whole time allowed, according to the usage of the trade, to complete her cargo, she cannot go to the other port without being guilty of such a deviation as will avoid the policy.[13] Where the delay is relied on as a deviation, it is a question for the jury whether it was justified in the exercise of sound discretion and good faith, by necessity, or reasonable cause.[14] An idle waste of time after a vessel has completed the purchases for which she entered a port, is a deviation which discharges the underwriters.[15] If the delay in commencing or prosecuting the voyage is reasonable and necessary for the purposes of the voyage, or is excused by other justifying cause, there is no deviation.[16] And a deviation may arise from unjustifiable delay at the end of the voyage, although awaiting her turn to be admitted

[8] Turner v. Protection Ins. Co. 25 Me. 515, 43 Am. Dec. 294.

[9] Himely v. South Carolina Ins. Co. 1 Mills (S. C.) 153, 12 Am. Dec. 623.

[10] Taylor v. Lowell, 3 Mass. 331, 3 Am. Dec. 141; Merchants' Ins. Co. v. Clapp, 11 Pick. (28 Mass.) 56; 1 Arnould on Marine Ins. (Perkins' ed. 1850) 357, *351; Id. (Maclachlan's ed. 1887) 459. See Id. (8th ed. Hart & Simey) secs. 411 et seq., pp. 537 et seq.

[11] Amsinck v. American Ins. Co. 129 Mass. 185.

[12] Mannheim Ins. Co. v. Atlantic & L. S. R. Co. (Rap. Jud. Queb.) 11 B. R. 200.

[13] Oliver v. Maryland Ins. Co. 7 Cranch (11 U. S.) 487, 3 L. ed. 414.

[14] Foster v. Jackson Marine Ins. Co. 1 Edm. Sel. Cas. (N. Y.) 290.

[15] Oliver v. Maryland Ins. Co. 7 Cranch (11 U. S.) 487, 3 L. ed. 414.

[16] Columbian Ins. Co. v. Catlett, 12 Wheat. (25 U. S.) 383, 6 L. ed. 664,

to a dock to unload is not a deviation by the vessel;[17] but if there exists no such justifying excuse for delaying the commencement or prosecution of the voyage insured, or if the vessel delays in port for the prosecution of business not connected with the purposes of the voyage, the underwriter is discharged.[18]

If the vessel delays the commencement of the risk by undertaking an intermediate voyage, this is a deviation.[19] What constitutes a reasonable and justifiable cause for delay in commencing or prosecuting the voyage is dependent upon varying conditions, such as the character of the voyage, the business or trade in which the ship is engaged, the description of the risk, or terms of the policy. The vessel may, undoubtedly, be detained for a reasonable time for the purposes of the adventure, but such fact cannot be determined by any positive rule; every case must depend upon its entire circumstances.[20] The extent of the stay in port may vary, but mere length of time is not controlling,[1] and a delay which would not be justifiable in one case may be excusable in another. Thus, where a vessel stayed in port six months after the date of the policy, it was held not to be a deviation, it not being fraudulent or varying the risk.[2] So delays have been held justifiable when existing for seventy-two days,[3] for one hundred and nine days,[4] for over four months,[5] for two months,[6] and for nine months for needed repairs and to obtain a cargo.[7] So a delay for over a month after the cargo was loaded, caused by inability to obtain a crew, is

per Story, J.; Phillips v. Irving, 7 Man. & G. 325, 8 Scott (N. R.) 3, 13 L. J. C. P. 145, 9 Eng. Rul. Cas. 396; Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654, per Endicott, J.

[17] Samuel v. Royal Exchange Assur. Co. 8 Barn. & C. 119, 6 L. J. (O. S.) K. B. 315, 13 Eng. Rul. Cas. 641.

[18] Seamans v. Loring, 1 Mason (U. S. C. C.) 127, Fed. Cas. No. 12,583; Burgess v. Equitable Marine Ins. Co. 126 Mass. 70, 30 Am. Rep. 654, per Endicott, J.; Earl v. Shaw, 1 Johns. Cas. (N. Y.) 313, 1 Am. Dec. 117; Mount v. Larkins, 8 Bing. 122, per Tindal, C. J. See § 2380 herein; African Merchants Co. v. British & Foreign Marine Ins. Co. L. R. 8 Ex. 154, 42 L. J. Ex. 60, 28 L. T. 233, 21 W. R. 484, 1 Asp. M. C. 588.

[19] Vallance v. Dewar, 1 Camp. 503, 10 R. R. 738. See § 2380 herein.

[20] See Phillips v. Irving, 7 Man. & G. 325, 13 L. J. Com. P. 145, 8 Scott (N. R.) 3, 9 Eng. Rul. Cas. 396; Motteaux v. London Assurance Co. 1 Atk. 545, 13 Eng. Rul. Cas. 467; Columbian Ins. Co. v. Catlett, 12 Wheat. (25 U. S.) 383, 6 L. ed. 664, Story, J.

[1] Grant v. King, 4 Esp. 175, 6 R. R. 849, per Lord Ellenborough.

[2] Earl v. Shaw, 1 Johns. (N. Y.) 313, 314, 1 Am. Dec. 117.

[3] Columbian Ins. Co. v. Catlett, 12 Wheat. (25 U. S.) 383, 6 L. ed. 664.

[4] Bain v. Case, 3 Car. & P. 496, M. & M. 262.

[5] Gilfert v. Hallett, 2 Johns. (N. Y.) 296, 297.

[6] Langhorn v. Allnutt, 4 Taunt. 511, 12 R. R. 660.

[7] Phillips v. Irving, 13 L. J. Com. P. 145, 7 Man. & G. 325, 8 Scott (N. R.) 3, 9 Eng. Rul. Cas. 396.

excusable, but is not justified by proceedings in admiralty for the recovery of debts,[8] and, after obtaining a manifest and custom-house clearances, a delay long enough to put goods of the insured on board by a packer was excusable.[9] But the insurers will be released by a delay of eight days to obtain a supercargo,[10] or of twenty-four hours to transfer goods without necessity.[11] So also of a delay to save cargo of a sunken ship.[12] There is in policies "at and from" an implied agreement that the risk shall commence in a reasonable time, in the absence of an express provision to the contrary.[13] The vessel under such a policy may not, therefore, delay an unreasonable time after she is "at" and before commencing a voyage; she may delay a reasonable time for justifiable cause.[14] A delay of four months where the policy attaches at the port of lading,[15] or of twenty-four months not accounted for, releases the underwriters.[16] So under a policy "at and from, and until moored twenty-four hours in safety," an unnecessary stay for a month discharges the underwriters.[17] And the ship may not delay unnecessarily before arriving at the outport under a policy "at and from" homeward;[18] nor may the master detain the vessel for his own purposes before arriving "at" the outport under such a policy.[19] A vessel insured from a port with liberty to trade is not justified in staying seven months beyond the usual time of vessels engaged in such trade.[20] When staying for the purposes of trade having no reference to the main scope of the voyage insured, it is a deviation, even though there is a liberty of ports for

[8] Augusta Ins. & Banking Co. v. Abbott, 12 Md. 348.

[9] Carruthers v. Gray, 15 East, 35, 3 Camp. 142.

[10] Martin v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 254, Fed. Cas. No. 9,161.

[11] Settle v. St. Louis Perpetual Marine Fire & Life Ins. Co. 7 Mo. 379.

[12] African Merchants Co. v. British & Foreign Marine Ins. Co. 8 L. R. Ex. 154, 42 L. J. Ex. 60, 28 L. T. 233, 21 W. R. 484, 1 Asp. M. C. 588.

[13] De Wolff v. Archangel Maritime Bank & Ins. Co. 9 L. R. Q. B. 451, 43 L. J. Q. B. 147, 39 L. T. 605, 22 W. R. 801, 2 Asp. M. C. 273, 13 Eng. Rul. Cas. 609.

[14] Chitty v. Selwyn, 2 Atk. 359; Augusta Ins. & Banking Co. v. Abbott, 12 Md. 348; Motteaux v. London Assur. Co. 1 Atk. 545, 13 Eng. Rul. Cas. 467, per Lord Hardwick; Seamans v. Loring, 1 Mason (U. S. C. C.) 127, Fed. Cas. No. 12,583.

[15] Palmer v. Fenning, 9 Bing. 460, 2 Moore & S. 624.

[16] Palmer v. Marshall, 8 Bing. 79, 317, 1 M. & Scott, 161, 454, 1 L. J. C. P. 19.

[17] Leigh v. Mather, 1 Esp. 411, 5 R. R. 740.

[18] Mount v. Larkins, 8 Bing. 108, 1 L. J. Com. P. N. S. 20, 1 M. & Scott, 165; Freeman v. Taylor, 8 Bing. 124, 1 L. J. C. P. 26, 1 M. & Scott, 182.

[19] Mount v. Larkins, 8 Bing. 108, 1 L. J. Com. P. N. S. 20, 1 M. & Scott, 165.

[20] Hartley v. Buggin, 3 Doug. 39. See Lavabre v. Wilson, 1 Doug. 284; Hamilton v. Sheddon, 3 Mees. & W. 49, M. & H. 334, 7 L. J. Ex. 1.

any purpose whatsoever.[1] If the delay is incurred bona fide in the course of trade, and to accomplish the objects of the adventure, it is excusable;[2] as in case of a "seeking ship" waiting for a remunerative cargo, owing to the large number of vessels in port, the scarcity of produce, the depressed state of trade, and extremely low rates of freight.[3] If, on being refused an entrance at the place of destination, a master delays under a reasonable expectation of finally being able to obtain it, it will not be a deviation.[4] So the ship may be justified in waiting bona fide at the port that she has entered for the purpose of disposing of her cargo at a price limited by the owner, which is reasonable. The master is not compelled to sacrifice his cargo so soon as he arrives in port by selling it at whatever price he can obtain, but he ought not fairly to be permitted to wait beyond such time, as it is clearly evident that there will be no change in the market.[5] So delay on an intermediate voyage may be justified by the usages of a particular trade,[6] and where a vessel is driven into a port of necessity, and a pestilence breaks out, which prevents her pursuing her voyage, it is a loss within the meaning of the policy,[7] and a delay may be justified under a liberty in the policy,[8] but the vessel must not delay beyond the time permitted.[9]

§ 2427. **Delay for towing vessel.**—A delay for the purpose of towing not permitted by the terms of the policy, or within the purposes and scope of the voyage insured, is such a change of risk as releases the insurers. Thus, taking a brig in tow by a steamer is a deviation by the latter, there being nothing in the policy which expressly authorized it; especially where the steamer is, by reason of said tow, compelled to stop because stress of weather prevents making headway with the brig.[10] In a New York case the facts were as follows: On June 13, 1879, the company insured a steam

[1] Williams v. Shee, 3 Camp. 469, 14 R. R. 811.

[2] Columbian Ins. Co. v. Catlett, 12 Wheat. (25 U. S.) 383, 6 L. ed. 664, per Story, J.

[3] Phillips v. Irving, 7 Man. & G. 325, 13 L. J. Com. P. 145, 8 Scott (N. R.) 3, 9 Eng. Rul. Cas. 396.

[4] Suydam v. Marine Ins. Co. 2 Johns. (N. Y.) 138.

[5] Columbian Ins. Co. v. Catlett, 12 Wheat. (25 U. S.) 383, 6 L. ed. 664 per Story, J.; Ellerry v. New England Ins. Co. 8 Pick. (25 Mass.) 14.

[6] Vallance v. Dewar, 1 Camp. 503. 10 R. R. 738; Kingston v. Knibbs, 1 Camp. 508, 10 R. R. 742.

[7] Williams v. Smith, 2 Caine (N. Y.) 1, 2 Am. Dec. 209.

[8] Doyle v. Powell, 4 Barn. & A. 267, 1 N. & M. 678; Hughes v. Union Ins. Co. 3 Wheat. (16 U. S.) 159, 4 L. ed. 357; Langhorn v. Allnutt, 4 Taunt. 511, 12 R. R. 660. And see cases under sections in this chapter covering "liberty of ports."

[9] Doyle v. Powell, 4 Barn. & A. 267, 1 N. & M. 678.

[10] Natchez Ins. Co. v. Stanton, 2 Smedes & M. (10 Miss.) 340, 41 Am. Dec. 592.

tug, then lying at St. Georges in the Bermudas, "at and from Bermuda to New York," to sail during July. On July 2d she left her berth and steamed to Hamilton, about twenty miles, where she took a schooner in tow and brought it to St. Georges, and from there towed it out to sea, about five miles, and then returned to her berth. On July 3d, after receiving her clearance papers, she towed another schooner to sea, then proceeded to Hamilton and took on coal and a lifeboat, and sailed from there July 4th for New York, and was lost en route. It was held that the towing trips were such deviations as forfeited the insurance.[11]

§ 2428. **Vessel turned away, and delay in port which she has entered.**—A vessel which has been turned away by a ship of war and has entered a port which under the terms of the policy she may enter, in such case is justified in delaying in said port a reasonable time to avoid heavy weather and to secure the protection of a convoy to avoid seizure.[12]

§ 2429. **Departure from route or delay to avoid danger, cruisers, or capture.**—If the danger of capture is real and imminent, or there is a reasonable and just ground, in the judgment and discretion of the owners or the master acting in good faith for the belief that it is so, a vessel is justified, in order to avoid enemy's cruisers, in delaying in port, or in going out of her usual course, or in putting into port to seek convoy, or in hastily departing from a port before she is fully equipped and prepared for her voyage.[13] And a vessel pursued by a cruiser may seek an intermediate port to avoid the danger of capture.[14] So putting into a port, while obliged to wait for a favorable wind in order to avoid such danger is justifiable.[15]

[11] Snyder v. Atlantic Mutual Ins. Co. 95 N. Y. 196, 47 Am. Rep. 29. See also Herman v. Western Marine & Fire Ins. Co. 13 La. 523; Gourock Rope Works Co. v. Fleming, 5 Ct. Sess. Cas. 3d ser. 501. See § 2398 herein.

[12] Snowden v. Phœnix Ins. Co. 3 Binn. (Pa.) 457. The ship in this case awaited convoy to avoid seizure under Bonaparte's Milan decree, which was a violation of the law of nations, and the vessel delayed four months.

[13] *United States.*—Oliver v. Maryland Ins. Co. 7 Cranch (11 U. S.) 487, 493, 3 L. ed. 414; Goyon v. Pleasants, 3 Wash. (U. S. C. C.) 241, Fed. Cas. No. 5,647.

*Maryland.*—Riggin v. Patapsco Ins. Co. 7 Har. & J. (Md.) 279, 16 Am. Dec. 302.

*Massachusetts.*—Whitney v. Haven, 13 Mass. 172; Post v. Phœnix Ins. Co. 10 Johns. (N. Y.) 79, 80; Reade v. Commercial Ins. Co. 3 Johns. (N. Y.) 453, 3 Am. Dec. 495; Patrick v. Ludlow, 3 Johns. (N. Y.) 10, 2 Am. Dec. 130; Suydam v. Marine Ins. Co. 2 Johns. (N. Y.) 138.

*England.*—Blackenhagen v. London Assurance Co. 1 Camp. 454, 10 R. R. 729, 15 Eng. Rul. Cas. 650; Driscol v. Bovil, 1 Bos. & P. 313; O'Reilly v. Gonne, 4 Camp. 249, 16 R. R. 788.

[14] Post v. Phœnix Ins. Co. 10 Johns. (N. Y.) 79.

[15] Suydam v. Marine Ins. Co. 2

So a vessel may put into port to obtain the protection of convoy, the danger of capture being imminent.[16] And a vessel with leave to stop at a port to learn if any men-of-war are off a certain port is justified in putting into said port to avoid cruisers, and in delaying there so long as the danger from the cruisers off such port may continue,[17] but the vessel should not remain longer than necessary.[18] So if there is imminent danger of capture, the vessel may delay sailing, and it is not a deviation if done to avoid a peril insured against.[19] The general principles governing the class of cases considered under this section are as follows: While the underwriters are presumed tacitly to assent to all reasonable efforts on the master's part for the safety of the property insured, and to authorize the usual means of avoiding urgent danger,[20] yet an increase of risk after the voyage is begun will not excuse the insured beyond a prudent and necessary deviation in order to avoid it.[1] And the danger which will justify a vessel in remaining in port a long time must be obvious, immediate, and directly applied to the interruption of the voyage, and imminent, not distant and contingent and indefinite.[2] A mere apprehension of danger, unless founded upon reasonable evidence, does not justify deviation. The peril apprehended must be one that would occasion serious loss or injury; it must be imminent and obvious, not problematical or contingent. If the apprehended danger be such as would justify a departure, the master should, if possible, go to the nearest practicable port in

Johns. (N. Y.) 138; Post v. Phœnix Ins. Co. 10 Johns. (N. Y.) 79.

[16] Patrick v. Ludlow, 3 Johns. (N. Y.) 10, 2 Am. Dec. 130.

[17] Hughes v. Union Ins. Co. 3 Wheat. (16 U. S.) 159, 4 L. ed. 357. See also as to extent of delay, Post v. Phœnix Ins. Co. 10 Johns. (N. Y.) 79, 80.

The stopping at a place permitted by the policy, to avoid capture, and unloading the cargo, which produced no delay, no increase of risk, and did not alter the voyage, is not such a deviation as to discharge the underwriters, when the vessel was afterwards lost by the perils of the sea. Hughes v. Union Ins. Co. 3 Wheat. (16 U. S.) 159, 4 L. ed. 357. *Cited* in Jolly v. Baltimore Equitable Soc. 1 Harr. & G. 305, 18 Am. Dec. 288; Thorndike v. Bordman, 4 Pick. 484.

[18] Goyon v. Pleasants, 3 Wash. (U. S. C. C.) 241, Fed. Cas. No. 5,647.

[19] Whitney v. Haven, 13 Mass. 172. See Duerhagen v. United States Ins. Co. 2 Serg. & R. (Pa.) 309; Riggin v. Patapsco Ins. Co. 7 Har. & J. (Md.) 279, 16 Am. Dec. 302; Neilson v. Columbian Ins. Co. 1 Johns. (N. Y.) 301.

[20] Riggin v. Patapsco Ins. Co. 7 Har. & J. (Md.) 279, 16 Am. Dec. 302.

[1] King v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 300, Fed. Cas. No. 7,788.

[2] Oliver v. Maryland Ins. Co. 7 Cranch (11 U. S.) 487, 3 L. ed. 414. *Cited* in Crosby v. Fitch, 12 Conn. 410, 421, 31 Am. Dec. 745; Riggin v. Patapsco Ins. Co. 7 Harr. & J. (Md.) 279, 291, 16 Am. Dec. 302.

the course of the voyage, and the deviation is not justified where the vessel seeks a port many hundred miles out of the course.[3]

§ 2430. **Vessel delayed by ice.**—If a vessel finds it impossible to reach her port of destination by reason of ice closing navigation, she is justified in a reasonable delay, and also in attempting to seek the nearest practicable port in prosecuting her voyage, where the master exercises good faith. Thus, where an insurance was on cargo at and from Carlsham to St. Petersburg, and the vessel sailed, but by reason of adverse winds attempted to get into Revel, but being unable to make that port put into port Baltic, where, being informed that it would be impossible to reach Cronstadt by reason of the ice, she remained about twenty days, when wind and weather appearing favorable she sailed for Revel, but heavy and thick weather and adverse winds coming on she was lost on a shoal while trying to get into Revel, it was held that going to port Baltic and delaying there, and subsequently attempting to make Revel, were justifiable, and not a deviation.[4]

§ 2431. **Deviation to comply with warranty.**—A deviation is justifiable when necessary to comply with a warranty; as in case of a warranty to depart with convoy. The rule is especially applicable where the departure from the course is in conformity with usage. But if the departure from the route be for another distinct purpose, and not for the purpose of compliance with the warranty, it is not excusable.[5] If, however, a convoy might be obtained at a nearer port than that to which the instructions are to proceed for convoy, conforming to instructions may amount to a deviation.[6]

§ 2432. **Departure from course or delay to seek protection of convoy.**—If the stipulations of the contract require the master to join convoy, or if the master, acting bona fide and with the sole view of avoiding danger and to seek the safest course to his destination, departs from the route or delays for the purpose of seeking protection of convoy, this is a justifiable deviation,[7] and this is so

[3] Riggin v. Patapsco Ins. Co. 7 Har. & J. (Md.) 279, 16 Am. Dec. 302. See Blackenhagen v. London Assur. Co. 1 Camp. 454, 10 R. R. 729, 13 Eng. Rul. Cas. 650.

[4] Graham v. Commercial Ins. Co. 11 Johns. (N. Y.) 352. See Blackenhagen v. London Assur. Co. 1 Camp. 454, 10 R. R. 729, 13 Eng. Rul. Cas. 650, per Lord Ellenborough.

[5] Bond v. Nutt, Cowp. 601, reported in 1 Marshall on Ins. (ed. 1810) *354, per Lord Mansfield; Gordon v. Morley, 2 Strange, 1265. "A deviation is proper . . . when necessary to comply with a warranty:" Deering's Annot. Civ. Code Cal. sec. 2695, subd. 2. See next section herein.

See marine ins. act of England, sec. 49 (1), under § 2417 herein.

[6] Heselton v. Allnutt, 1 Maule & S. 46.

[7] Governeur v. United States Ins. Co. 1 Caines (N. Y.) 592; Patrick v. Ludlow, 3 Johns. (N. Y.) 10, 2 Am. Dec. 30. Snowden v. Phœnix Ins. Co. 3 Binn. (Pa.) 457; D'Agui-

even though the vessel is forced by stress of weather to prosecute or continue her voyage without convoy.[8]

§ 2433. **Right to convoy prize under liberty clauses to cruise, capture, etc.**—The liberty to "cruise or capture" or "cruise, capture, and man prizes," and the like, does not permit a vessel to delay or depart from the course of her voyage to convoy her prize and thereby correspondingly change the risk, but if there is no delay or departure from the route in convoying the prize whereby the route is changed, such act is not a deviation, nor is it a deviation to convoy if there be a liberty so to do; and if a liberty to cruise and capture, or the like, be given, but it is confined in its exercise within certain specified limits, such clause controls.[9]

Wthin this rule sailing as convoy for ten days was held no deviation.[10] But where the master convoyed his prize, and several times during the voyage shortened sail and lay to in order to give time to the prize to come up, and particularly on one occasion, when the prize carried away her foretopmast, it was held a deviation, and that the liberty did not extend to convoying prize, even though the port to which she was being convoyed was within the limits of the voyage.[11] And if the liberty be extensive enough to warrant convoying the vessel into port, such provision will not authorize a delay there beyond what the permission necessarily and reasonably implies.[12]

§ 2434. **Deviation to recapture vessel.**—Where the master of a vessel departs from the course of the insured voyage in pursuit of a vessel which has been piratically taken off by its crew, it is a deviation, unless the act of the master is such as to constitute barratry.[13]

lar v. Tobin, Holt N. P. 185, 2 Marsh. 265; Bond v. Gonsales, 2 Salk. 445, Holt, 469; Bond v. Nutt, Cowp. 601, per Lord Ellenborough, reported in 1 Marshall on Ins. (ed. 1810) *210, *355.

[8] Patrick v. Ludlow, 3 Johns. (N. Y.) 10, 2 Am. Dec. 30; Lane v. Glover, 5 Taunt. 89.

[9] Ward v. Wood, 13 Mass. 539 (liberty "to cruise and capture"); Lawrence v. Sydebotham, 6 East, 45, 2 Smith 214, 8 R. R. 385, 9 Eng. Rul. Cas. 402, reported in 1 Marshall on Ins. (ed. 1810) 199 ("with leave to chase, capture, and man prizes"); Hibbert v. Halliday, 2 Taunt. 428, 11 R. R. 633 ("to chase, capture, and man any prize or prizes . . . to cruise anywhere and in any latitude on the outward bound voyage on this side of Cape Horn"); Jarratt v. Ward, 1 Camp. 263, 10 R. R. 677 ("to cruise for, chase, capture, man and see into port any ship or ships of the enemies").

[10] Ward v. Wood, 13 Mass. 539.

[11] Lawrence v. Sydebotham, 6 East, 45, 8 R. R. 385, 9 Eng. Rul. Cas. 402, reported in 1 Marshall on Ins. (ed. 1810) *199.

[12] Jarratt v. Ward, 1 Camp. 263, 10 R. R. 677 (delay for repairs not justified).

[13] Hood v. Nesbitt, 2 Dall. (Pa.) 137, 1 Yeates (Pa.) 114, 1 L. ed. 321, 1 Am. Dec. 265; Robinson v.

**§ 2435. Letter of marque: cruising and making prizes.**—A merchant ship carrying letters of marque and insured as such has no right to cruise at large in quest of prizes; that is, she must not delay the prosecution of her voyage to lie in wait for prizes, or depart from her course to seek them. But if hostile vessels come in sight within the course of her voyage, she may chase and capture them, or lie in wait for them, without its being such a deviation as will release the insurer; although such acts of delay or departure must be fairly attributable to motives for self-defense, or to intimidate the enemy and repel a meditated attack before she herself should be disabled. If said acts are, however, based upon motives of profit, for the mere purpose of making a prize, they are not justifiable. The right to capture, if justifiable, draws to it all the incidents necessary to make it effectual, and, therefore, justifies a delay for the purpose of manning a prize. If it is made known to the underwriters at the time of insuring that the ship carries letters of marque, it makes no difference that the vessel is not described as such in the policy.[14]

Such, at least, seems to be the law in this country, and it evidently conforms with that existing under the English cases.[15]

Jones, 8 Mass. 536, 5 Am. Dec. 514. See § 2415 herein.

[14] Haven v. Holland, 2 Mason (U. S. C. C.) 230, Fed. Cas. No. 6,229, per Story, J.

[15] Wiggin v. Boardman, 14 Mass. 12; Wiggin v. Amory, 14 Mass. 1, 7 Am. Dec. 175, s. c. 13 Mass. 118, 123; Hibbert v. Halliday, 2 Taunt. 428, 11 R. R. 633, 1 Marshall on Ins. *195 et seq. *citing* Cock v. Townson, Beawes, 316; Park on Ins. 396, per Lord Camden, C. J., and reporting, Jolly v. Walker, Beawes, 316; Park on Ins. 396, where the case was left by Lord Mansfield to the jury, and it was admitted that the vessel could not cruise, yet if an enemy came in her way she might engage or defend herself. The vessel was insured "at and from London to Cork and the West Indies," and had letters of marque on board. And Parr v. Anderson, 6 East, 202, where the vessel was insured "with or without letters of marque," and she altered her course a quarter of a point, pursued a hostile vessel in sight for about a quarter of an hour, when she abandoned the chase and proceeded on her voyage, Lord Ellenborough left it to the jury to determine whether the deviation was for the mere purpose of capture or for defense, and if the latter, they should find for the plaintiff. The jury found for defendant, and a new trial was granted, and the case sent back to the jury to ascertain if any usage of trade existed, and what it was. It was also said in this case that the purposes of defense might happen in various ways, "as by making a show of confidence in the face of an enemy with a view to deter them from an attack, or, if that could not be accomplished, with a view to obtain some advantage in the conflict, and the like:" 1 Arnould on Marine Ins. (Perkins' ed. 1850) 395–402, *391–398; Id. (Maclachlan's ed. 1887) 493–99; Id. (8th ed. Hart & Simey) secs. 418 et seq., pp. 544 et seq.); 2 Parsons on Marine Ins. (ed. 1868) 22, 36 et seq. and notes; 1 Phillips on Ins. (3d ed.) 581–84, sec. 1029; 3 Kent's Commentaries (5th ed.) 316.

Although in a Massachusetts case, where the ship carried letters of marque obtained from the American minister for her homeward voyage, with the understanding that they were to be used only for purposes of dispatch, and her armament was increased from four to fourteen guns, and the crew from thirty to seventy men, about three days out from France on her voyage, a brig was seen standing for the insured vessel, she was captured, and a delay of about two hours was made to man the vessel, she was sent into a port in France and condemned, and this was held a deviation.[16] But it was also held that a letter of marque does not confine the vessel to acts merely of defense, but extends the right to pursue hostile ships in sight.[17] So it is decided that the ship may attack and capture a vessel which comes across her course where there is no departure from the voyage, although there are other motives than those merely of self-defense.[18] In a policy, a warranty that "orders will be given that the ship shall not cruise" is satisfied only by positive orders not to cruise, not by mere absence of authority to cruise.[19]

**§ 2436. Instructions as to cruising.**—If the acts of cruising, chasing, or convoying prize are not justified by the liberty given under the policy, they are none the less a deviation because done in pursuance of her instructions,[20] although it may be a question whether the act of cruising contrary to instructions is a mere deviation or barratry. If the act be based on fraud or criminality of the master to the prejudice of the owners, it would probably be barratrous.[1] A warranty that "orders will be given that the ship shall not cruise" is not complied with unless such orders are expressly given to the captain. No compliance can arise by implication from the implied instructions, and there being no proof of express directions not to cruise, the insurers would be released.[2]

**§ 2437. Understood purpose for which letters of marque taken is important.**—The understood purpose for which letters of marque are taken ought to be an important factor in determining what

[16] Wiggin v. Amory, 14 Mass. 1, 7 Am. Dec. 175, s. c. 13 Mass. 118, 123.

[17] Haven v. Holland, 2 Mason (C. C.) 230, Fed. Cas. No. 6,229. See also Wiggin v. Boardman, 14 Mass. 12.

[18] Jolly v. Walker, Beawes, 316, reported in 1 Marshall on Ins. (ed. 1810) *196; Park on Ins. (3d ed.) 299; 2 Park on Ins. (8th ed.) 630.

[19] Ogden v. Ash, 1 Dall. 162 (Ct. Com. Pl. Phila.) 1 L. ed. 82.

[20] Lawrence v. Sydebotham, 6 East, 45, 2 Smith, 214, 8 R. R. 385, 9 Eng. Rul. Cas. 402.

[1] Moss v. Byron, 6 Term Rep. 379, 3 R. R. 208, as *construed* in Wiggin v. Amory, 14 Mass. 1, 7 Am. Dec. 175. See Wiggin v. Boardman, 14 Mass. 12; Phyn v. Royal Exch. Assur. Co. 7 Term Rep. 505, 4 R. R. 508.

[2] Ogden v. Ash, 1 Dall. (Pa.) 162, 1 L. ed. 82.

their use shall be; as where they were taken for the sole purpose of inducing seamen to ship, and without any intention of cruising,[3] or where they were taken with the intention of being used for defense only.[4]

§ 2438. **Liberty clauses to cruise, capture, etc.: construction.**—If the policy gives a liberty "to cruise and capture," or "to chase, capture, and man prizes," or a like liberty, but confines the exercise thereof within certain specified limits, or if there be any other similar stipulation, such liberty must no doubt be confined in its exercise within the strict meaning of the terms used, and the permission cannot be extended beyond what is necessary for the performance of the permitted acts, although such a liberty ought also to carry with its lawful and justifiable exercise all the incidents necessary to make the capture effectual, but nevertheless throughout the entire class of cases of this character, as well as in all those wherever the right of making and securing prize is claimed, the determining factor or test is whether there has been a change of risk. A proven usage may, however, justify an act which would otherwise, under this class of policies, be a deviation.[5]

§ 2439. **Carrying letters of marque no deviation in itself.**—The mere fact of carrying letters of marque is in itself no deviation.[6]

§ 2440. **Liberty clauses to cruise, capture, etc., for designated time.**—If the time during which the vessel has liberty to cruise is designated by weeks, days, etc., it means successive weeks, days, etc., from the commencement of the cruise, when no time of commencement is specified, and cruising at different times not within such period is a deviation, unless a usage exists justifying such desultory cruising.[7]

§ 2441. **Whether the peril which will justify a deviation must be one insured against.**—The question whether a vessel is justified in a delay or a departure from her course to avoid a peril not insured against has been much discussed. Mr. Arnould distinguishes

[3] Moss v. Byron, 6 Term Rep. 379, 3 R. R. 208.

[4] Wiggins v. Amory, 14 Mass. 1, 7 Am. Dec. 175, 13 Mass. 118, 123; Haven v. Holland, 2 Mason (U. S. C. C.) 230, Fed. Cas. No. 6,229; Parr v. Anderson, 6 East, 202, 2 Smith 316, 8 R. R. 461 (contention of defendants).

[5] See Lawrence v. Sydebotham, 6 East, 45, 2 Smith, 214, 8 R. R. 385, 9 Eng. Rul. Cas. 402, per Lord Ellenborough, and cases generally, under §§ 2433-39 herein.

[6] Jarratt v. Ward, 1 Camp. 263, 277, 10 R. R. 677; Haven v. Holland, 2 Mason (U. S. C. C.) 230, Fed. Cas. No. 6,229; Raine v. Bell, 9 East, 195, 9 R. R. 533, 9 Eng. Rul. Cas. 365, per Lawrence, J.; Wiggin v. Amory, 13 Mass. 118; Wiggin v. Boardman, 14 Mass. 12. Formerly otherwise, Denison v. Modigliani, 5 Term Rep. 580.

[7] Syeres v. Bridge, 2 Doug. 527, reported in 1 Marshall on Ins. (ed. 1810) *197 et seq., per Lord Mansfield.

between a deviation necessitated by the immediate and irresistible operation of a peril not insured against or excluded, and a going off the course in order to avoid such peril, or to repair in consequence thereof. Mr. Maclachlan, in his edition of Mr. Arnould's work, does not, however, make this distinction, although he goes to the extent of stating that the deviation is justified when the "necessary effect of the immediate and inevitable operation of a peril not insured against" or excluded.[8] In one of the cases, however, relied on by Mr. Arnould, the insurance was against sea risk and fire only, and the vessel was seized, carried off her course, and detained by a British cruiser, and the court said that a deviation never puts an end to the insurance unless it be a voluntary act of those who have the management of the ship. "Here the deviation was occasioned by force, which in such case is necessity; and there is no ground for the distinction between a policy confined to sea risk and fire, and a general policy including all risks."[9] Clearly in this case the sole distinction was whether the act was voluntary or one justified by necessity, without regard to the fact whether the peril was one insured against or not. In another case relied on by Mr. Arnould capture or seizure was an excepted peril, and the vessel endeavored to avoid this peril by cutting her cables and putting to sea when she had half completed her loading, and, subsequently sustaining damage, put into a port for repairs. This was held a deviation, because the ship endeavored to avoid a risk against which the underwriters had stipulated. While in another case, under the same facts, the deviation was covered by a peril insured against.[10] Mr. Maclachlan, however, omits any reference to either case in this connection, but does notice elsewhere and remarks under a subsequent chapter, as to the first case, that "when she (the vessel) was lost, she was out of her due course, carried thither seemingly because she left port in a state of unseaworthiness."[11] Mr. Phillips criticizes at length this distinction of Mr. Arnould's, and says no such distinction was made in the authority relied on, and that the rulings in the two cases referred to were based upon the fact that the risk was excepted in one case and not in the other, and that, even in this view the ground is not tenable.[12] He also speaks of the case as

[8] 1 Arnould on Marine Ins. (Perkins' ed. 1850) 411–13, *406–8; Id. (Maclachlan's ed. 1887) 508.

[9] Scott v. Thompson, 1 Bos. & P. (N. R.) 181, per Sir James Mansfield, C. J.

[10] O'Reilly v. Royal Exchange Ins. Co. 4 Camp. 246, 16 R. R. 786, per Gibbs, C. J.; O'Reilly v. Gonne, 4 Camp. 249, 16 R. R. 788.

[11] 2 Arnould on Marine Ins. (Maclachlan's ed. 1887) 842. See Id. (8th ed. Hart & Simey) secs. 424a, 435, pp. 550, 563.

[12] 1 Phillips on Ins. (3d ed.) 597, sec. 1025.

"a hasty ruling at nisi prius." In a case in this country, it is declared that the mere apprehension of danger is not of itself sufficient to justify a deviation without other reasonable grounds, but that if the danger be urgent, or the peril which it is sought to avoid be such that it would necessarily occasion serious injury or loss if met, or there is a reasonable ground for a belief that it would have such effect, the master is justified in a delay or a departure from the voyage insured to save either ship or cargo, whether the peril be one insured against or not.[13] And where a vessel insured against a sea risk only, is turned away by a blockading squadron, and thereafter suffered loss, this was held no deviation.[14]

It would seem, in view of the cases and of the opinions of textwriters, that the weight of authority at the present day does not rest the question of deviation upon the fact whether the peril is one insured against or not, but that if the deviation is not voluntary, and one which would be justifiable if the insurance were against perils of the sea generally, it makes no difference whether the peril justifiably necessitating the deviation is one insured against or not.[15]

§ 2442. **Loss need not be connected with deviation.**—The insurers are released from the time a deviation without a justifying cause occurs.[16] It is not, therefore, necessary to show that a subsequent loss arose from or was connected with the deviation.[17]

[13] Riggin v. Patapsco Ins. Co. 7 Har. & J. (Md.) 279, 16 Am. Dec. 302.

[14] Robinson v. Marine Ins. Co. 2 Johns. (N. Y.) 89.

[15] "Going off the course or delay from necessity, or any other cause which would be justifiable under a policy against perils of the sea generally, is not a deviation under one against one or a part only of such perils:" 1 Phillips on Ins. (3d ed.) 578, sec. 1025, *citing* Scott v. Thompson, 1 Bos. & P. 181; Greene v. Elmslie, Peake, 278, 3 R. R. 693; Riggin v. Patapsco Ins. Co. 7 Har. & J. (Md.) 279, 16 Am. Dec. 302; Robinson v. Marine Ins. Co. 2 Johns. (N. Y.) 89; Lee v. Gray, 7 Mass. 349; Richardson v. Maine Ins. Co. 6 Mass. 102, 4 Am. Dec. 92. Not all these authorities are, however, directly in point on the main question in the text. "Nor does it seem to be material that the peril which the ship thus endeavors to escape should be one which is insured against." And again: "The weight of authority seems to be in favor of the view that a departure from the course to avoid a peril, although that peril is not insured against, is no deviation:" 2 Parsons on Marine Ins. (ed. 1868) 31–32, note 1. See Suydam v. Marine Ins. Co. 2 Johns. (N. Y.) 138. "A deviation is proper . . . when necessary . . . to avoid a peril, whether insured against or not:" Deering's Annot. Civ. Code Cal. sec. 2695, subd. 2. Contra, Budd v. Eaton, 10 Mass. 21; Roget v. Thurston, 2 Johns. (N. Y.) 248; Murden v. South Carolina Ins. Co. Mill Const. (S. C.) 96; O'Reilly v. Royal Exch. Assur. Co. 4 Camp. 246, 16 R. R. 786, per Gibbs, C. J.

[16] See § 2370 herein.

[17] Crousillat v. Ball, 4 Dall. (4 U.

**§ 2443. Whether any exception exists to last rule.**—As already noted, however, there is a class of cases where the policy is on time with clauses limiting the navigation, and in cases of this character, where the loss occurs after a temporary deviation and return in safety to the permitted waters, and a loss occurs not at all connected with the breach of condition, the insurers are held not discharged,[18] and if it be admitted, as is claimed by some writers, that there may be a temporary deviation under other policies than those within the class mentioned,[19] it must also be admitted that a similar rule would apply.

**§ 2444. Waiver of deviation.**—That the insurer, having full knowledge, may waive the deviation is undoubted, but such waiver must be by some unequivocal act; as where the underwriters signed a memorandum that a specified deviation should not prejudice the insurance,[20] or where a contract is made healing the deviation assented to by the company's president, and written on the policy by his order, although it may not have been recorded by the secretary,[1] or where the policy is subscribed with the knowledge of the deviation by the underwriter.[2] So the question, whether or not a contract, by which a vessel is restricted to certain waters, has been modified, so as to permit a deviation, may be one for the jury.[3] But if there are two deviations, and one is expressly waived by memorandum, this excludes the claim that the other, even though a previous one, has been waived,[4] although it is also held that a writing waiving a deviation for an additional premium covers all previous deviations,[5] and where under such a memorandum there was a misstatement as to place to which the return voyage was made, it was held of no effect.[6] A deviation occurring by reason of a vessel navigating outside of restricted waters, may be waived, and is waived, where insurer, with knowledge thereof

S.) 294, 1 L. ed. 840, 3 Yeates (Pa.) 375, 2 Am. Dec. 375; Martin v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 254, Fed. Cas. No 9,161; Kettel v. Wiggin, 13 Mass. 68; Walsh v. Homer, 10 Mo. 6, 45 Am. Dec. 342.

[18] Wilkins v. Tobacco Ins. Co. 30 Ohio St. 317, 27 Am. Rep. 455. See §§ 2372–2374 herein.

[19] See § 2373 herein.

[20] Glidden v. Manufacturers' Ins. Co. 1 Sum. (U. S. C. C.) 232, Fed. Cas. No. 5,482.

[1] Warren v. Ocean Ins. Co. 16 Me. 439, 33 Am. Dec. 674.

[2] Coles v. Marine Ins. Co. 3 Wash. (U. S. C. C.) 159, Fed. Cas. No. 2,-988. See Redman v. London, 3 Camp. 503, 5 Taunt. 462, 1 Marsh. 136.

[3] Norris v. China Traders' Ins. Co. 52 Wash. 554, 100 Pac. 1025.

[4] Glidden v. Manufacturers' Ins. Co. 1 Sum. (U. S. C. C.) 232, Fed. Cas. No. 5,482.

[5] Crowninshield v. New York Ins. Co. 3 Johns. (N. Y.) 142. See § 2417a herein.

[6] Glidden v. Manufacturers' Ins. Co. 1 Sum. (U. S. C. C.) 232, Fed. Cas. No. 5,482.

thereafter receives premiums without objection, received proofs of loss and stated that the loss would undoubtedly be paid.[7]

§ 2445. **Deviation: acts of third person.**—The insured is not responsible for the acts of third persons done in consequence of a misfortune occurring during the voyage, from which misfortune alone, and not from any act of the owner or his agents, such third persons derived their power to interfere, although the same acts would have avoided the policy had they been done by the assured or his agents, as in case where the vessel was driven into a port of necessity, and while there it was claimed, together with its cargo, by the assured's correspondent, but it was referred to the American consul there, who procured a survey and sold the cargo, putting in a lighter one, because he deemed the vessel overloaded, dispatched the vessel to her return port in command of a British subject, and it was held that the American consul could not be considered the assured's agent, although the act of changing and adding to the cargo, if done by the assured or his agents, would have been a change of risk.[8]

[7] Norris v. China Traders' Ins. Co. Wash. (U. S. C. C.) 7, Fed. Cas. No. 52 Wash. 554, 100 Pac. 1025. 17,901.

[8] Winthrop v. Union Ins. Co. 2

# CHAPTER LXVII.

## OTHER OR DOUBLE AND OVER INSURANCE.

§ 2455. What is other or double insurance.
§ 2456. Overinsurance.
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§ 2457. Conditions as to other insurance.
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§ 2459. Where other insurance is only temporary.
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§ 2465. Insurance on ship and on advances.
§ 2466. Insurance against different perils.
§ 2467. Where insurances are upon different interests or do not cover same subject.
§ 2468. Policy to different joint owners of property: tenants in common.
§ 2469. Insurance by owner of land and person holding under contract for deed.
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§ 2471. Insurance by stranger will not constitute other insurance.
§ 2472. Subsequent insurance covering property first insured and other property.
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§ 2477. Where subsequent voidable policy is treated as valid after a loss.
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§ 2480a. Distinction between concurrent insurance and coinsurance.
§ 2481. Rule where marine policies of same date are issued: priority in date may be shown.
§ 2482. Provisions in charter or by-laws as to other insurance.
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§ 2484. Permission to obtain other insurance.
§ 2484a. Permission continued: concurrent insurance.
§ 2485. Consent to other insurance: indorsement on policy.
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§ 2486. Return of premium in case of refusal to indorse consent to other insurance.
§ 2487. Waiver of provisions as to other insurance: estoppel: notice: consent: indorsement on policy.
§ 2487a. When no waiver of provisions as to other insurance.
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§ 2488. Insurer is chargeable with knowledge of prior policies issued by it.
§ 2489. Recovery: prior policies: marine insurance: contribution: where no pro rata clause.
§ 2490. To enforce contribution policies must cover same interest to same property.
§ 2491. Rules as to recovery and contribution in fire insurance where there are several policies constituting other insurance.
§ 2492. Rule where fire policy contains pro rata clause.
§ 2493. Specific insurance and general policy.
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§ 2496. "American clause:" "shall only be liable for deficiency."
§ 2496a. Other insurance as affected by coinsurance: "average" or "distribution" clause.
§ 2496b. Effect of three-fourths value provisions: valued policy laws: concurrent insurance: other or double insurance: coinsurance: prorating.
§ 2497. Where policies of different dates attach and property subsequently diminished.
§ 2498. Presumption as to basis of settlement where settlement made with one of two insurers.
§ 2499. Double insurance for "whom it may concern."

**§ 2455. What is other or double insurance.**—Other or double insurance exists where two or more policies of insurance are effected upon the same interest in the same property against the same risk, and either in the name or for the benefit of the same person.[9] "A double insurance is where one insures the same thing twice over against the same perils; . . . where one procures an insurance from one underwriter against the danger of the seas, from another against the danger of the enemy, from a third against the barratry of the master, etc., although these several insurances are upon the same ship, they are not double, because the assured can never receive more than one satisfaction." [10] It is not necessary that the insurance be effected in the same name to constitute double insurance. Lord Mansfield says: [11] "If the same man really and for his own proper account insures the same goods doubly, though both insurances be not made in his own name, but one or both of them in the name of another person, yet that is just the same thing, for the same person is to have the benefit of both policies." [12]

[9] *United States.*—California Ins. Co. v. Union Compress Co. 133 U. S. 730, 33 L. ed. 730, 19 Ins. L. J. 385, 10 Sup. Ct. 385; Thurston v. Koch, 4 Dall. (49 U. S.) 348–51, 1 L. ed. 862.

*Illinois.*—Peoria Fire & Marine Ins. Co. v. Lewis, 18 Ill. 553.

*Maryland.*—Baltimore Fire Ins. Co. v. Loney, 20 Md. 20.

*Massachusetts.*—Perkins v. New England Marine Ins. Co. 12 Mass. 214–17.

*Michigan.*—Hall v. Concordia Fire Ins. Co. 90 Mich. 403, 51 N. W. 52.

*New York.*—Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; Mussey v. Atlas Ins. Co. 14 N. Y. (Kern) 79.

*Ohio.*—Roots v. Cincinnati Ins. Co. 1 Disn. (Ohio) 138, 12 Ohio Dec. 535.

*Pennsylvania.*—Clarke v. Western Assur. Co. 146 Pa. 561, 28 Am. St. Rep. 821, 15 L.R.A. 127, 23 Atl. 248, 21 Ins. L. J. 281; Lebanon Ins. Co. v. Kepler, 106 Pa. St. 28–35; Royal Ins. Co. v. Roedel, 78 Pa. St. 19–22, 21 Am. Rep. 1; Merrick v. Germania Fire Ins. Co. 54 Pa. 277; Sloat v. Royal Ins. Co. 49 Pa. 14–18, 88 Am. Dec. 477; Peters v. Delaware Ins. Co. 5 Serg. & R. (Pa.) 473–84, per Duncan, J.; Norwich Union Fire Ins. Soc. v. Cheaney Bros. 161 Tex. Civ. App. 220, 128 S. W. 1163.

*England.*—Godin v. London Assur. Co. 1 Burr. 489–95; Irving v. Richardson, 1 Moody & R. 153, 2 Barn. & A. 193, 9 L. J. (O. S.) K. B. 225.

See also Rapalje & Lawrence's Law Dictionary, 668; 17 Earl of Halsbury's Laws of England, p. 380.

Other insurance means, when indorsed upon a policy, additional insurance to that of said policy amount. De Leach v. Ætna Ins. Co. 4 Ga. App. 746, 62 S. E. 473.

"A double insurance exists where the same person is insured by several insurers separately in respect to the same subject and interest." S. Dak. Civ. Code, sec. 1877; Lawyer v. Globe Mutual Ins. Co. 25 S. Dak. 549, 127 N. W. 615, 39 Ins. L. J. 1588, 1595.

[10] Perkins v. New England Marine Ins. Co. 12 Mass. 214–17.

[11] Godin v. London Assur. Co. 1 Burr. 489, 1 W. Black. 103.

[12] See also Phœnix Ins. Co. v. Copeland, 86 Ala. 551, 4 L.R.A. 848, 6 So. 143; Hough v. People's Fire Ins. Co. 36 Md. 398; Van Aylstyne v. Ætna Ins. Co. 14 Hun (N. Y.) 360.

Over or double insurance is not reinsurance. Reinsurance is the making of a contract by the insurer in order to secure himself, while other and double insurance is where the different insurances are effected by the insured as we have stated.[13]

So double insurance and concurrent insurance are entirely distinct.[14]

In case of double insurance, unless otherwise stipulated, the respective insurers are liable pro rata. all the policies being considered as together making but one policy. But where two policies cover the same property, but one also covers additional property without specifying how much of the insurance applies to each property, a case of double insurance does not arise; certainly not as to the whole amount of such policies.[15]

§ 2456. **Overinsurance.**—The words "other insurance," "double insurance," and "overinsurance" are used in most instances as if synonymous. They are, in fact, practically the same, yet overinsurance more particularly refers to that class of cases not simply where "other insurance" is prohibited, but rather to that class where the policy prohibits the insurance beyond a certain amount. The same principle naturally controls in case of overinsurance as in case of other or double insurance. Different persons may insure different interests in the property. So when a sheriff seizing an insured vessel effected insurance to cover harbor risks, and this together with the insurance held by the owners exceeded the amount named in a prohibitory clause in the policy providing that it should become void if any interest already insured should be insured to exceed a certain sum, the interests insured are not the same, and the policy cannot be avoided on the ground of excessive insurance.[16] So an overinsurance of the freight to be earned on a voyage is not a breach of the warranty by the owner of a vessel that he will not insure his interest in the vessel beyond a specified amount.[17] In Pennsylvania a policy of fire insurance upon build-

[13] Davis v. Gilbert, 1 Marshall on Ins. (2d Am. ed.) 148. Mr. Marshall says: "It differs from reinsurance in this, that it is made by the insured with a view of receiving a double satisfaction in case of loss, whereas a reinsurance is made by a former insurer, his executors or assigns, to protect himself and his estate from the risk to which they were liable by the first insurance:" 1 Marshall on Ins. (2d Am. ed.) 146.

[14] Lawver v. Globe Mutual Ins. Co. 25 S. Dak. 549, 127 N. W. 615, 39 Ins. L. J. 1588, 1596. Concurrent insurance defined, see § 2480 herein.

On what is concurrent insurance, see note in 49 L.R.A.(N.S.) 374.

[15] Clarke v. Western Assur. Co. 146 Pa. St. 561, 28 Am. St. Rep. 821, 15 L.R.A. 127, 23 Atl. 248. See §§ 2489 et seq. herein. But see § 2472 herein.

[16] Marigny v. Home Ins. Co. 13 La. Ann. 338, 71 Am. Dec. 511.

[17] Merchants Mutual Ins. Co. v. Allen, 121 U. S. 67, 30 L. ed. 858, 7

ings contained a stipulation "that the aggregate amount insured in this and other companies . . . shall not exceed two-thirds of the estimated cash value." The insurance was for thirteen hundred dollars, and the estimated cash value according to the policy was nineteen hundred and fifty dollars; subsequently improvements were made and an additional insurance of one thousand dollars was effected in another company. The buildings were destroyed by fire and their value at the time of the fire was four thousand two hundred dollars. In an action on the first policy it was held that the "estimated cash value" was that at the time of the first insurance, and that the first policy was void for overinsurance.[18]

**§ 2456a. "Existing insurance:" marine: mutual societies.**—The term "existing insurance" in a clause in a carrier marine policy excluding goods and merchandise covered by existing insurance by or on account of the owners of the same, is not limited to insurance by the owners existing at the time of the attachment of the policy, but includes all other insurance while the risk continues.[19] Certificates in mutual aid societies do not constitute insurance within the meaning of a question in an application blank of an insurance company as to "existing insurance" in this or any other company.[20]

**§ 2457. Conditions as to other insurance.**—An ordinary provision of policies of insurance is that in case of other or double insurance upon the property covered by the policy, without the consent of the insurers, the policy shall be void. The object of this provision is to prevent the moral hazard from being increased without the knowledge of the insurer who has assumed the risk. Though the insured may in all cases have an interest in the preservation of the property, yet it is certainly true that the motive for its preservation would not be as strong if several policies existed upon the property amounting to a sum in excess of the actual value of the same. In such cases the insured might not be as watchful and careful of the acts of others as he would if the property were not as fully protected. And not only is such a provision a protection against the gross carelessness of the insured

Sup. Ct. 821, 122 U. S. 376, 30 L. ed. 1209, 7 Sup. Ct. 1248.

[18] Elliott v. Lycoming County Mutual Ins. Co. 66 Pa. St. 22, 5 Am. Rep. 323.

[19] Lehigh Valley Rd. Co. v. Providence-Washington Ins. Co. (U. S. D. C.) 167 Fed. 223, aff'd 172 Fed. 364, 97 C. C. A. 62.

[20] Penn Mutual Life Ins. Co. v. Mechanics' Savings Bank & Trust Co. 72 Fed. 413, 19 C. C. A. 286, 37 U. S. App. 692, 73 Fed. 653, 19 C. C. A. 316, 43 U. S. App. 75, 38 L.R.A. 33. See § 2075, subdiv. (j) herein.

in respect to his own acts and the acts of others, but it also tends to prevent any motive existing for the fraudulent destruction of the property by the insured. The condition is a reasonable and valid one, and will be enforced by the courts.[1] Therefore, as a general rule, procuring additional valid insurance in violation of an express condition in the first policy, without the written consent of the insurer avoids the policy, unless the company has waived the right to insist upon such forfeiture.[2] And the policy

[1] *United States.*—Bakhaus v. Germania Fire Ins. Co. 176 Fed. 879, 100 C. C. A. 349, 39 Ins. L. J. 1049.

*Alabama.*—Queen Ins. Co. v. Young, 86 Ala. 424, 11 Am. St. Rep. 51, 5 So. 116.

*Iowa.*—O'Leary v. Merchants' & Bankers' Mutual Ins. Co. 100 Iowa, 173, 62 Am. St. Rep. 555, 66 N. W. 175, 69 N. W. 420.

*Kentucky.*—Northwestern National Ins. Co. v. Avant, 132 Ky. 106, 116 S. W. 274, 38 Ins. L. J. 472, 474 (object is to prevent overinsurance and temptation to burn property, etc.).

*Michigan.*—Liverpool & London & Globe Ins. Co. v. Verdier, 35 Mich. 395.

*Missouri.*—Rogers v. Home Ins. Co. of N. Y. 150 Mo. App. 276, 136 S. W. 743, 40 Ins. L. J. 1434.

*New York.*—Sanders v. Cooper, 115 N. Y. 279, 5 L.R.A. 638, 12 Am. St. Rep. 801, 22 N. E. 212.

*North Dakota.*—First National Bank of Nome v. German American Ins. Co. 23 N. Dak. 139, 38 L.R.A. (N.S.) 213, 134 N. W. 873, 41 Ins. L. J. 899.

*South Carolina.*—Spann v. Phœnix Ins. Co. 83 S. Car. 262, 65 S. E. 232, 38 Ins. L. J. 1020.

*Texas.*—National Union Fire Ins. Co. v. Dorroh, — Tex. Civ. App. —, 133 S. W. 475, 40 Ins. L. J. 484.

*Washington.*—Rice v. Hartford Ins. Co. 50 Wash. 346, 97 Pac. 238.

Clauses in a policy forbidding other insurance without notice to or the knowledge and consent of the insurer, are proper and reasonable, and violation of them avoid the policy. Carpenter v. Providence Washington Ins. Co. 16 Pet. (41 U. S.) 495, 10 L. ed. 1044.

*Cited* in: *United States.*—Northern Assurance Co. v. Grand View Building Assoc. 183 U. S. 308, 341, 46 L. ed. 213, 227, 22 Sup. Ct. 133; Clark v. Manufacturing Ins. Co. 2 Woodb. & M. (U. S. C. C.) 491, Fed. Cas. No. 2,829.

*District of Columbia.*—Hamburg-Bremen Fire Ins. Co. v. Lewis, 4 App. D. C. 66, 86.

*Iowa.*—Hubbard v. Hartford Fire Ins. Co. 33 Iowa, 325, 332, 11 Am. Rep. 125.

*Louisiana.*—Duclos v. Citizens' Mutual Ins. Co. 23 La. Ann. 332, 333; Battaile v. Merchants Ins. Co. 3 Rob. 384, 386.

*Maine.*—Gardiner v. Piscatauqua Mutual Fire Ins. Co. 38 Me. 439, 442.

*New York.*—Whitwell v. Putnam Fire Ins. Co. 6 Lans. 166, 168; Gilbert v. Phœnix Ins. Co. 36 Barb. 372, 377.

On void or inoperative policies of insurance as breach of a condition against additional or other insurance on property, see note in 1 B. R. C. 39.

[2] Queen Ins. Co. v. Young, 86 Ala. 424, 11 Am. St. Rep. 51, 5 So. 116.

*Arkansas.*—Planters Mutual Ins. Co. v. Green, 72 Ark. 305, 80 S. W. 151.

*Iowa.*—Wilson v. Anchor Fire Ins. Co. 143 Iowa, 458, 122 N. W. 157.

*Maine.*—Towle v. Dirigo Mutual Fire Ins. Co. 107 Me. 317, 78 Atl. 374.

*Massachusetts.*—Hayes v. Milford

is avoided by such breach of condition even though insured is ignorant of said prohibition.[3] But if the parties agree that additional insurance may be obtained; a condition prohibiting other insurance becomes unenforceable and said agreement need not be in writing.[4]

That insurance in other companies is effected at the same time as a policy providing that it shall be void "if insured now has, or shall hereafter make or procure," any other contract of insurance on the same property, will not prevent the operation of such provision.[5]

A distinction is made between a condition that the policy shall be void if there is any other insurance upon the property and a condition that the policy shall be void if insured has or thereafter procures other insurance upon the property without insurer's consent and this is applied in a case where a policy was procured by the owner and mortgagor and duly assigned for the mortgagee's benefit and thereafter said owner, through a trustee, conveyed the property to his wife who obtained the policy in suit containing the condition last above mentioned, when the property was so conveyed to the vendee, the policy was not assigned to her, nor was she aware of its existence and, therefore, inasmuch as the mere transfer of title does not carry the policy the later policy was not void for other insurance.[6] The insertion by an insurance agent who has failed to secure all the insurance to be placed on a building, of a clause in the policy issued by him making it void if additional insurance is taken, will not prevent recovery on the policy in case of loss, although the intended amount was placed with other companies.[7] If the policy covers "goods sold but not

Mutual Fire Ins. Co. 170 Mass. 492, 40 N. E. 754, 27 Ins. L. J. 459.

*Nebraska.*—Nebraska Mercantile Mutual Co. v. Susek, 64 Neb. 17, 89 N. W. 428.

*New York.*—Tilton v. Farmers Ins. Co. 143 N. Y. Supp. 107, 82 Misc. 79.

*North Dakota.*—First National Bank of Nome v. German American Ins. Co. 23 N. Dak. 139, 38 L.R.A. (N.S.) 213, 134 N. W. 873, 41 Ins. L. J. 899.

*Pennsylvania.*—Greiner v. Lawn Mutual Fire, Storm & Lightning Ins. Co. (Pa.) 25 Lan. L. Rev. 337; Seibel v. Lebanon Mutual Ins. Co. (Pa.) 16 Lan. L. Rev. 356.

*Tennessee.*—Arnold v. St. Paul Fire & Marine Ins. Co. 106 Tenn. 529, 61 S. W. 1032, 30 Ins. L. J. 941, 942.—McAlister, J.

*Washington.*—Rice v. Hartford Ins. Co. 50 Wash. 346, 97 Pac. 238.

[3] Rice v. Hartford Ins. Co. 50 Wash. 346, 97 Pac. 238.

[4] Northwestern National Ins. Co. v. Avant, 132 Ky. 106, 116 S. W. 274.

[5] United Firemen's Ins. Co. v. Thomas, 47 L.R.A. 450, 82 Fed. 406, 27 C. C. A. 42, 53 U. S. App. 517, 92 Fed. 127, 34 C. C. A. 240, 47 L.R.A. 455.

[6] German Fire Ins. Co. v. Greenwald, 51 Ind. App. 469, 99 N. E. 1011, 42 Ins. L. J. 248.

That sale of property does not transfer policy to purchaser, see § 2307 herein.

[7] Norfolk Fire Ins. Co. v. Wood, 113 Va. 310, 39 L.R.A.(N.S.) 1020, 74 S. E. 186.

delivered" a policy taken out by the purchaser does not constitute other insurance where no such delivery or transfer has been made as to vest any property in the vendee.[8]

§ 2458. **Construction of conditions as to other insurance.**—A condition in a policy of insurance that it shall be void in case of other insurance has been construed as meaning that the policy is voidable at the option of the insurer, and not absolutely void.[9] In such a case, though the facts of other insurance may not be known to the insurer upon the first policy until after the loss, yet it is a good defense.[10] And if the insurer after loss interposes other insurance as a defense, and the defense is sustained, it is held to amount to an election to avoid the policy at the time the other insurance was effected, and consequently to render a premium note void from that moment for want of consideration as to all future risks and losses.[11] Where the policy provides that a person insuring must give notice of "any other insurance effected," it refers to both prior and subsequent insurance.[12] So also do the words "additional insurance."[13] A condition in a policy that "if any other insurance be made which together with this shall exceed, etc.," has been held to refer only to subsequent insurance.[14] The word "assigns" in the clause "if the said insured or assigns shall hereafter make any other insurance" has been construed as meaning the assignees of the policy, and not of the property.[15] In the standard form of fire insurance policy for New York the policy is conditioned to be void "if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by the policy." A "standard guaranty to maintain eighty per cent insurance," stamped on the face of a policy of fire insurance, does not supersede a provision that the policy shall be void in case of

[8] McFadden v. Union Assur. Co. (U. S. D. C.) 112 Fed. 35.

[9] Turner v. Meridian Fire Ins. Co. 16 Fed. 454, Fed. Cas. No. 530n; Hubbard v. Hartford Fire Ins. Co. 33 Iowa, 325, 11 Am. Rep. 125; Stevenson v. Phœnix Ins. Co. 83 Ky. 7, 4 Am. Rep. 120.

Construction: law of foreign state, see Northwestern Fuel Co. v. Boston Ins. Co. 131 Minn. 19, 154 N. W. 53, 46 Ins. L. J. 715 (*considered* under § 2496a herein). See also §§ 225 et seq. herein.

As to construction against insurer, see §§ 220 et seq. herein.

[10] Turner v. Meridian Fire Ins. Co. 16 Fed. 454, Fed. Cas. No. 530n.

[11] Tuckerman v. Rigler, 46 Barb. (N. Y.) 375.

[12] Warwick v. Monmouth County Mutual Fire Ins. Co. 44 N. J. L. 83, 43 Am. Rep. 343; Harris v. Ohio Ins. Co. 5 Ohio, 466.

[13] Behrens v. Germania Ins. Co. 58 Iowa, 26, 11 N. W. 719.

[14] Mussey v. Atlas Mutual Ins. Co. 14 N. Y. (4 Kern) 79.

[15] Bates v. Commercial Ins. Co. 1 Cinc. Rep. (Ohio) 523, 13 Ohio Dec. 698.

other insurance, at least, when that policy itself is for more than eighty per cent of the value of the property.[16] A provision of a policy as to prorating in case of loss of property covered by several policies, controls another provision that the interest of a mortgagee or trustee shall not be invalidated by any act or neglect of the mortgagor or owner of the property.[17]

§ 2459. **Where other insurance is only temporary.**—A temporary violation of the condition in a policy is held to render the policy inoperative only during the time while such other insurance exists. In such a case if there is no other insurance at the time of the loss, it is held that there may be a recovery on the policy first issued, since after the other insurance has ceased the prior policy becomes operative, the same as if the subsequent insurance had not been effected.[18]

§ 2460. **Subsequent marine policy suspended where property fully covered by other insurance at time of issuance.**—A frequent provision in marine policies is that if there be any prior insurance upon the property insured then the insurer shall only be liable for so much of the amount of the prior insurance as shall be deficient toward fully covering the property at risk. Under such a stipulation if the property is fully covered by insurance at the time the subsequent insurance is effected, then the subsequent policy will be suspended only, and will attach if at any time before a loss and during the term for which the policy is issued the prior insurance ceases to attach, or does not fully cover the property at risk.[19] Thus where the owners of a vessel, a few days before the expiration of a policy thereupon, obtained another policy upon the same vessel at and from Boston to Charleston, which contained such a condition, it was held that though the first policy continued in full force until after the vessel had sailed from Boston, the second policy attached immediately upon the expiration of the first, and the insured could recover for a loss subsequently occurring.[20]

[16] Cutler v. Royal Ins. Co. 70 Conn. 566, 41 L.R.A. 159, 40 Atl. 529.

[17] Sun Ins. Office v. Varble, 103 Ky. 758, 41 L.R.A. 792, 46 S. W. 486, 27 Ins. L. J. 798.

[18] New England Fire & Marine Ins. Co. v. Schletter, 38 Ill. 166, 167; Germania Ins. Co. v. Klewer, 129 Ill. 599, 22 N. E. 489; Obermeyer v. Globe Ins. Co. 43 Mo. 573. See, however, §§ 2239, 2240 herein, as to effect of temporary violation, etc., of conditions.

On effect of other insurance which ceased before loss under general provisions against other insurance, see note in 32 L.R.A.(N.S.) 461.

[19] Murray v. Insurance Co. of Pennsylvania, 2 Wash. (U. S. C. C.) 186, Fed. Cas. No. 9,961.

[20] Kent v. Manufacturers' Ins. Co. 18 Pick. (35 Mass.) 19.

**§ 2461. Warranted "uninsured:" "honor policy:" marine risk.**—An important decision in this connection was rendered in England in 1895, under a policy upon a marine risk, wherein there was a warranty that the subject matter, the hull and machinery of a vessel, was uninsured, and the question was involved whether certain "honor" policies void under the statute 19 George II. chapter 37, would, if they had been on the same subject matter, have operated as an infringement of the warranty, and it was said by the court, per Kennedy, J.: "I am of opinion that the clause ought to be construed as a warranty by plaintiff that as to the five thousand pounds he was not covered by any such insurance as is treated in practice and according to the usage of commercial men as an effectual insurance. It is merely another way of putting the same thing to say that we ought not to read into the warranty the words 'by any policy not invalid in point of law.'" The court also said: "The plaintiff's counsel . . . argued that the 'honor policy,' being null and void by statute, was no insurance at all, and therefore . . . the plaintiff was uninsured within the meaning of the warranty, even if the subject matter was in part the same subject matter as that of the policies on 'hull and machinery.' . . . I am of opinion that plaintiff is wrong, and that the 'honor' policies . . . cannot be disregarded in reference to this warranty on account of their legal invalidity. A curious result would follow if they could be. The main, if not the whole, object of the warranty is to give the insurer a pledge of the good faith of the assured and of his diligence in preserving the thing assured by reason of remaining his own insurer to the extent specified in the warranty. It was admitted in the course of the argument, and it could not but be admitted, that a claim under an 'honor' policy is regularly recognized and discharged by the underwriter as faithfully and as promptly as a claim under a policy which is not open to the same legal objection. Therefore, if this contention on behalf of the plaintiff is right, he might after giving this warranty have straightway gone and safely defeated its purpose, by covering by 'honor' policies on 'hull and machinery' the whole of the five thousand pounds which he was warranted uninsured. Looking alike at the obvious aim of such a warranty as this and the fair meaning of the word 'uninsured' in a commercial document of this kind, it must be taken to have been understood both by assurer and assured by the light of their common knowledge and of the universal treatment of an 'honor' policy in the insurance world." [1]

[1] Roddick v. Indemnity Mutual B. D. 836, 64 L. J. Q. B. 733, 2 Q. Marine Ins. Co. (1895) 1 L. R. Q. B. 380, 14 R. 516, 72 L. T. 860, 44

Upon appeal, however, this case was decided upon another point, and Lord Esher, M. R., says as to this question, that it was unnecessary to deal with it. "But it must not be assumed that I assent to the view of the learned judge on this point." And Smith L. J., says: "With regard to 'honor' policies as being a breach of the warranty, the business meaning of the warranty was to secure that the shipowner would be careful in the management of his ship by his remaining uninsured to the extent of five thousand pounds. It is not necessary to decide the point; but I am not satisfied that, by reason of his having a policy upon which he could not recover at law, the shipowner would cease to be his own insurer."[2] And it would seem that the main point which ought to decide the question would be whether there could be a recovery at law; not whether the underwriters consented to pay because of a practice so to do, but whether they could, should they choose, successively rest upon the defense that the "honor" policy was void at law. If insured has a policy not legally enforceable, has he, as it is clearly put by Smith, L. J., ceased "to be his own insurer?" We believe not. The question of usage, however, evidently outweighed this point in the opinion of the court in the first case so that said decision, as then rendered, in effect makes practice or usage validate that which is in law invalid.

**§ 2462. Representations or concealment concerning other insurance.**—Representations as to other insurance will not in all cases where incorrect avoid the policy; as where the company is satisfied to rely on a mere statement of belief, instead of a positive assertion which the assured makes in good faith, they cannot set up the defense that the facts were not correctly stated.[3] So an approximate estimate made by assured from memory of amounts of insurance then existing on the property to the company's agent, who reported a definite sum to the company, and the agent had authority to act upon verbal statements, will not avoid the contract.[4] But a statement of mere belief as the amount of other insurance is not sufficient when made in response to a statement of the agent that the amount must be exactly stated where such amount is incorrect, and the answers of the insured in the application are made warranties, and in such case there can be no recovery.[5] If the

W. R. 27, 8 Asp. M. C. 24, 1 B. R. C. 51n. See §§ 2475–2478 herein.

[2] Roddick v. Indemnity Mutual Marine Ins. Co. (1895) 2 L. R. Q. B. D. 380, 384, 386, 64 L. J. Q. B. 733, 14 R. 516, 72 L. T. 860, 44 W. R. 27, 8 Asp. M. C. 241.

[3] Bridgewater Iron Works Co. v. Enterprise Ins. Co. 134 Mass. 433. See §§ 1874, 1926, 2075 herein.

[4] Hornthal & Bros. v. Western Ins. Co. 88 N. C. 71.

[5] Commonwealth Mutual Fire Ins. Co. v. Huntzinger, 98 Pa. St. 41.

actual amount of other insurance does not exceed the amount stated, a slight mistake as to the amount will not be considered material,[6] nor will a mistake as to the name of the other insurer,[7] but a representation as to the amount of insurance upon the property may be so much in excess of the actual insurance as to be considered material, and thus avoid the policy.[8] As a general rule, if the statement is one upon which the insurers have a right to rely, or it is made a warranty by the terms of the policy, and it is not in fact a true statement of the actual facts, and is misleading, then no recovery may be had upon a policy which is issued based upon such statement.[9] A representation that other insurance to a certain amount exists at the time of taking out the policy, when in fact it does not, will not justify the insured in taking out subsequent policies in other companies to the amount named.[10] And where a former owner's title to the property has been parted with but he had taken out insurance in his own name it does not constitute such other insurance as falsifies a representation concerning its existence and, therefore, it does not invalidate a policy issued upon the faith of the statement.[11]

Additional insurance existing upon property when the application was accepted and unknown to the insurer issuing a policy on said property avoids the latter policy, which provides that if assured now has or shall hereafter make any other insurance on the property without assent of the insurer, the policy shall be void.[12]

A paid-up policy calling for unconditional payment for a certain sum to the executors, administrators, or assigns of the insured at his death, with reservation to the insurer of the right to pay the money to any person who has incurred expense on behalf of the insured, constitutes "insurance in force upon his life," within the meaning of an application calling for information upon that point.[13]

[6] Osser v. Provincial Ins. Co. 12 U. C. C. P. 133, 141.

[7] Osser v. Provincial Ins. Co. 12 U. C. C. P. 133, 141.

[8] Armour v. Transatlantic Ins. Co. 90 N. Y. 450.

[9] Clapp v. Massachusetts Benefit Assoc. 146 Mass. 519, 16 N. E. 433; London Assurance Co. v. Mansel, 11 T. R. Ch. D. 363, 48 L. J. Ch. 331, 41 L. T. 225, 27 W. R. 444.

[10] Conway Tool Co. v. Hudson River Ins. Co. 12 Cush. (66 Mass.) 144, 59 Am. Dec. 172.

[11] State Insurance Co. v. New Hampshire Trust Co. 47 Neb. 62, 66 N. W. 9, 47 Neb. 71, 66 N. W. 1106.

[12] Carleton v. Patrons' Androscoggin Mutual Fire Ins. Co. 109 Me. 70, 39 L.R.A.(N.S.) 951 (annotated on duty to notify insurer of facts which develop after submission of application but before delivery of policy), 82 Atl. 649, 41 Ins. L. J. 1067.

[13] Dimick v. Metropolitan Life Ins. Co. 69 N. J. L. 384, 62 L.R.A. 774, 55 Atl. 291.

**§ 2462a. Effect of want of knowledge of other insurance.**—It may be reasonably deducted from the decisions that the insured will not, on the ground of a breach of condition as to other insurance, lose the protection afforded by his policy where there clearly exists, bona fide, a want of knowledge or consent on his part as to other policies being issued or in existence, and which, without such want of knowledge or consent, might constitute other insurance. There are, however, as will appear from the decisions, certain qualifications which modify or limit the application of this rule.

In a Michigan case the owners in fee sold the property under a land contract with insurer's consent and they retained an insurable interest and the policy, for which the vendee paid the premium for the unexpired portion of the insurance under her agreement to keep the property insured for the vendor's benefit and that the unpaid part of the foreclosure money should, in case of loss, be received by the latter. The purchaser in possession without notice to or consent of said owners, insured in her own name her interest. The second insurer claimed that the policy was void because of the prior policy, and her policy was canceled as to that part which covered the purchased property. It was claimed as to the owners' policy that they were not entitled to recover more than the loss or damage to their interest in the property insured, but this claim was not sustained by the court, and it was also held that the policy retained by said owners could not be changed to their harm by the vendee's said act, and that the vendors had no interest in the second policy because said vendee had carried out her agreement by insuring the property for their benefit.[14] And where the husband of the vendee of property, to whom the policy had been assigned with insurer's consent, obtained additional insurance without the knowledge of either the insurer or the vendor, to whom, under an attached rider the loss was payable as interest might appear, it was held that the policy was not thereby voided as to said vendor's interest as the policy conditions made applicable by said rider, protected his interest.[15] So a vendee in possession, who holds under a contract to purchase from the mortgagor of the property insured, and who takes out a policy, has an interest thereunder so far different from that of the mortgagee under his policy as not to constitute other insurance even though the mortgagee has caused an indorsement to be made upon the policy, without the knowledge

[14] Smith v. American Ins. Co. 177 Mich. 123, 143 N. W. 54, 42 Ins. L. J. 1758.

[15] Dumphy v. Commercial Union Assur. Co. — Tex. —, 174 S. W. 814, rev'g — Tex. Civ. App. —, 142 S. W. 116, 41 Ins. L. J. 441.

of either the mortgagor or vendee, stating that the latter is recognized as the owner of the property and the policy, for he is not thereby made the insured.[16]

So a policy issued to the owner of property is not avoided by the fact that additional insurance is without said owner's knowledge or consent, procured thereon by one who has a lien on the property.[17] And any other contract or agreement for insurance held by any person "interested," within the meaning of a provision in a policy against other insurance, does not include insurance procured without the knowledge and consent of the other party by a third person who has no interest in the first policy, although he has or claims an insurable interest in the property.[18]

If a person, after insurance has been procured for him by another at his request, obtains insurance on the same property with another insurer it constitutes other insurance although insured had no knowledge that the first insurance had been effected for in such case it is his duty to learn what his agent has done, and, in addition, if insured brings an action on the policy obtained by his said agent he ratifies his act.[19] So the fact that the owner of insured property does not know of the existence of other insurance thereon, will not excuse him in making a statement, in his application, that there is no other insurance; nor will it prevent the company from setting up the false representations in an action on the policy.[20]

If an assignor and his assignee ratify an unauthorized act of the assignee's wife in obtaining additional insurance and accept the benefits thereof they are bound thereby.[1] But a person cannot after the property insured has been destroyed accept a policy procured without his knowledge or procurement and which at the time of issue he never intended to accept, and, therefore, in such case there can be no question of ratifications and where it is claimed that such a policy is other insurance and this is denied the question is one for the jury.[2]

[16] De Witt v. Agricultural Ins. Co. 157 N. Y. 353, 61 N. E. 977, aff'g 36 N. Y. Supp. 570, 89 Hun, 229, 71 N. Y. St. Rep. 566.

[17] Ginners' Mutual Underwriters v. Wiley & House, — Tex. Civ. App. —, 147 S. W. 629.

[18] Niagara Fire Ins. Co. v. Scammon, 144 Ill. 490, 19 L.R.A. 114, 28 N. E. 919, 32 N. E. 914.

[19] Arnold v. St. Paul Fire & Marine Ins. Co. 106 Tenn. 529, 61 S. W. 1032.

[20] Phœnix Ins. Co. v. Copeland, 86 Ala. 551, 4 L.R.A. 848, 6 So. 143.

[1] German Ins. Co. v. Emporia Mutual Loan & Savings Assoc. 9 Kan. App. 803, 59 Pac. 1092.

[2] Nelson v. Atlanta Home Ins. Co. 120 N. Car. 302, 27 S. E. 38, 26 Ins. L. J. 913.

**§ 2462b. Same subject: mortgagor and mortgagee.**[2a]—If an owner of property accepts a fire policy thereon, containing a condition that it shall be void if other insurance is taken on the insured property, the fact that the mortgagee of such property subsequently takes other insurance on his interest does not avoid the owner's insurance, especially when neither knew that insurance had been procured by the other.[3] And where a mortgagee who is assignee of the policy obtains its cancelation without the mortgagor's knowledge and effects insurance with another insurer, it does not constitute double insurance under the commercial law, nor is it subsequent insurance under the Ontario statute.[4] In another case the loan agent who negotiated the mortgage, took out, without the mortgagor's knowledge or consent, a mortgage on his dwelling, loss payable to the mortgagee, said agent paying the premium out of the loan fund. After the loss the mortgagor learned of the prior insurance and upon advice of insurer's agent that he present proofs of loss on both policies and prorate the same, he did so and it was held that the insurance subsequently obtained was not annulled and that his acts after loss, done upon advice of insurer's agent, after the moral hazard had ceased to exist, could not prevent recovery.[5] Again, a condition binding insurer's liability to the mortgagor's proportionate share of the loss has no application where the only other policy is one which is taken out by the mortgagee without authority on the part of the mortgagor and who upon learning thereof notified said mortgagee that she had procured insurance upon the property and he thereupon promised to cancel that obtained by him, he having no authority to procure said insurance unless the mortgagor failed to protect his interest.[6] Where the policy is issued, loss payable to the mortgagee, limiting liability to no greater proportion of the loss than the amount insured should bear to the whole insurance whether valid or not, and the mortgagee, at the agent's request, surrendered the policy for cancelation and accepted from said agent another policy in another company in place thereof, of which facts the

[2a] When mortgagee's interest not affected by mortgagor's acts. See § 2795 herein.

[3] Home Ins. Co. of N. Y. v. Koob, 113 Ky. 360, 58 L.R.A. 58, 101 Am. St. Rep. 354, 68 S. W. 453, 24 Ky. L. Rep. 223.

On procuring of insurance by mortgagee as a violation of provisions in policy of mortgagor against other or additional insurance, see note in L.R.A.1917A, 607.

[4] Morrow v. Lancashire Ins. Co. 29 Ont. 377, 18 Canadian L. T. 220, aff'd 26 Ont. App. 123, 19 Canadian L. T. 130; Rev. Stat. Ont. c. 203, sec. 8.

[5] Cowart v. Capital City Ins. Co. 114 Ala. 356, 22 So. 57, 27 Ins. L. J. 246.

[6] Kelley v. People's National Fire Ins. Co. 262 Ill. 158, 50 L.R.A.(N.S.) 1164, 104 N. E. 188, aff'g 181 Ill. App. 142.

mortgagor had no notice, it was held that the second policy constituted other insurance and that the loss should be apportioned as stipulated.[7] But where the mortgagee has effected insurance in the owner's name loss payable to himself as his interest may appear the insured owner is not aided by the fact that the mortgagee's act was without said owner's knowledge or consent.[8]

If a mortgagee's interest is protected by a policy taken out in the name of the mortgagor and they accept and retain the policy they are chargeable with knowledge that the mortgagor is the insured and whether the latter had actual or imputed notice that said policy was issued, his act in taking out further insurance without consent of the insurer constitutes other insurance which defeats the first policy.[9] So the rights of mortgagees under a policy payable to them as their interest may appear, and providing that they shall not be affected by any act of the mortgagor to which they do not consent, are not affected by additional insurance taken by him without their knowledge, although the policy provided that in the event of other insurance "the insured" can recover only pro rata, and a rider to the policy permits other insurance, making a similar provision as to pro rata liability, "whether such other insurance applies in the same manner or not," as the other insurance in such case affects only the insured, and not the mortgagees.[10]

**§ 2463. Policy outstanding at time of application for insurance surrendered before issuance of subsequent policy.**—Though the insured may insert a statement in his application for insurance that there is no other insurance upon the property, and there is in fact a prior policy in existence, yet it is held that if he surrenders this prior policy before the subsequent one is issued, the condition in the subsequent policy as to "prior and subsequent insurance" will not be violated.[11]

**§ 2464. Subsequent policy must cover same or part of same property.**—As we have already stated, the subsequent policy must cover the same or at least part of the same property as is covered by the prior policy. If it does not, then it will not constitute double or other insurance. So an insurance on goods in the store is not within the rule of an insurance company making void the policy

[7] Hartford Fire Ins. Co. v. Peterson, 209 Ill. 112, 70 N. E. 757.

[8] Perry v. Liverpool & London & Globe Ins. Co. 34 N. B. 380.

[9] Holbrook v. Balvise Fire Ins. Co. 117 Cal. 561, 49 Pac. 555, 26 Ins. L. J. 639.

When mortgagee's interest not affected by mortgagor's acts, see § 2795 herein.

[10] Hardy v. Lancashire Ins. Co. 166 Mass. 210, 33 L.R.A. 241, 44 N. E. 209. See § 2795 herein.

[11] Train v. Holland Ins. Co. 68 N. Y. 208. See §§ 2475–2478 herein.

on the store in case the assured shall be allowed to insure the same or "any other property connected with it in any other company or any other office." [12] The fact that the insured had insured in other companies is no defense if the policies do not legally cover the same property though there may be some mingling of the goods.[13] Where the policy covered a "carpenter's shop and carpenter tools," it was held that, although another policy was issued to the same person upon "four chests of carpenters' tools in a wood shop," which was described as being in the same street as the property described in the first policy, it was not proof that any part of the property was covered by both policies where it appeared that there were two chests in the shop belonging to the assured and two or three belonging to the workmen.[14]

**§ 2465. Insurance on ship and on advances.**—If an insurance is effected upon a ship and also upon "advances," this will not constitute double insurance where it is evident from the construction of the policy that the advances are independent of and distinct from the ship, and are intended so to be insured; as in a case where the ship's valuation was fixed at one hundred thousand dollars, and there had been the sum of ninety-five thousand dollars paid on the policies and also twenty-eight thousand seven hundred and fifty dollars on account of advances, it was held, in an action to recover on a five thousand dollar policy, that there was no double insurance. This was a case where a policy was effected at Lloyds "on advances." The policy was the common form of Lloyds' valued policies, printed with blanks for the insertion of the particular terms of the contract to be superadded to the printed parts. The court said: "When the words 'on advances,' together with the valuation, are inserted, they cannot be taken to mean any part of the ship or cargo, because all these are already described not only in the valuation clause but in the general clause descriptive of the insured property. . . . The sensible construction of a policy like this now in controversy is that it insures advances against risk from the loss of a ship and the advances thus insured are something independent of and distinct from the ship herself." [15]

**§ 2466. Insurance against different perils.**—As we have previously stated,[16] the insurance must be upon the same property,

[12] Jones v. Maine Mutual Fire Ins. Co. 18 Me. 155. See also Illinois Mutual Fire Ins. Co. v. O'Neil, 13 Ill. 89. See § 2472 herein.

[13] Boatman's Fire & Marine Ins. Co. v. Hocking, 8 Atl. 417, 6 Cent. 652, 5 Sadler (Pa.) 180.

[14] Clark v. Hamilton Ins. Co. 9 Gray (75 Mass.) 148.

[15] Providence-Washington Ins. Co. v. Bowring, 50 Fed. 613, 1 C. C. A. 583.

[16] See § 2455 herein.

for the benefit of the same person, and against the same risk, in order to be within the meaning of a provision as to other insurance. All these conditions must unite. Therefore, the same property may be insured against different perils,[17] and it will not constitute other insurance.

A case upon this point arose in England. Insurance against fire was effected to the amount of three thousand pounds upon wool in any shed or station or in transit by land only, or in any shed, store, or on the wharf in Sydney until placed on ships. The policy was conditioned to be void in case of other insurance. The insured then procured a subsequent marine policy for sixteen thousand five hundred pounds on wool to be carried by ship from Hunter to Sydney, and from thence to London by ships. The policy carried the risk of craft from the time the wool was first waterborne, and of transshipment or landing and reshipment at Sydney. It was the custom of stevedores at Sydney to have the wool taken to their stores, where it was pressed and taken to the ship. The wool, upon the arrival of the ship at Sydney, was transferred by the plaintiff's agent to his store. The agent entered into a contract for its shipment by water to London. After having the wool weighed, it was transferred from his store to the warehouse of the ship's stevedore, and while there it was in part destroyed by fire. In an action to recover it was held that there was no other insurance within the meaning of the provision, as the policy covering the marine risk did not attach while the wool was in the warehouse of the stevedore.[18]

**§ 2467. Where insurances are upon different interests or do not cover same subject.**—If different persons have different interests in the same subject of insurance each may insure his interest, and this will not constitute other or double insurance.[19] A policy of fire insurance containing a stipulation against "other insurance" is not invalidated by the fact that at the time of its issuance a prior policy covering the same property is in existence, unless the assured has an interest in such prior policy, or will derive a benefit under

[17] See § 2466 herein.

[18] Australia Agricultural Ins. Co. v. Saunders, 10 L. R. Com. P. 668, 44 L. J. C. P. 391, 53 L. T. 447, 3 Asp. M. C. 63.

[19] Perkins v. New England Marine Ins. Co. 12 Mass. 214; Lowell Manufacturing Ins. Co. v. Safeguard Fire Ins. Co. 88 N. Y. 591; Rowley v. Empire Fire Ins. Co. 4 Abb. Dec. (N. Y.) 131, 36 N. Y. 550, 42 N. Y. 557; Whittwell v. Putnam Fire Ins. Co. 6 Lans. (N. Y.) 166; Wells v. Philadelphia Ins. Co. 9 Serg. & R. (Pa.) 103; Goding v. London Assurance Co. 1 Burr. 489–93, per Lord Mansfield, 1 Ld. Ken. 254, 1 W. Black. 103.

it in the event of the burning of the property.[20] So where a policy provided against other insurance, it was held that an insurance by a partner of his undivided interest did not avoid the policy.[1] An agreement between different owners of property that one of them shall take out the insurance upon said property in his own name does not amount to double insurance.[2] Different merchants who have been supplying a dealer with stock may each insure his interest, and it will not constitute other or double insurance.[3] Nor will it in case of insurance by both pledgeor and pledgee,[4] or by vendor and vendee.[5] But where the vendee of goods procured a policy prohibiting other insurance, and assigned it to the vendor with insurer's consent, and then executed a subsequent insurance for his own account, it was held that the second policy was void.[6] And insurance by both shipper and carrier will not constitute other insurance,[7] or by lessor and lessee,[8] or by consignor and consignee,[9] except where the policy is procured by the consignee to protect both his interest and that of the consignor, and in such a case so much of the insurance as will be for the protection of the consignor will be double or other insurance.[10] So also where B had a bond from A for an undivided half of a mill, and gave a bond back to keep it in repair, and also agreed that A might get it insured at his expense to secure him for the debt, and A procured an insurance on the whole mill, it was held that the insurance by A was not a double insurance.[11] Insurance may be effected by the grantee of the equity of redemption and by the mortgagee in the cases where the sale or transfer of the property by the mortgagor will not defeat the mortgagee's policy, and such insurance will not be in violation of a condition in the mortgagee's policy requiring notice of other insurance.[12] Where a widow insures property be-

[20] Copeland v. Phœnix Ins. Co. 96 Ala. 615, 38 Am. St. Rep. 134, 11 So. 746.

[1] Hall v. Concordia Fire Ins. Co. 90 Mich. 403, 51 N. W. 524.

[2] Burbank v. Rockingham Ins. Co. 24 N. H. 550, 57 Am. Dec. 300.

[3] Roos v. Merchants' Ins. Co. 27 La. Ann. 409.

[4] Nussbaum v. Northern Ins. Co. 37 Fed. 524, 1 L.R.A. 704.

[5] Southern Ins. Co. v. Lewis, 42 Ga. 587; Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; Rumsey v. Phœnix Ins. Co. 1 Fed. 396, 17 Blatchf. 527.

[6] Neve v. Columbia Ins. Co. 2 McMull. (S. C.) *220, 490; Leavitt v. Western Fire & Marine Ins. Co. 7 Rob. (La.) 351.

[7] Royster v. Roanoke N. & B. Steamboat Co. 26 Fed. 492.

[8] Mitchell v. Home Ins. Co. 32 Iowa, 421; Planters' Mutual Ins. Co. v. Rowland, 66 Md. 236, 7 Atl. 257.

[9] Williams v. Crescent Mutual Ins. Co. 15 La. Ann. 651; Shaw v. Ætna Ins. Co. 49 Mo. 578, 8 Am. Rep. 150; Herkimer v. Rice, 27 N. Y. 163.

[10] Home Ins. Co. v. Baltimore Warehouse Co. 93 U. S. 527, 23 L. ed. 868.

[11] Burbank v. Rockingham Ins. Co. 24 N. H. (Fost.) 550, 57 Am. Dec. 300.

[12] City Five Cents Savings Bank

longing to the minor heirs of her deceased husband, making the application in their behalf, they having no guardian and she has a dower interest in the property, the policy is not forfeited by the fact that she subsequently insures her dower interest in the property in another company, since in order to assert a forfeiture on the ground of double insurance the second policy must have been made to the same person mentioned in the first policy and on the same interest in the same policy.[13]

§ 2468. **Policy to different joint owners of property: tenants in common.**—Where several persons own property as tenants in common, and have effected a policy thereon which forbids other insurance, a subsequent policy effected by one of the tenants without mention of the joint ownership will constitute other insurance within the meaning of the prohibition.[14] And a policy conditioned to be void if there be any prior insurance is held to be avoided by a prior policy in the name of one of the joint owners only.[15] In Kentucky, it has been held that insurance by several joint owners may be made on their respective interests at different offices, notwithstanding a provision in each policy "that it shall be void in case any other insurance is effected on the same property without notice." Such a provision applies only to a second insurance in case the policy is forfeited.[16]

§ 2469. **Insurance by owner of land and person holding under contract for deed.**—Both the owner of land and a person holding possession under a contract for a deed may each insure his interest, and in such a case if the policy to the person holding possession under such a contract contains a condition forbidding other insurance, a subsequent policy to the owner will not avoid the prior policy.[17] So an insurance upon the mortgagee's interest and a policy upon the interest of a vendee in possession under a contract for purchase cover different interests and an insurance by the latter does not void the former's policy although it forbids additional insurance.[18]

v. Pennsylvania Ins. Co. 122 Mass. 165.

[13] Haire v. Ohio Farmers' Ins. Co. 93 Mich. 481, 32 Am. St. Rep. 516, 53 N. W. 623.

[14] Pitney v. Glens Falls Ins. Co. 65 N. Y. 6.

[15] Horridge v. Dwelling-House Ins. Co. 75 Iowa, 374, 39 N. W. 648.

[16] Franklin Marine & Fire Ins. Co. v. Drake, 2 B. Mon. (Ky.) 47; Woodbury Savings Bank v. Charter Oak Fire & Marine Ins. Co. 31 Conn. 517, 518.

[17] Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; Tyler v. Ætna Fire Ins. Co. 12 Wend. (N. Y.) 507. See also Smith v. American Ins. Co. 177 Mich. 123, 143 N. W. 54, 42 Ins. L. J. 1758, *considered* under § 2462a herein.

[18] DeWitt v. Agricultural Ins. Co.

**§ 2470. Different interests: mortgagor and mortgagee.**—The general rule that different persons each having a different interest in property may insure that interest also prevails where different policies are effected by the mortgagor and mortgagee upon the property. The mortgagor may insure the property to cover his interest, and the mortgagee may likewise insure his interest in the property, and it will not be within the meaning of the clause as to other insurance.[19] So a policy taken by a mortgagee on his interest in mortgaged property is not within the meaning of a clause of a policy issued to the mortgagor, rendering the policy void "if now or hereafter there be other insurance on any property hereby insured."[20]

If a policy is procured in the name of the mortgagor, and is merely made payable to the mortgagee as his interest may appear, and the mortgagor subsequently procures additional insurance, the policy will be avoided if conditioned to be void in case of other insurance.[1]

A mortgagee may be bound by the stipulations of a policy so that the policy will be defeated by subsequent unauthorized insurance, although obtained by and insuring the interest of one of the mortgagors only. In this case the mortgage provided that if the mortgagors failed to insure the property, the mortgagee could in-

157 N. Y. 353, 51 N. E. 977, aff'g 36 N. Y. Supp. 570, 89 Hun, 229, 71 N. Y. St. Rep. 566.

[19] *Connecticut.*—Woodbury Savings Bank v. Charter Oak Fire & Marine Ins. Co. 31 Conn. 517.

*Illinois.*—Niagara Fire Ins. Co. v. Scammon, 35 Ill. App. 582, 20 Ins. L. J. 119.

*Kentucky.*—Home Ins. Co. of N. Y. v. Koob, 113 Ky. 360, 24 Ky. L. Rep. 223, 58 L.R.A. 58, 68 S. W. 453.

*Massachusetts.*—Wheeler v. Watertown Fire Ins. Co. 131 Mass. 1; Nichols v. Fayette Ins. Co. 1 Allen (83 Mass.) 63.

*Michigan.*—Guest v. New Hampshire Fire Ins. Co. 66 Mich. 98, 33 N. W. 31.

*New York.*—Traders' Ins. Co. v. Roberts, 9 Wend. (N. Y.) 404.

As to insurance by mortgagee without mortgagor's knowledge, see § 2462a herein.

[20] Home Ins. Co. of N. Y. v. Koob, 113 Ky. 360, 58 L.R.A. 58, 101 Am. St. Rep. 354, 68 S. W. 453, 22 Ky. L. Rep. 223.

On procuring of insurance by mortgagee as a violation of provisions in policy of mortgagor against other or additional insurance, see note in L.R.A.1917A, 607.

[1] Sias v. Roger Williams Ins. Co. 8 Fed. 183, 187, 9 Ins. L. J. 154; Monroe Building & Loan Assoc. v. Liverpool & London & Globe Ins. Co. 50 La. Ann. 1243, 24 So. 238, 28 Ins. L. J. 266; Hine v. Homestead Fire Ins. Co. 29 Hun (N. Y.) 84, s. c. 93 N. Y. 75, 45 Am. Rep. 176; Perry v. Lorillard Fire Ins. Co. 61 N. Y. 214, 19 Am. Rep. 272; Van Alstyne v. Ætna Ins. Co. 14 Hun (N. Y.) 360, 366; Gillett v. London & Liverpool & Globe Ins. Co. 73 Wis. 203, 9 Am. St. Rep. 784, 41 N. W. 78. *Examine* Franklin Ins. Co. v. Wolff, 23 Ind. App. 549, 54 N. E. 772.

*Compare* §§ 2314 et seq., 2795 herein.

sure the same, the expense thereof being added to the mortgage debt, and the mortgagee applied for insurance on the property to secure his interest therein, and a policy was issued running to the mortgagors, but provided that the loss, if any, should be payable to the mortgagee, and contained a stipulation avoiding the policy if the insured obtained additional insurance without consent of the company, and the mortgagee paid the premium and retained the policy without objection for nearly a year before the property was burned.[2] Again, where a husband and wife mortgaged the wife's premises, and procured an insurance thereon payable to the mortgagee as his interest might appear, and the policy was conditioned to be void in case of subsequent insurance, whether valid or not, without consent written on the policy, and the wife alone procured another policy of insurance in her own name, it was held, first, that the first insurance was of the mortgagor's, and not of the mortgagee's, interest, and second, that the first insurance was avoided by the second.[3] And where a policy was issued in the name of the owner of a vessel which was mortgaged, and the policy was assigned to the mortgagee, and the mortgagor subsequently procured another policy, it was held that the assignee's right to recover was defeated.[4] A policy in the name of the mortgagor alone which contains such a condition will, it is held, be avoided where one of the mortgagors procures a subsequent insurance, though the former policy was procured and paid for by the mortgagee.[5] In these cases it will be seen that the person who procures the insurance, or in whose name it is issued, retains his interest in the first policy at the time of procuring the second. If, however, the policy has been assigned by the mortgagor to the mortgagee, so as to transfer all interest in the policy and to constitute it a new contract between the mortgagee and the insured, there will be no reason why the mortgagor might not procure a subsequent policy in his own name to protect his interest in the mortgaged property, and such insurance would not be other or double insurance. Where a fire policy issued by the G Company to M, payable to T as mortgagee, contained a clause avoiding it in case of other insurance without G's written consent, etc., and T, without M's knowledge, procured insurance in the H Company, and after the loss M made the formal proof required to procure payment of the H insurance,

[2] Gillett v. London & Liverpool & Globe Ins. Co. 73 Wis. 203, 9 Am. St. Rep. 784, 41 N. W. 78.

[3] Continental Ins. Co. v. Hulman, 92 Ill. 145, 34 Am. Rep. 122, *cited* in note 1 B. R. C. 52. See §§ 2475–2478 herein.

[4] Buffalo Steam Engine Works v. Sun Mutual Ins. Co. 17 N. Y. 401.

[5] Gillett v. London & Liverpool & Globe Ins. Co. 73 Wis. 203, 9 Am. St. Rep. 784, 41 N. W. 78.

it was held that there was no default or ratification by M that would avoid the G policy.[6] Persons holding under different mortgages may each insure the property to protect their interest.[7] It has been held, if a policy contains a warranty that no other insurance exists, that the fact that the insured had no knowledge of other insurance is not always conclusive.[8] Again, insurance taken out by a mortgagee under authority of the mortgage deed to do so if the mortgagor fails to insure, after the mortgagor had secured a policy, and which the mortgagee promised to cancel upon learning the facts, does not avoid the policy of the mortgagor under a provision therein making it void if insured shall make or procure any other contract of insurance.[9] And if the mortgagor takes out a policy to cover the mortgagee's interest it is not avoided by the latter's effecting insurance without the former's consent where she upon learning thereof sent notice to said mortgagee informing him of the insurance previously obtained by her and he thereupon promised to cancel his policy but did not do so, said mortgagee only being authorized to procure insurance to protect his interest in case the mortgagor failed to procure it.[10] And the fact that a mortgagee in effecting insurance on his interest in the mortgaged property attempted to charge the premium to the mortgagor, does not make it "other insurance," within the meaning of a clause in a policy procured by the mortgagor making it void in case there be any other insurance on the property hereby insured.[11]

§ 2471. **Insurance by stranger will not constitute other insurance.**—If a stranger without the knowledge and consent of the owner of the property, or the person having therein an insurable interest which he has protected by a policy of insurance, procures a policy upon the property, this will not constitute other insurance such as will be within the meaning of a prohibition as to other insurances,[12] unless the subsequent insurance is ratified by the

[6] Titus v. Glens Falls Ins. Co. 81 N. Y. 410, 8 Abb. N. C. (N. Y.) 315. See also Robert v. Traders' Ins. Co. 17 Wend. (N. Y.) 631, rev'g 9 Wend. (N. Y.) 474.

[7] Fox v. Phœnix Ins. Co. 52 Me. 333.

[8] Phœnix Ins. Co. v. Copeland, 86 Ala. 551, 4 L.R.A. 848, 6 So. 143.

[9] Kelley (use of Chisholm) v. People's National Fire Ins. Co. 262 Ill. 158, 50 L.R.A.(N.S.) 1164, 104 N. E. 188.

[10] Kelley v. People's National Fire Ins. Co. 262 Ill. 158, 50 L.R.A.(N.S.) 1164, 104 N. E. 188, aff'g 181 Ill. App. 142.

[11] Home Ins. Co. of N. Y. v. Koob, 113 Ky. 360, 58 L.R.A. 58, 101 Am. St. Rep. 354, 68 S. W. 453, 22 Ky. L. Rep. 223.

[12] *United States.*—Carpenter v. Providence-Washington Ins. Co. 16 Pet. (41 U. S.) 495, 10 L. ed. 1044; Johnson v. North British Mutual Ins. Co. 1 Holmes (U. S. C. C.) 117, Fed. Cas. No. 7,460.

*Illinois.*—Niagara Fire Ins. Co. v. Scammon, 144 Ill. 490, 19 L.R.A. 114, 28 N. E. 919, 32 N. E. 914.

insured under the prior policy; as where a father procured insurance in his son's name, and the latter accepted payment under such policy for a loss, it was held that the prior policy was avoided.[13] If persons interested in property have procured insurance thereon, though in the name and for the benefit of the person procuring the subsequent policy, yet it is held that the subsequent insurance will not be within the meaning of a condition in the prior policy prohibiting other insurance where it appears that the person procuring the subsequent policy was not aware of the issuance of the prior policy.[14]

§ 2472. **Subsequent insurance covering property first insured and other property.**—Where a policy contains a clause forbidding other insurance, it is held that it does not merely prohibit insurance of precisely the same property, but that the policy will be avoided by an insurance effected upon the property named in connection with other property.[15] In Pennsylvania, however, it has been held where one policy of insurance covers the building only, and a subsequent policy in another company covers the building, machinery, shafting, belting, tools, lathes, planes, drills, and stock, finished and unfinished, it is not a case of double insurance and does not come within the meaning of a clause in the former policy prohibiting double insurance without notice.[16] But in New York an insurance of one thousand dollars on fixtures and three thousand dollars on stock, and a further insurance of five thousand dollars on stock and fixtures as one parcel, was held to be a case of double insurance.[17] Although in another case where the first policy covered the "electric lamps, shades, wires, and all other electric fixtures and appurtenances," and the subsequent policies covered household goods and "fixtures of every description," there being no apportionment of the risk between the different kinds of prop-

*Kentucky.*—London & Lancashire Fire Ins. Co. v. Turnbull, 86 Ky. 230, 5 S. W. 542, 9 Ky. L. Rep. 544; Franklin Marine Fire Ins. Co. v. Drake, 2 B. Mon. (Ky.) 47.

*Maine.*—Fox v. Phœnix Ins. Co. 52 Me. 333, 353.

*New York.*—Rowley v. Empire Ins. Co. 4 Abb. Dec. (N. Y.) 131, 36 N. Y. 550, s. c. 42 N. Y. 557.

*Ohio.*—Harris v. Ohio Ins. Co. Wright (Ohio) 544.

[13] Dafoe v. Johnstown District Mutual Ins. Co. 7 U. C. C. P. 55, *cited* in note in 1 B. R. C. 46, 56. See §§ 2475–2478 herein.

[14] Nichols v. Fayette Ins. Co. 1 Allen (83 Mass.) 63.

[15] Phœnix Ins. Co. v. Michigan Southern & Northern Indiana R. R. Co. 28 Ohio, 69; McMahon v. Portsmouth Ins. Co. 22 N. H. 15. See §§ 2464, 2473a herein.

[16] Sloat v. Royal Ins. Co. 49 Pa. St. 14, 88 Am. Dec. 477; Clark v. Western Assurance Co. 146 Pa. St. 561, 28 Am. St. Rep. 821, 15 L.R.A. 127, 23 Atl. 248.

[17] Ogden v. East River Ins. Co. 50 N. Y. 388, 389, 10 Am. Rep. 492, overruling Howard Ins. Co. v. Scribner, 5 Hill (N. Y.) 298.

erty insured, it was held that it was not a case of double insurance, at least as to the whole amount of the policies.[18] So where the risk is apportioned, a separate amount upon each class of property insured, so that one of the classes would be the same as that covered by a prior policy, it would seem to clearly constitute a case of double insurance so as to avoid the prior policy.

**§ 2473. Where part of insured property covered by subsequent policy: entire or divisible contract.**—If a policy apportions the insurance to different items or classes of property, a subsequent insurance upon one of the items or classes to which a separate sum is apportioned in the first policy will avoid that, at least as to the item or class subsequently insured.[19] In Massachusetts, it has been held [20] that in such a case the policy first issued is entirely avoided where the first policy prohibits other insurance upon the "property insured or any part thereof." So where a policy which was issued containing such a condition apportioned part to a building and part to the household goods and furniture therein, it was held that the taking of subsequent insurance upon merely the building would avoid the policy.[1]

The question which arises in these cases is this, Does the fact of the apportionment of the insurance to different items or classes of property of itself render the contract a divisible one, so that an insurance subsequently effected upon one of the items will only avoid the policy as to that item, or is the contract so entire that the whole policy is avoided? Upon this point it is declared in an Indiana case that:[2] "In order, therefore, to give effect to the conditions according to the intent and purpose of the contract, it follows necessarily that where the property covered by one policy, although consisting of separate items, appears to be so situate as to constitute substantially one risk, then even though separate amounts of the insurance be apportioned to each separate item or class of property, if the consideration for the contract and the risk are both indivisible, the contract must be treated as entire nevertheless. To such a policy the principles governing entire and indivisible contracts are applicable, for the reason that the matter which renders the policy void as to part affects the risk of the insurer, in respect to the other items, in the same manner as it affects those items in respect to which the contract is voided. In such a

[18] Clark v. Western Assurance Ins. Co. 146 Pa. St. 561, 28 Am. St. Rep. 821, 15 L.R.A. 127, 33 Atl. 248, 21 Ins. L. J. 281.

[19] Illinois Mutual Fire Ins. Co. v. Fix, 53 Ill. 151, 5 Am. Rep. 38.

[20] Kimball v. Howard Ins. Co. 8 Gray (74 Mass.) 33.

[1] Havens v. Home Ins. Co. 111 Ind. 90, 60 Am. Rep. 689, 12 N. E. 137.

[2] Havens v. Home Ins. Co. 111 Ind. 90, 60 Am. Rep. 689, 12 N. E. 137.

case the only effect of apportioning the amount of the insurance upon the separate items of property specified in the policy is to limit the extent of the company's liability to the sum specified upon each item or class of property insured." [3]

The weight of authority seems to support the rule that if the amount of the insurance is not apportioned to different items or classes of property, but the contract is entire, then a subsequent insurance effected by the assured in the first policy upon part of the property covered by such prior policy will defeat the entire policy.[4] The object of this condition in policies is to protect the insurer from any increased hazard due to overinsurance. By such a condition the insured has an interest in the preservation of the property, since in case of its destruction he will sustain no benefit, and will consequently be more watchful against fire; therefore, the property need not be the identical property covered in the first policy, but only a part thereof. If, however, the prior insurance is apportioned to different items, and the subsequent policy covers only one of those items, then it ought to constitute double insurance only as to that item, unless the contract is clearly an entire contract, or unless the policy is conditioned to be void in case of subsequent insurance upon the whole or any part of the property covered.

**§ 2473a. Other insurance: whether contract divisible or entire: statute.**—In a North Dakota Case where the first policy was upon the building and the other on the building for a specified amount and also covered for another specified sum the furniture and fixtures, for a lump consideration as premium, it was held that the contract was indivisible so that under the provisions of the policy anything which voided the policy as to the building also voided it in its entirety; but upon rehearing a statute of that state was before the court, the provision thereof being that the procurement of any other contract of insurance upon one or more of the several distinct things insured by one policy does not render void any insurance upon the things not covered by such other contract of insurance, "but in case of loss or damage such an amount shall be deducted from the insurance as the value of the property so doubly insured bears to the value of all the property covered by the policy" and also providing that any agreement to waive said provision should be void, so that it was held that in view of said statute the policy

[3] See also § 2254 herein. *Examine* Sunderlin v. Ætna Ins. Co. 18 Hun (N. Y.) 522.

[4] Associated Firemen's Ins. Co. v. Assum, 5 Md. 165; Liscom v. Boston Mutual Fire Ins. Co. 9 Met. (50 Mass.) 205; Columbus Ins. Co. v. Walsh, 18 Mo. 229; Pitney v. Glens Falls Ins. Co. 65 N. Y. 6. But see Quarrier v. Peabody Ins. Co. 10 W. Va. 507, 27 Am. Rep. 582.

must be treated as two separate and distinct policies, one on the building and the other upon the personal property and fixtures, and a breach of conditions subsequent which renders the insurance void as to one, did not affect the other.[5]

**§ 2474. Where insured goods are removed and joined with other goods also insured.**—Where a policy of insurance contains a condition "that if any other insurance has been or shall hereafter be made upon the said property not consented to in writing herein this policy shall be null and void," and the stock of goods insured is removed and merged in another stock which is insured under policies covering accruing stock, the insurance on the latter will cover the former, and, if effected without the consent of the first insurer, the policy issued by him is void.[6] In a case which arose in New York, however,[7] it was held that where goods covered by a policy containing such a condition were removed and mingled with other goods of a similar nature, which were also insured, it was not a case of other insurance, as the two policies covered different goods.

**§ 2475. Where other insurance is void or voidable: prior or subsequent policies conditioned against other insurance.**—A policy of insurance conditioned to be void if there be any other insurance upon the property is not avoided by other insurance which is void upon its face.[8] In a case in Maryland, this question arose, and it

[5] First National Bank of Nome v. German American Ins. Co. 23 N. Dak. 139, 38 L.R.A.(N.S.) 213, 134 N. W. 873, 41 Ins. L. J. 899, 906; Rev. Code 1905, sec. 5909. See Carleton v. Patrons' Androscoggin Mutual Fire Ins. Co. 109 Me. 70, 39 L.R.A.(N.S.) 951n, 82 Atl. 649, 41 Ins. L. J. 1067. See §§ 1931, 2472 herein.

[6] Washington Ins. Co. v. Hayes, 17 Ohio St. 432, 93 Am. Dec. 628. See also Walton v. Louisiana State Marine & Fire Ins. Co. 2 Rob. (La.) 563.

[7] Vose v. Hamilton Ins. Co. 39 Barb. (N. Y.) 302.

[8] *Indiana.*—American Ins. Co. v. Replogle, 114 Ind. 1, 15 N. E. 810; Replogle v. American Ins. Co. 132 Ind. 360, 31 N. E. 947.

*Iowa.*—Behrens v. Germania Ins. Co. 64 Iowa, 19, 19 N. W. 838; David v. Hartford Ins. Co. 13 Iowa, 69.

*Massachusetts.*—Hayes v. Milford Mutual Fire Ins. Co. 170 Mass. 492, 49 N. E. 754, 27 Ins. L. J. 459; Jackson v. Farmers' Mutual Fire Ins. Co. 5 Gray (71 Mass.) 52; Jackson v. Massachusetts Mutual Fire Ins. Co. 23 Pick. (40 Mass.) 418, 34 Am. Dec. 69.

*Missouri.* — Obermeyer v. Globe Mut. Ins. Co. 43 Mo. 573.

*New Hampshire.*—Gee v. Cheshire Ins. Co. 55 N. H. 65, 20 Am. Rep. 171; Hale v. Union Ins. Co. 32 N. H. 295, 64 Am. Dec. 370.

*New York.*—Bigler v. New York Ins. Co. 20 Barb. (N. Y.) 635, aff'd 22 N. Y. 402.

*Ohio.*—Firemen's Ins. Co. v. Holt, 35 Ohio St. 189, 35 Am. Rep. 601.

*Pennsylvania.*—Mitchell v. Lycoming Ins. Co. 51 Pa. St. 402; *Examine* Bateman v. Lumberman's Ins. Co. 189 Pa. 465, 42 Atl. 184, 28 Ins. L. J. 159; Stacy v. Franklin Fire Ins. Co. 2 Watts & S. (Pa.) 506.

was held that the first policy was not avoided by a second policy which was void ab initio.[9] In this case the second policy was conditioned to be void in case of prior or subsequent insurance, whether valid or invalid. The court said: "'Other insurance' does not mean a void policy which obviously affords no insurance at all, nor does it mean a policy which may, at the option of the underwriter, be canceled; for that is at least but conditional insurance. But it means a binding available insurance; one upon which the insured can rely for protection in case of loss, and which he can enforce by law, and which cannot be repudiated with impunity at the arbitrary election of the insurer. . . . A second policy which by its own terms is void for any cause is not an insurance at all, and this is equally true whether the invalidity is apparent on the face of the policy itself or is made to appear by evidence aliunde the policy. It is not the method by which the invalidity of the second policy may be shown that determines whether it does or does not create a liability on the part of the underwriter who issues it, and therefore does or does not constitute a breach of the condition in the first policy against further insurance; but it is the fact that the second policy is valid and binding that alone fixes upon its underwriter a liability, and accordingly determines whether in this respect the condition against other insurance set forth in the first policy has been violated or not. . . . If, then, its provisions be given the effect which the parties to it intended they should have, it is void and not merely voidable the moment the condition arises upon the occurrence of which the parties have declared it shall be invalid. And if thus invalid, it obviously does not create other insurance within the prohibition contained in the first policy. It would, then, be nothing more than an attempt to secure other insurance. An ineffectual attempt to secure insurance is confessedly no insurance."

All of the cases cited below do not directly hold that the policy is not avoided only in those cases where the other insurance is void upon its face, but many of them will be found to be in accord with the rule supported by a large number of cases, that in order to avoid a policy on account of subsequent insurance against an express condition therein, it must appear that such subsequent insurance is valid, and that the policy upon which it is made is cap-

*South Carolina.*—Neve v. Columbia Ins. Co. 2 McMull. (S. C.) *220.

*West Virginia.*—Wolpert v. Northern Assurance Co. 44 W. Va. 734, 29 S. E. 1024.

See also § 2492 herein.

On void or inoperative policies of insurance as breach of condition against additional or other insurance on property, see note in 1 B. R. C. 39.

[9] Sweeting v. Mutual Fire Ins. Co. 83 Md. 63, 32 L.R.A. 570, 34 Atl. 826.

able of being enforced.[10] Where the subsequent policy is invalid by reason of a misrepresentation as to other or prior insurance, a recovery may be had upon the prior policy.[11] In a case in Minnesota, however, it is held that a fire policy, conditioned to be void if the insured should thereafter insure the same property in another company without the consent of the insurer, is avoided by subsequent insurance void by its terms for misrepresentation.[12] There is a class of cases in line with this Minnesota case in which it is said that if the insured believed that the subsequent insurance was valid, then the prior policy is avoided or voidable at the option of the insurer, whether the subsequent insurance is in fact valid or not, since the same motives might move the insured to be less careful of the property, and the same motives would exist for a fraudulent destruction of the property as if it was in fact valid. Therefore, it is held that the policy is avoided, since the very motives exist which the insured intended to guard against, and the moral hazard is in fact increased.[13] So a prior insurance is none the less within the conditions of a policy of insurance declaring it void if

[10] Hubbard v. Hartford Fire Ins. Co. 33 Iowa, 325, 11 Am. Rep. 125, per Beck, J. See also:

*United States.*—Allison v. Phoenix Ins. Co. 3 Dill. (U. S. C. C.) 480, Fed. Cas. No. 252; Wilson v. Queen's Ins. Co. 5 Fed. 674.

*Illinois.*—Germania Fire Ins. Co. v. Klewer, 129 Ill. 599, 22 N. E. 489; New England Fire & Marine Ins. Co. v. Schettler, 38 Ill. 166.

*Maine.*—Lindley v. Union Ins. Co. 65 Me. 368, 20 Am. Rep. 701; Philbrook v. New England Mutual Fire Ins. Co. 37 Me. 137.

*Massachusetts.*—Thomas v. Builders' Mutual Fire Ins. Co. 119 Mass. 121, 20 Am. Rep. 317; Clark v. New England Fire Ins. Co. 6 Cush. (60 Mass.) 342, 53 Am. Dec. 44; Hardy v. Union Ins. Co. 4 Allen (86 Mass.) 217.

*Michigan.*—Keyser v. Hartford Fire Ins. Co. 66 Mich. 664, 33 N. W. 756; Emery v. Mutual City Ins. Co. 51 Mich. 469, 47 Am. Rep. 590, 16 N. W. 816.

*Missouri.*—Dahlberg v. St. Louis Ins. Co. 6 Mo. App. 121.

*New Hampshire.*—Gee v. Cheshire Ins. Co. 55 N. H. 65, 20 Am. Rep. 171; Gale v. Belknap Ins. Co. 41 N. H. 170.

*New Jersey.*—Jersey City Ins. Co. v. Nichol, 35 N. J. Eq. 291, 40 Am. St. Rep. 625; Schenck v. Mercer Co. Ins. Co. 24 N. J. L. 447.

*Ohio.*—Knight v. Eureka Ins. Co. 26 Ohio St. 664, 20 Am. Rep. 778.

*Virginia.*—Sutherland v. Old Dominion Ins. Co. 31 Gratt. (Va.) 176. See also § 2492 herein.

[11] Allison v. Phœnix Ins. Co. 3 Dill. (U. S. C. C.) 480, Fed. Cas. No. 252; Lindley v. Union Ins. Co. 65 Me. 368, 20 Am. Rep. 701; Clark v. New England Mutual Fire Ins. Co. 6 Cush. (60 Mass.) 342, 53 Am. Dec. 44.

[12] Funke v. Minnesota Farmers' Mutual Fire Ins. Assoc. 29 Minn. 347, 43 Am. Rep. 216, 13 N. W. 164.

[13] *United States.* — Carpenter v. Providence-Washington Ins. Co. 16 Pet. (41 U. S.) 495, 10 L. ed. 1044; Turner v. Equitable Ins. Co. 16 Fed. 454, Fed. Cas. No. 530n.

*Georgia.*—Lackey v. Georgia Home Ins. Co. 42 Ga. 456.

*Indiana.* — American Ins. Co. v. Replogle, 114 Ind. 1, 15 N. E. 810, 17 Ins. L. J. 456; Phœnix Ins. Co. v.

there be other insurance not made known to the insurer, because it is vitiated by misrepresentation of material facts, and so voidable at the option of the prior insurer.[14] So where a contract of insurance, which covered a storehouse and the goods therein, provided

Lamar, 106 Ind. 513, 55 Am. Rep. 764, 7 N. E. 241.

*Iowa.*—David v. Hartford Ins. Co. 13 Iowa, 69.

*Minnesota.* — Funke v. Farmers' Mutual Fire Ins. Co. 29 Minn. 347, 43 Am. Rep. 216, 13 N. W. 164.

*New York.* — Landers v. Watertown Fire Ins. Co. 86 N. Y. 414, 40 Am. Rep. 554; Bigler v. New York Central Ins. Co. 20 Barb. 635, s. c. 22 N. Y. 402.

*North Carolina.*—Suggs v. Hartford Ins. Co. 98 N. C. 143, 3 S. E. 732, 17 Ins. L. J. 62.

*Pennsylvania.*—Mitchell v. Lycoming Ins. Co. 51 Pa. St. 402.

*Tennessee.*—Royal Ins. Co. v. McCrea, 8 Lea (76 Tenn.) 531, 41 Am. Rep. 565; Somerfield v. State Ins. Co. 8 Lea (76 Tenn.) 547, 41 Am. Rep. 662.

*England.*—Mason v. Andes Ins. Co. 23 U. C. C. P. 37; Ramsay Woolen Cloth Manufacturing Co. v. Mutual Fire Ins. Co. of District of Johnstown, 11 U. C. Q. B. 516.

[14] Carpenter v. Providence Washington Ins. Co. 16 Pet. (41 U. S.) 495, 10 L. ed. 1044. *Cited* in:

*United States.*—Phoenix Ins. Co. v. Raddin, 120 U. S. 183, 189, 30 L. ed. 644, 646; Allison v. Phœnix Ins. Co. 3 Dill. 480, Fed. Cas. No. 2562; Johnson v. North British & Mercantile Ins. Co. Holmes, 117, 119, Fed. Cas. No. 7,400; Turner v. Meridian Fire Ins. Co. 16 Fed. 454, 456.

*Georgia.*—Lackey v. Georgia Home Ins. Co. 42 Ga. 456, 459.

*Illinois.*—Germania Fire Ins. Co. v. Klewer, 129 Ill. 599, 607, 22 N. E. 489.

*Indiana.* — American Ins. Co. v. Replogle, 114 Ind. 1, 6, 15 N. E. 810; Phoenix Ins. Co. v. Lamar, 106 Ind. 513, 516, 55 Am. Rep. 764, 7 N. E. 241; Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520, 525.

*Iowa.*—David v. Hartford Ins. Co. 13 Iowa, 69, 79.

*Maine.*—Lindley v. Union Farmers' Mutual Fire Ins. Co. 65 Me. 368, 372, 20 Am. Rep. 901.

*Maryland.* — Sweeting v. Mutual Fire Ins. Co. 83 Md. 63, 68, 32 L.R.A. 570, 572, 34 Atl. 826.

*Massachusetts.* — Burt v. People's Mutual Fire Ins. Co. 2 Gray (68 Mass.) 397, 398.

*Michigan.* — Donogh v. Farmers' Fire Ins. Co. 104 Mich. 503, 506, 62 N. W. 721; Carpenter v. Continental Ins. Co. 61 Mich. 635, 643, 28 N. W. 749.

*Missouri.* — Obermeyer v. Globe Mutual Ins. Co. 43 Mo. 573, 577.

*Montana.* — Saville v. Aetna Ins. Co. 8 Mont. 419, 430, 3 L.R.A. 542, 545, 20 Pac. 646.

*New Hampshire.* — Atlantic Ins. Co. v. Goodall, 34 N. H. 328, 334.

*New York.*—Hastings v. Westchester Fire Ins. Co. 73 N. Y. 141, 152; Bigler v. New York Central Ins. Co. 22 N. Y. 402, 407; Landers v. Watertown Fire Ins. Co. 19 Hun, 174, 177; Bigler v. New York Central Ins. Co. 20 Barb. 635, 637; Tillou v. Kingston Mutual Ins. Co. 7 Barb. 570, 575.

*Ohio.*—Firemen's Ins. Co. v. Holt, 35 Ohio St. 189, 192, 35 Am. Rep. 601.

*Tennessee.*—Royal Ins. Co. v. McCrea, 8 Lea, 531, 535, 41 Am. Rep. 656.

*Texas.*—New Orleans Ins. Assoc. v. Griffin, 66 Tex. 232, 234, 18 S. W. 505.

*Virginia.*—Sutherland v. Old Dominion Ins. Co. 31 Gratt. 176, 187.

*Distinguished* in Reed v. Equitable Fire & Marine Ins. Co. 17 R. I. 785, 787, 18 L.R.A. 496, 497, 24 Atl. 838.

that should the assured subsequently take out a policy in any other company, the assurers should receive notice of it on pain of forfeiting their policy, a subsequent assurance of the house or the goods in another company without notice to the assurers was held to work the forfeiture of the contract with them, whether the subsequent contract was legally enforceable or not.[15]

We have cited in the third last preceding note, under this last-stated principle, the cases usually and primarily relied upon to sustain that ruling. Upon examination, however, it will be seen that many of them cannot be said to fully support the point. The case of Carpenter v. Providence-Washington Ins. Co.,[16] has been briefly commented upon in Hubbard v. Hartford Fire Ins. Co.[17] as follows: "This case, we have observed, is often cited in support of this rule. . . . If such a rule be found in the case—but it does not so appear to us—its enunciation was not called for by the facts before the court and made the basis of the decision. The policy upon which that suit was brought is considered in the opinion the second instrument, and the court holds that it was defective by a condition therein against prior insurance, which in fact existed when it was issued." In Lackey v. Georgia Home Ins. Co.,[18] the court said: "The question here turns not so much upon the contract as upon our statute. . . . And this law would make void the first policy, though nothing was said in it about a second policy." In Phœnix Ins. Co. v. Lamar,[19] the prior policy was conditioned to be void in case of any other insurance "whether valid or not." In David v. Hartford Fire Ins. Co.,[20] the insurers in the subsequent policies treated the policies as valid after the loss had occurred, and paid the amount of the loss sustained. In Suggs v. Hartford F. Ins. Co.,[1] the prior policy was conditioned to be void in case of any other insurance, "whether valid or otherwise." In Bigler v. New York Cent. Ins. Co.,[2] the insurer issuing the subsequent policy waived the forfeiture and paid the loss under the policy. In Mitchell v. Lycoming Ins. Co.,[3] it was held by Agnew, J.: "If they were void at the time of the loss, they constituted no obstacle; but if they were voidable only by reason of some breach of condition enabling the insurer to avoid them,

[15] Allen v. Merchants' Mutual Ins. Co. 30 La. Ann. 1386, 31 Am. Rep. 243.

[16] 16 Pet. (41 U. S.) 495, 10 L. ed. 1044.

[17] 33 Iowa, 325, 11 Am. Rep. 125.

[18] 42 Ga. 456, 457.

[19] 106 Ind. 513, 55 Am. Rep. 764, 7 N. E. 241. See § 2478 herein.

[20] 13 Iowa, 69.

[1] 98 N. Car. 143, 3 S. E. 732, 17 Ins. L. J. 62. See § 2478 herein.

[2] 20 Barb. (N. Y.) 635, aff'd 22 N. Y. 402.

[3] 51 Pa. St. 402.

but which they had waived, the overinsurance doubtless exists." In a case in Indiana[4] it was held that if in any case the insured accepted the subsequent policy as a valid subsisting contract, and extrinsic facts were necessary in order to show that the second policy was invalid, then the condition of the prior policy as to other insurance had been violated. In a case in Kentucky[5] it has been held that the prior policy forbidding other insurance is avoided, even though the subsequent policy is void upon its face.

Where the subsequent insurance is merely voidable and not absolutely void on its face, it has been contended that the insurers under a prior policy are released.[6] The cases, however, support the rule that the insurers are not released unless the insurer in the subsequent policy waives the condition as to other insurance before a loss, and becomes liable upon the policy.[7]

These questions have most frequently arisen where both the prior and subsequent policies have been conditioned to be void in case of any other insurance. Where the policies both contain such a condition, the latter policy cannot be considered as operative unless the condition is waived. Can the condition in the prior policy as to other insurance be said to be violated unless the subsequent policy is a valid and enforceable contract? The subsequent policy is certainly not an enforceable contract, unless the insurer assumes the risk after knowledge of the other prior insurance. It does not seem that it could reasonably be contended that a subsequent policy containing such a condition, and which has never attached, is within the meaning of the provision as to other insurance. The latter policy is inoperative, unless it is ratified and confirmed by the insurers with knowledge of the facts rendering it invalid. The better reasoning supported by the weight of authority is that the other insurance must be a valid contract, legally enforceable against the insurers, in order to avoid the prior policy. If the risk has been so increased by an alteration or change in the occupation of the premises as to avoid a policy,

[4] American Ins. Co. v. Replogle, 114 Ind. 1, 15 N. E. 810; Replogle v. American Ins. Co. 132 Ind. 360, 31 N. E. 947.

[5] Stevenson v. Phoenix Ins. Co. 83 Ky. 7, 6 Ky. L. Rep. 196, 4 Am. St. Rep. 120.

[6] Phœnix Ins. Co. v. Copeland, 90 Ala. 386, 8 So. 48; David v. Hartford Fire Ins. Co. 13 Iowa, 69; Mitchell v. Lycoming Ins. Co. 51 Pa. St. 402.

[7] Thomas v. Builders' Fire Ins. Co. 119 Mass. 121, 20 Am. Rep. 317; Hardy v. Union Ins. Co. 4 Allen (86 Mass.) 217; Hale v. Union Ins. Co. 32 N. H. 295, 299, 64 Am. Dec. 370; Knight v. Eureka Ins. Co. 26 Ohio St. 664, 20 Am. Rep. 778; Mitchell v. Lycoming Fire Ins. Co. 51 Pa. St. 402.

and the company refuses to assume the risk as changed, a subsequent insurer cannot set up such prior policy in defense to an action on the subsequent policy which contains a condition as to other insurance.[8] It is held in Rhode Island that avoidance of a policy for a breach of a condition against other insurance, by the existence of a prior policy, is not prevented by the fact that the latter contains a like condition, although a void policy is not a breach of such a condition.[9]

An unconsummated contract of insurance is not other insurance, so where notice of cancelation has been given insured and upon inquiry by him of insurer's agent as to another policy, the latter writes one without assured's knowledge, countersigns and enters the same on his books but it is not delivered and no premium is agreed to be or is paid, and a loss occurs before the expiration of the time limit under the cancelation notice there is no new insurance effected and the first policy was in force at the time of the fire and insurer was held liable thereon although it provided against other insurance.[10] And if insurer's agent is applied to for insurance with another insurer and a part of the premium is paid by insured but said agent to whom the policy is sent does not deliver it until after the loss and the first policy is not canceled, although insured had expressed his intention to abandon it, the conditional insurance does not become operative so as to relieve from liability the insurer issuing the same.[11] So where there is nothing more than indefinite negotiations, they are insufficient to constitute such other insurance as to invalidate existing policies although a policy is antedated and issued after the loss and in such case assured is not estopped, after suit thereon and compromise, to deny its existence, in an action for the loss under a prior policy conditioned against other insurance as in the latter case the other policy had not been issued at the time the liability attached.[12] Again, where it was stipulated that notice should be given of any additional insurance and consent of insurer obtained and that a breach would render the policy null

[8] Leibrandt & McDowell Stove Co. v. Firemen's Ins. Co. 35 Fed. 30.

[9] Reed v. Equitable Fire & Marine Ins. Co. 17 R. I. 785, 18 L.R.A. 496, 24 Atl. 833.

[10] Milwaukee Mechanics Ins. Co. v. Graham, 181 Ill. 158, 54 N. E. 914, 29 Ins. L. J. 175, aff'g 80 Ill. App. 549.

[11] Whitla v. Royal Ins. Co. (Whitla v. Manitoba Ins. Co.) 14 Man. R. 90, 108.

[12] Taylor v. State Ins. Co. 107 Iowa, 275, 77 N. W. 1032, 28 Ins. L. J. 338, s. c. 98 Iowa, 521, 67 N. W. 677. Insurer "never ratified the act of its agent in dating its policy back, and not liable for the loss, it had the undoubted right to buy its peace without acknowledging its liability," per Ladd, J.

and void, omission to give notice does not avoid the contract as to additional insurance which never became effective by reason of nonpayment of the premium therefor as stipulated.[13] But it is also decided that a policy conditioned against other insurance is avoided by the existence of other insurance at the time of its issuance, although such other insurance is not in effect at the time of the loss.[14]

Under a Colorado decision a policy is not void by reason of prior insurance which had lapsed before the issuance of the policy sued on.[15] In Montana a policy valid upon its face and in the hands of the insured at the time of a loss, which is not null and void, but merely voidable at the option of the company, because a subsequent policy from another insurer was taken without the consent of the first insurer, is to be treated as "other insurance," within the meaning of a clause in the latter policy, providing that the insurer's liability on the policy shall be only in proportion to the whole amount of insurance.[16]

Whether, where parties to an alleged contract of insurance agree in treating it as void, it may be considered as violating a condition in another policy against additional undisclosed insurance, quære.[17]

§ 2476. **Effect of interim receipts.**—If a valid contract of insurance or to insure be effected, and in evidence of such contract an interim receipt is given, this will be sufficient to constitute a violation of the condition in the policy as to other insurance.[18]

§ 2477. **Where subsequent voidable policy is treated as valid after a loss.**—If the condition in a subsequent policy of insurance as to other insurance is waived by the insurer before a loss occurs, and the policy becomes a valid enforceable policy, there is no doubt but that the prior policy would be avoided where it is conditioned to be void in case of other insurance. The question whether

[13] Equitable Fire & Accident Office Ltd. v. The Ching Wo Hong [1907] L. R. App. Cas. 96; 76 L. J. P. C. (N. S.) 31, 96 L. T. (N. S.) 1; 23 T. L. R. 200; 1 B. R. C. 34.

[14] Reed v. Equitable Fire & Marine Ins. Co. 17 R. I. 785, 18 L.R.A. 496, 24 Atl. 833.

[15] German Ins. Co. v. Hayden, 21 Colo. 127, 52 Am. St. Rep. 206, 40 Pac. 453. See Obermeyer v. Globe Mutual Ins. Co. 43 Mo. 573. *Compare* Replogle v. American Ins. Co. 132 Ind. 360, 31 N. E. 947.

[16] Saville v. Aetna Ins. Co. 8 Mont. 419, 3 L.R.A. 542, 20 Pac. 646. See Southern National Ins. Co. v. Barr, — Tex. Civ. App. —, 148 S. W. 845, 41 Ins. L. J. 1496.

[17] Equitable Fire & Accident Office Ltd. v. The Ching Wo Hong [1907] L. R. App. Cas. 96; 76 L. J. P. C. (N. S.) 31, 96 L. T. (N. S.) 1, 23 Times L. R. 200, 1 B. R. C. 34.

[18] Hatton v. Beacon Ins. Co. 16 U. C. Q. B. 316; Mason v. Andes Ins. Co. 23 U. C. C. P. 37.

or not the prior policy would be avoided where the validity of the subsequent policy is not waived until after a loss has been many times discussed. There is a large class of cases in which it is held, and in fact the majority of the courts before which the question has come have held, that where the subsequent policy is valid on its face, or for any reason has been attached up to the time of the loss, then the prior policy is not avoided, though the insured may have received payment of the second policy from the insurer.[19] The rights of the parties become fixed from the time of the loss. If the subsequent policy is not a valid policy at that time, then the liability of the insurer under the prior policy has become fixed, and the insurer is indebted to the insured to the extent of the loss up to the amount of the policy. If the insurer who issues the subsequent policy waives its invalidity after the loss, such waiver can in no way affect the rights of the parties under the prior contract, since a payment under the subsequent policy will be considered as a gratuity. In such a case the insured is not estopped from showing that at the time of the loss there was no valid enforceable contract existing other than the policy first issued. If the insured had received a gift from some third person immediately after a loss, could it be reasonably contended that the insurer in a prior policy could defeat a recovery on that ground? And yet is it not substantially and in fact a gift where the insurers who have issued a subsequent policy make a payment to the insured of the amount of his loss, when in fact the policy is invalid and inoperative and cannot be enforced, and is in no way binding upon them? These cases are in accord and in the same line with the principles stated in the preceding section as sustained by the weight of authority. The rule could not, consistently with principle, be otherwise. It has been held, however, that in such a case the prior policy is avoided,[20] but the weight of authority supports the contrary view, as we have stated.

[19] *Maine.*—Lindley v. Union Ins. Co. 65 Me. 368, 20 Am. Rep. 701; Philbrook v. New England Mutual Fire Ins. Co. 37 Me. 137.

*Massachusetts.*—Thomas v. Builders' Fire Ins. Co. 119 Mass. 121, 20 Am. Rep. 317; Hardy v. Union Ins. Co. 4 Allen (86 Mass.) 217; Jackson v. Massachusetts Mutual Fire Ins. Co. 23 Pick. (40 Mass.) 418, 34 Am. Dec. 69; Clark v. New England Mutual Fire Ins. Co. 6 Cush. (60 Mass.) 342, 53 Am. Dec. 44.

*New Hampshire.*—Gale v. Belknap Ins. Co. 41 N. H. 170, 176.

*New Jersey.* — Schenck v. Mercer County Mutual Ins. Co. 24 N. J. Law, 447.

*Pennsylvania.* — Stacey v. Franklin Ins. Co. 2 Watts & S. (Pa.) 506.

[20] David v. Hartford Ins. Co. 13 Iowa, 69; Bigler v. New York Central Ins. Co. 22 N. Y. 402.

**§ 2478. Prohibition against other insurance, whether "valid or invalid."**—In many policies the words "valid or invalid" have been added to the clause against additional insurance in order to eliminate the question as to the effect of other insurance which is void or voidable. The courts, however, are not in harmony in their decisions as to the construction of this clause, though it has generally been sustained as valid and binding.[1] In Phoenix Insurance Company v. Lamar[2] it was held that where an insurance policy is conditioned to be void in case of "any other insurance" without consent, "whether valid or not," another policy in and of itself invalid and void, so that it constitutes no contract of insurance, is not within the prohibition, but if to avoid it requires the production of extraneous facts, it is within the prohibition. And in an Iowa case[3] it was held that where a prior policy had become void by the removal of the property insured, so that it had been taken out of the operation of that policy, one issued subsequent to the avoidance of the prior policy, and which was conditioned to be void by other insurance, whether "valid or invalid," was not avoided by the prior policy. In New Hampshire, it has been held that such a condition is not a valid one, since a void contract, which is regarded by law as a mere nullity, can in no way affect rights obtained under an existing contract.[4] The question has also arisen, where these words are added, whether or not the prior or subsequent policy is avoided where the conditions are the same or similar in each. In Michigan, it has been held that the subsequent policy is void,[5] while in North Carolina it has been decided that the

[1] *Alabama.* — Phœnix Ins. Co. v. Copeland, 90 Ala. 386, 8 So. 48.

*Illinois.*—Continental Ins. Co. v. Hulman & Cox, 92 Ill. 145, 34 Am. Rep. 122, 9 Ins. L. J. 91.

*Kentucky.*—Northwestern National Ins. Co. v. Avant, 132 Ky. 106, 116 S. W. 274, 38 Ins. L. J. 472.

*Louisiana.* — Allen v. Merchants' Ins. Co. 30 La. Ann. 1386, 31 Am. Rep. 243.

*New York.* — Bigler v. New York Central Ins. Co. 22 N. Y. 402.

*North Carolina.*—Sugg v. Hartford Fire Ins. Co. 98 N. C. 143, 3 S. E. 732.

*North Dakota.* — First National Bank of Nome v. German American Ins. Co. 23 N. Dak. 139, 38 L.R.A. (N.S.) 213, 134 N. W. 873, 41 Ins. L. J. 899.

*South Carolina.*—Spann v. Phoenix Ins. Co. of Hfd. 83 S. Car. 262, 65 S. E. 232.

*Texas.*—National Union Fire Ins. Co. v. Dorroh, — Tex. Civ. App. —, 133 S. W. 475. See Dumphy v. Commercial Union Assur. Co. — Tex. Civ. App. —, 142 S. W. 116, 41 Ins. L. J. 441, rev'd — Tex. —, 174 S. W. 814.

See §§ 2475, 2492 herein.

[2] 106 Ind. 513, 55 Am. Rep. 764, 7 N. E. 241.

[3] Stevens v. Citizens' Ins. Co. 69 Iowa, 658, 29 N. W. 769.

[4] Gee v. Cheshire Ins. Co. 55 N. H. 65, 20 Am. Rep. 171.

[5] Keyser v. Hartford Fire Ins. Co. 66 Mich. 664, 33 N. W. 756.

prior policy is void.[6] Under a Massachusetts decision if a policy is conditioned to be void if insured has or shall thereafter make other insurance on the same property without consent of insurer, and he subsequently obtains other policies with a like condition but with the added words "whether valid or not" neither of these latter policies affords any defense to a suit on the former. "If the Citizens' Companys' policy was issued before the policy in suit, it became void by its terms when the defendant issued its policy. . . . If it was issued subsequently, as was the policy of the security company, for the same reason neither it nor the policy of the latter company took effect." [7] If a prior policy continues in force by reason of an unsuccessful attempt to cancel the same and another policy is issued on the same property conditioned to be void for other insurance whether valid or not it is invalidated.[8] An application, however, for additional insurance will not avoid a policy under a provision therein, that it shall be void if assured shall procure any other contract of insurance, whether valid or not, on the property, if both the owner and the company to which the application for additional insurance is made, understood that no risk was assumed by the latter.[9]

Where the policy was to be void if insured should make or procure any other contract of insurance "whether valid or not" on the property insured the procuring of a second policy in violation of the policy conditions is not justified or excused by the fact that insured acted in good faith, and without intent to overinsure as where it was taken out under the mistaken belief that the first policy had expired.[10]

Under a Texas decision the policy does not become ipso facto void as insurer may waive such condition.[11]

§ 2479. **Renewals of prior policies.**—A policy of insurance which provides that it shall be void in case of other insurance is not avoided by the renewal of a policy existing at the time the policy containing the provision was effected, and which was mentioned

[6] Sugg v. Hartford Fire Ins. Co. 98 N. C. 143, 3 S. E. 732. See § 2475 herein.

[7] Hayes v. Milford Mutual Fire Ins. Co. 170 Mass. 492, 49 N. E. 754, 27 Ins. L. J. 459. See Nabors v. Dixie Mutual Fire Ins. Co. 84 Ark. 184, 105 S. W. 92.

[8] Hartford Fire Ins. Co. v. McKenzie, 70 Ill. App. 615.

[9] National Mutual Fire Ins. Co. v. Duncan, 44 Colo. 472, 20 L.R.A. (N.S.) 340, 98 Pac. 634, 38 Ins. L. J. 184.

[10] National Union Fire Ins. Co. v. Dorroh, — Tex. Civ. App. —, 133 S. W. 475, 40 Ins. L. J. 484.

[11] Southern National Ins. Co. v. Barr, — Tex. Civ. App. —, 148 S. W. 845, 41 Ins. L. J. 1496. *Citing* as to the meaning of "void," 8 Words & Phrases, p. 7334. See Saville v. Aetna Ins. Co. 8 Mont. 419, 3 L.R.A. 542, 20 Pac. 646.

in the application for that policy.[12] But if the insured mentions the prior insurance in his application for a policy, and states that it will not be renewed, a renewal of such prior policy will constitute a violation of the condition as to other insurance.[13] If the insured, instead of renewing the policy in the same company, takes out a policy for the same amount in another company, it is held to be a violation of the condition.[14] In a case in New Hampshire, however,[15] it was held that where the charter of a mutual company did not require the name of the company in which the other insurance was effected nor the terms of the policy to be given, but simply the amount of the other insurance to be stated to which the company had duly assented, that the assured might renew that policy in the same company, or transfer it to another for the same amount without giving any further notice. If the condition in a policy expressly refers only to other subsequent insurance, or is construed as only referring to a subsequent insurance, then the renewal of a prior policy would probably not avoid the policy containing such a condition.[16] Where an insurance company renews a policy with the knowledge of the existence of other insurance contrary to its provisions, it is estopped to afterward claim that this renewal is inoperative or the policy void by reason of the existence of such other insurance.[17]

§ 2480. **Where policies are simultaneous: concurrent insurance: fire risks.**—If policies are issued by different companies through different agents to the same assured, though the risk insured against is to commence at the same moment, it will not be presumed that the policies are simultaneous.[18] In the absence of proof to the contrary, the necessary presumption of both law and fact is that one of the policies was antecedent to the other, and consequently the companies are entitled to the usual notice in respect to prior and additional insurance.[19]

Where, however, they are issued by the same agent, and may

[12] Brown v. Cattaraugus County Mutual Co. 18 N. Y. 385; First Baptist Soc. v. Hillsborough Mutual Fire Ins. Co. 19 N. H. 580.

[13] Dietz v. Mound City Fire & Life Ins. Co. 38 Mo. 85.

[14] Healey v. Imperial Ins. Co. 5 Nev. 268; Burt v. People's Mutual Ins. Co. 2 Gray (68 Mass.) 397.

[15] First Baptist Soc. v. Hillsborough Mutual Fire Ins. Co. 19 N. H. 580.

[16] Pitney v. Glens Falls Ins. Co. 65 N. Y. 6.

[17] Carroll v. Charter Oak Ins. Co. 38 Barb. (N. Y.) 402, s. c. 40 Barb. (N. Y.) 292. That renewal is not "other" insurance under a clause providing for notice of other insurance, see Pitney v. Glens Falls Ins. Co. 65 N. Y. 6.

[18] Manhattan Ins. Co. v. Stein, 5 Bush (68 Ky.) 652. See § 2496 herein.

[19] Manhattan Ins. Co. v. Stein, 5 Bush (68 Ky.) 652.

be presumed to be simultaneous, notice is not necessary.[20] Under the code provision of California,[1] if two or more policies bear date from the same day, they are deemed to be simultaneous, and the liability of insurers on simultaneous policies is to contribute ratably with each other. If two companies co-operate in assuming a risk where the applicant has only applied to one, and two policies are issued, similar in all respects, simultaneously, neither policy will constitute other insurance in violation of the conditions in each as to the policy being void in case of other insurance.[2]

In construing the meaning of the word "concurrent" in connection with insurance contracts the court, in East Texas Fire Insurance Company v. Blum,[3] said: "To be concurrent, the insurance must operate at the same time upon the same property, and look to the indemnity of the insured in case of its loss or destruction from a casualty insured against." [4]

But where other concurrent insurance was permitted and the policies in question included only part of the insured property and were concurrent as to the particular property covered by both and concurrent as to time, though one was for a shorter period than the other, it was held that they were concurrent and the court, per Ladd, J., declared that the concurrent clause "did no more than wipe out the prohibition of the policy. The hazard of excessive insurance was entirely waived, and, in so far as the risk was concerned, it was immaterial whether the additional insurance was on one or all of the items covered by the defendants' contract. "Concurrent insurance," under the circumstances, means any insurance running with that of the defendant and sharing its risk. If so, it would include policies covering not only a part of defendant's risk, but all of it, and more. The definitions of the lexicographers warrant such a conclusion.[5] . . . We are of opinion that the clause, 'other concurrent insurance permitted,' in the absence of any limitation in amount, should not be construed to require the later policies to exactly concur in covering all of the property. Otherwise it must be held that they must also cover all the time. . . . The authorities determining when

[20] Farmers' Mutual Ins. Co. v. Taylor, 73 Pa. St. 342.

[1] Deering's Annot. Civ. Code Cal. sec. 2642.

[2] Washington Fire Ins. Co. v. Davison, 30 Md. 91, 108.

[3] 76 Tex. 653, 13 S. W. 572, see Gough v. Davis, 52 N. Y. Supp. 947, 24 Misc. Rep. 245, aff'd 57 N. Y. Supp. 1139, 39 App. Div. 639. "Concurrent insurance" defined, see Kelly v. Liverpool & London & Globe Ins. Co. 102 Minn. 178, 184, 111 N. W. 395, 112 N. W. 870, 1019.

[4] See Wynn v. Caledonian Ins. Co. 100 S. Car. 47, 84 S. E. 306, under Civ. Code sec. 2718.

[5] Quoting from Webster.

insurance is double throw little light on the question. Besides these are in conflict." [6] But it is declared in a Federal case that it does not appear that in insurance contracts the word "concurrent" has any settled, definite, technical meaning.[7] But con-

[6] Washburn-Halligan Coffee Co. v. Merchants Brick Mutual Fire Ins. Co. 110 Iowa, 423, 81 N. W. 707, 29 Ins. L. J. 234. The policy sued on covered all the property described in the others, with the possible exception of boilers, and much more.

[7] Globe & Rutgers Fire Ins. Co. v. Alaska-Portland Packers' Assoc. 49 L.R.A.(N.S.) 374 (annotated on what is concurrent insurance), 205 Fed. 32, 123 C. C. A. 340, 42 Ins. L. J. 1331. The court, per Gilbert, C. J., said: "What is 'concurrent insurance,' as those words are used in the contract? The word 'concurrent,' while its primary meaning is 'running with,' is used in different senses. It does not appear that in insurance contracts it has any settled, definite, technical meaning. But few insurance cases are reported in which the courts have been called upon to determine its meaning.

"The plaintiff in error relies upon New Jersey Rubber Co. v. Commercial Union Assurance Co. 64 N. J. Law, 580, 46 Atl. 777, 30 Ins. L. J. 55, aff'g 64 N. J. L. 51, 44 Atl. 848. In that case there were two defenses, —one resting on the terms of the policy, the other resting on an agreement made before the policy was issued. The policy insured certain property against loss by fire, and it contained a provision against other insurance similar to that in the policy in the case at bar, and a rider permitting 'other concurrent insurance.' The concurrent insurance which was procured covered only a portion of the property. Defining the provision permitting concurrent insurance, the court said:—

"'Concurrent insurance is that which to any extent insures the same interest, against the same casualty, at the same time, as the primary insurance, on such terms that the insurers would bear proportionally the loss happening within the provisions of both policies. It is this last quality, of sharing proportionally in the loss, that distinguishes concurrent insurance from mere double insurance.'

"And the court held that the additional insurance, although it covered only a portion of the property, came within the expressed permission. But, in discussing the second defense, which was the agreement between the parties that the plaintiff could procure from other insurers insurance on the same property to the amount of $75,000 at least, which should be concurrent and proportionate with the policy of the defendant, the court said:—

"'The true intent of this agreement was that, simultaneously with the complete execution of the defendant's contract, the plaintiff would procure other insurance of such a character as would limit the defendant's responsibility.'

"As to that defense the court said:—

"'Concurrent insurance required by an insured must, where there is no qualifying provision, run with the primary insurance for all the time and over all the objects covered by the latter. In the present case the insurance required was to be, not only current, but for a definite amount, and proportionate; that is, the amount was to be distributed among the various items of property insured, in the same proportion as was the amount of the defendant's policy.'

"For the reason that this agreement was not carried out by the plaintiff, the court held that defendant's policy did not become operative. The agreement to obtain concurrent insurance in that case was for the

protection of the defendant. The defendant required that the insured take out additional insurance in other companies, and in order to secure the protection which was expressly stipulated for it was necessary that such other policies cover all the property which the defendant had insured. The construction placed by the court, in that case, upon the word 'concurrent' as used in the agreement, can hardly be said to be appropriate to a case like that at bar, where the insurer, instead of requiring concurrent insurance, simply granted permission to the insured to obtain it.

"In Gough v. Davis, 24 Misc. Rep. 245, 52 N. Y. Supp. 947, the policy provided that the procurement of additional insurance, except by agreement with the insurer, should void it; but it recited:—

" 'Permission is hereby given for other concurrent insurance.'

"The court held that the policy was not made void by other insurance covering only a part of the property, and said:—

" 'The object was to give the insured permission to have other insurance on the property during the existence of the policy. This would be concurrent insurance in respect of time and of the property. It would be concurrent in respect of time, though for a shorter period than that of the policy, and in respect of the property, though not upon all of it. It would not be wholly, but only partly, concurrent; and that, I think, is sufficient, in order to be within the terms of the permission. It does not seem to me that the insured could be expected to understand that the word was used in the precise and restricted sense that the additional policies must exactly concur in covering all the property any more than all of the time. . . . It is contended in the case at bar, however, that the permission for other insurance was intentionally restricted to "concurrent" insurance for the purpose of avoiding the difficulty of apportioning the loss among different insurers, where some of the policies cover all of the property and others cover only specific parts of it. If insurers want to express such a meaning and make such a severe alternative of a forfeiture, they should do it unequivocally, for that is the rule applicable. If the words are uncertain, or reasonably susceptible of two constructions, the construction of the insured will be upheld.'

"In Caraher v. Royal Ins. Co. 63 Hun, 82, 17 N. Y. Supp. 858, the court held that insurance was none the less concurrent in a case where the loss, if any, under one policy would be payable to the assured, and under another policy the company had by indorsement assented to its payment to a mortgagee as his interest may appear.

"In Corkery v. Security Fire Ins. Co. 99 Iowa, 382, 68 N. W. 792, the court said:—

" 'Defendant claims that these policies are noncurrent, because they did not specify the amount of insurance separately, on the goods held in trust or on commission. It is conceded that, if they specified the sum thereof applicable to the property covered by the policy in suit, they would be concurrent; but it is insisted that, as they are, an adjustment cannot be readily made. The provision as to contribution provides for such adjustment, and the fact that it may be so easily made as if the policies each covered only the same property is no reason for holding them to be noncurrent.'

"In Washburn-Halligan Coffee Co. v. Merchants' Brick Mutual Fire Ins. Co. 110 Iowa, 423, 80 Am. St. Rep. 311, 81 N. W. 707, the court said:—

" 'Here the clause "other concurrent insurance permitted" did no more than wipe out the prohibition of the policy. The hazard of excessive insurance was entirely waived, and, in so far as the risk was concerned, it was immaterial whether the additional insurance was on one or

current insurance and double insurance are entirely distinct.[8]

A stipulation limiting concurrent insurance to a certain amount is valid and enforceable.[9] And a policy is voided by concurrent insurance in excess of the amount limited therein.[10] Where a rider attached to a standard form of fire policy of New York relates to obtaining other insurance outside of the state it does not violate the statute relating thereto where the state insurance law also recognizes such insurance as valid upon compliance with the prescribed conditions and such rider is a part of the contract; and where the policy is issued upon a warranty that insurer has a policy in force insuring the identical property for a certain sum in concurrent form in identically the same proportion on each part thereof and at no higher rate of premium, and that said policies as written will be continued in force during the entire currency of said policy, otherwise the policy will be void, said provision may be validly attached as a rider and it is not inconsistent with the prescribed conditions of the standard form nor does it constitute a waiver of any of its conditions.[11] In Missouri a stipulation limiting concurrent insurance is a warranty presumed in law to be material to the risk, and any substantial breach will operate to forfeit the policy, notwithstanding a statute providing that warranties not material to the risk are representations, since such statutes relate to existing facts which before said enactment had been treated as conditions precedent, but not as affecting the construction of executory warranties.[12] It is held that a condition of a fire policy limiting and requiring consent to concurrent insurance is not violated by the cancelation of a concurrent policy

all the items covered by the defendant's contract. "Concurrent insurance," under the circumstances, means any insurance running with that of the defendant, and sharing its risk. If so, it would include policies covering, not only a part of defendant's risk, but all of it, and more.'"

The definition given under the above note in New Jersey Rubber Co. v. Commercial Union Assur. Co. 64 N. J. L. 580, is also given in Connecticut Fire Ins. Co. v. Union Mercantile Co. 161 Ky. 718, 171 S. W. 407.

[8] Lawver v. Globe Mutual Ins. Co. 25 S. Dak. 549, 127 N. W. 615, 39 Ins. L. J. 1583, 1596.

[9] Interstate Fire Ins. Co. v. Nelson, 105 Miss. 437, 62 So. 425.

[10] Interstate Fire Ins. Co. v. Nelson, 105 Miss. 437, 62 So. 425; Home Insurance Co. v. Morrow, 128 Ala. 595, 29 So. 687. See Wynn v. Caledonian Ins. Co. 100 S. Car. 47, 84 S. E. 306, under Civ. Code 1912, sec. 2718.

[11] Scharles & Deutsch v. N. Hubbard, J. & Co. 74 Misc. 72, 131 N. Y. Supp. 849, 40 Ins. L. J. 2119.

[12] Harwood v. National Union Fire Ins. Co. 170 Mo. App. 298, 156 S. W. 475, 42 Ins. L. J. 1002, act of 1887, Rev. Stat. 1909, secs. 7024, 7025.

subsequent to the issuance of the policy in question, and the issuance by another company of a new policy for the exact amount of the canceled policy making the total insurance the same as when the policy was issued.[13]

§ 2480a. **Distinction between concurrent insurance and coinsurance.**—A distinction is made between concurrent insurance and coinsurance in that a provision for concurrent insurance is a privilege extended to insured which, as usually framed, results in a forfeiture of the policy if insured exceeds the privilege. A provision for coinsurance is an obligation imposed upon insured to keep a specific amount of a percentage of additional insurance in force and if he fails to do so he becomes a coinsurer to the extent of the omitted insurance.[14] So it is also declared: "There is a wide distinction between 'coinsurance' and 'concurrent insurance.' The latter term has been used from time immemorial to designate insurance placed in other companies covering the same risk. . . . We venture to say that it is rare indeed that there is not concurrent insurance whenever the risk is a large one. Coinsurance on the other hand is a creature of modern invention at least in this state. . . . We hold there is no 'coinsurance' where insured does not bear a proportion of the risk himself." [15]

§ 2481. **Rule where marine policies of same date are issued: priority in date may be shown.**—If two or more marine policies are issued upon the same property and risk, and have the same date, there arises a presumption that they are simultaneous. This presumption, however, is by no means conclusive, and the actual time of the execution of each policy may be shown.[16] In a Federal case two policies were executed, bearing the same date, and upon this point Story, J., said: "The law, when it is material, will examine into fractions of a day, and give the parties their rights accordingly. In this case, therefore, I shall admit the evidence of the actual time of the execution of the two policies." [17] If in such a case it be shown that one of the policies was in fact executed prior to the other, then if the prior policy covers the whole interest the underwriters under that policy must alone bear the whole loss, where the subsequent policy provides that the un-

[13] New Orleans Ins. Assoc. v. Holberg, 64 Miss. 51, 8 So. 175.

[14] Northwestern Fuel Co. v. Boston Ins. Co. 131 Minn. 19, 154 N. W. 513, 46 Ins. L. J. 715, 720. Distinction made and applied by Dibell, C. See this case under § 2496a herein.

[15] Oppenheim v. Firemen's Fund Ins. Co. 119 Minn. 417, 138 N. W. 777, 42 Ins. L. J. 297, 300, Brown, J.

[16] Potter v. Marine Ins. Co. 2 Mason (U. S. C. C.) 475, Fed. Cas. No. 11,332; Lee v. Massachusetts Ins. Co. 6 Mass. 208. See § 2496 herein.

[17] Preceding note. See also Brown v. Hartford Ins. Co. 3 Day (Conn.) 58.

derwriters of that policy shall be liable only for as much interest as is uncovered by the prior policy.[18] If, however, the two policies were in fact executed at the same time, or the proof is not strong enough to overcome the presumption that they were so executed, then the priority clause is excluded, and the assured may, in an action upon either policy, recover the full amount of his loss on that policy. In such a case the other underwriters will be liable for contribution. The question concerning whether other policies are prior in date should not be determined by the date of the attaching of the policies; the clause refers to priority in date of effecting the insurance.[19]

§ 2482. **Provisions in charter or by-laws as to other insurance.**—If a policy issued by a mutual company refers to the charter and by-laws of the company, and makes them a part of the policy, then any provisions therein as to other insurance must be strictly complied with by the insured, and any violation of such provisions will avoid the policy.[20] A provision in the charter prescribing the manner and form of contract by the company must be complied with, and cannot, it is held, be waived.[1] Chief Justice Marshall says:[2] "The act of incorporation is an enabling act; it gives the corporation all the powers it possesses; it enables it to contract, and when it prescribes to it a form of contracting it must observe that mode, for the instrument no more creates a contract than if the body had never been incorporated." Consequently, if the charter of a company provides that the policy shall be void in case of other insurance unless assent has been given thereto and indorsed upon the policy, this provision must be complied with. The object of the provision is to prevent the insuring of the property in different companies, and to protect other policyholders and the public in general. The legislature in inserting the clause is presumed to have intended to place it be-

[18] Potter v. Marine Ins. Co. 2 Mason (U. S. C. C.) 475, Fed. Cas. No. 11,332.

[19] Lee v. Massachusetts Ins. Co. 6 Mass. 208; Deming v. Merchants' Cotton-Press Storage Co. 90 Tenn. 306, 17 S. W. 89, 13 L.R.A. 518; Corporation of London Assurance v. Paterson, 106 Ga. 538, 32 S. E. 650, 28 Ins. L. J. 385, 397.

[20] Burt v. People's Mutual Fire Ins. Co. 2 Gray (68 Mass.) 397; Security Ins. Co. v. Fay, 22 Mich. 467, 7 Am. Rep. 670; McMahon v. Portsmouth Ins. Co. 22 N. H. (2 Fost.) 15; Blanchard v. Atlantic Ins. Co. 33 N. H. 9; Fabyan v. American Fire Ins. Co. 33 N. H. 203. See O'Leary Bros. v. Merchants' & Bankers' Mutual Ins. Co. 100 Iowa, 173, 62 Am. St. Rep. 555, 66 N. W. 175, 69 N. W. 420.

[1] Couch v. City Fire Ins. Co. of Hartford, 38 Conn. 181, 9 Am. Rep. 375; Stark County Mutual Ins. Co. v. Hurd, 19 Ohio, 149. See § 2487 herein.

[2] Head v. Providence Ins. Co. 2 Cranch (6 U. S.) 127, 2 L. ed. 229.

yond the power of the company to enter into any contract of insurance which should be enforceable unless these provisions in the charter as to other insurance should be complied with. So it may be broadly stated that where there is a provision in the charter of a mutual company that the policy shall be void in case of other insurance unless consent has been given by the directors and indorsed by the president and secretary upon the policy, it cannot be waived, since it is considered as going to the essence of the contract, and consent can only be proved in the manner prescribed in the charter. In this connection the words of the court in an Indiana case[3] are pertinent: "Whenever the charter of an insurance company requires that any act shall be done, and declares that if the act be not done in the manner prescribed the contract or policy of insurance shall be void, the company cannot waive the performance of such act in the prescribed mode; for performance of any condition of the contract fixed by law cannot be waived. This has been repeatedly declared to be the law in cases involving the question of double insurance."

The words of a provision in a charter are not, however, in all cases to receive an absolutely literal construction, though they are to be strictly construed. Thus, where the charter provided that the consent to other insurance should be given by "indorsement on the back of the policy," it was held that a recital in the body of the policy of the other insurance was a substantial compliance with the provision.[4] In those cases where the by-laws or the charter contains such a provision, the courts have also held that the provision cannot be waived by an agent or any officer of the company.[5] Though it is held that charter provisions requiring certain things to be done in order to render a contract valid cannot be waived, yet it would seem that there might be a distinction where the provisions are only contained in the by-laws, and that while the charter provisions of this nature cannot be waived, provisions in the by-laws might.[6] A provision in the by-laws that "persons insuring with this company may insure with other companies, with the consent of the directors indorsed on the policy,"

[3] Leonard v. American Ins. Co. 97 Ind. 299.

[4] First Baptist Soc. v. Hillsborough Mutual Fire Ins. Co. 19 N. H. 580.

[5] Worcester Bank v. Hartford Fire Ins. Co. 11 Cush. (65 Mass.) 265, 59 Am. Dec. 145; Forbes v. Agawam Ins. Co. 9 Cush. (63 Mass.) 470; Hale v. Mechanics' Mutual Fire Ins. Co. 6 Gray (72 Mass.) 169, 66 Am. Dec. 410; Simpson v. Pennsylvania Ins. Co. 38 Pa. St. 250.

[6] See Redstrake v. Cumberland Mutual Fire Ins. Co. 44 N. J. L. 294. See § 526 herein.

the provision, being made a part of the policy, has been construed as being an implied prohibition against other insurance.[7]

The rules above given should be considered, however, in connection with what has been said elsewhere concerning the powers or corporations,[8] and of agents.[9]

**§ 2483. Notice of other, etc., insurance: what is and is not sufficient.**—A provision that notice shall be given of prior and subsequent insurance is reasonable and valid.[10] And policy clauses as to notice of prior and subsequent insurance are of such material importance, both to insurer and insured, that the courts will require that they be complied with by the insured in all good faith.[11] If a fire policy contains a condition that in case of "any other insurance" the insured must give notice to the company, such a condition applies to both subsequent and prior insurance.[12] But if the insurance requires "notices of all previous insurances," it will not be construed as extending to subsequent insurances also.[13] The provision requiring notice of all additional insurance in behalf of the insured refers only to additional insurance upon the same property.[14] But the insured should, in all cases where he has procured other insurance which his policy stipulates against,

[7] Hygum v. Ætna Ins. Co. 11 Iowa, 21.

[8] See §§ 34–36, 332–334, 350 et seq. herein.

[9] See §§ 434–439 and §§ 556 et seq. herein.

[10] Northern Assurance Co. v. Grand View Building Assoc. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. 133. See also Lancaster Ins. Co. v. Stanley, 70 Ark. 1, 62 S. W. 66.

[11] Carpenter v. Providence Washington Ins. Co. 16 Pet. (41 U. S.) 495, 10 L. ed. 1044. *Cited* in:

*United States.* — Phoenix Mutual Life Ins. Co. v. Raddin, 120 U. S. 183, 189, 30 L. ed. 644, 646, 7 Sup. Ct. 500; Humphrey v. Hartford Fire Ins. Co. 15 Blatchf. (U. S. C. C.) 504, 523, Fed. Cas. No. 6,875; Penn Mutual Life Ins. Co. v. Mechanics Savings Bank & Trust Co. 72 Fed. 413, 431, 19 C. C. A. 286, 304, 37 U. S. App. 692, 38 L.R.A. 33, 70; Union National Bank v. German Ins. Co. 71 Fed. 473, 475, 18 C. C. A. 203, 206, 34 U. S. App. 397.

*Maryland.*—Washington Fire Ins. Co. v. Davison, 30 Md. 91, 110.

*Massachusetts.*—Barrett v. Union Mutual Fire Ins. Co. 7 Cush. (61 Mass.) 175, 179.

*Missouri.*—Aloe v. Mutual Reserve Life Assoc. 147 Mo. 561, 579, 49 S. W. 553.

*Ohio.*—Madison Ins. Co. v. Fellowes, 1 Disney, 217, 224.

*West Virginia.*—Maupin v. Scottish Union & National Ins. Co. 53 W. Va. 557, 567, 45 S. E. 1003.

[12] Frederick County Mutual Fire Ins. Co. v. De Ford, 38 Md. 404; Warwick v. Monmouth County Mutual Fire Ins. Co. 15 Vroom (N. J.) 83, 43 Am. Rep. 343.

[13] Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; Tyler v. Aetna Fire Ins. Co. 12 Wend. (N. Y.) 507.

[14] Franklin Fire Ins. Co. v. Updegraff, 43 Pa. 350.

exercise reasonable diligence in giving notice of the same, and whether he has so exercised it is a question for the jury.[15]

Where a parol contract of insurance is entered into, a verbal notice is all that is necessary in case of other insurance, though the usual form of policies may require notice to be indorsed on the policy or otherwise acknowledged in writing.[16] But a parol notice of other insurance is not a compliance with the terms of a policy, requiring that all notice of previous insurance on the property be given and indorsed on the policy. This is true although the prior policy is voidable.[17] Notice of prior insurance may, however, be established by parol where the policy does not require it to be in writing, though it prescribes that the assent of the company be in writing.[18]

Where the policy provided that notice must be given of "all additional insurance and of all changes that may be made in such additional insurance," and the insured gave notice of other insurance, but upon renewing such other insurance had the amount differently distributed, it was held that a failure to give notice of such change in distribution would release the insurers.[19] While in all cases knowledge of further insurance may not be equivalent to notice to the original company, yet knowledge followed by acts that amount to a subsequent recognition of the original contract as still in force will dispense with the necessity of proving notice.[20]

[15] Kimball v. Howard Ins. Co. 8 Gray (74 Mass.) 33; Mellen v. Hamilton Fire Ins. Co. 17 N. Y. 609.

[16] Eureka Ins. Co. v. Robinson, 56 Pa. St. 256, 94 Am. Dec. 65.

[17] Carpenter v. Providence Washington Ins. Co. 16 Pet. (41 U. S.) 495, 10 L. ed. 1044. *Cited* in:

*United States.*—Modern Woodmen of America v. Tevis, 117 Fed. 369, 373, 54 C. C. A. 297; Northern Assurance Co. v. Grand View Building Assoc. 101 Fed. 77, 82, 41 C. C. A. 207; McElroy v. British American Assurance Co. 94 Fed. 990, 997, 36 C. C. A. 615, 621.

*Louisiana.* — Myers v. Germania Ins. Co. 27 La. Ann. 63, 66.

*Missouri.*—Hutchinson v. Western Ins. Co. 21 Mo. 97, 103, 64 Am. Dec. 218.

*Nevada.*—Healey v. Imperial Fire Ins. Co. 5 Nev. 268, 274.

*New York.*—Bigler v. New York Central Ins. Co. 20 Barb. 635, 636.

*Ohio.* — Robert v. New England Mutual Ins. Co. 2 Disney, 106, 112.

*Texas.*—Crescent Ins. Co. v. Griffin, 59 Tex. 509, 512.

*West Virginia.*—Medley v. German Alliance Ins. Co. 55 W. Va. 342, 350, 47 S. E. 101. *Cited as overruled* in Pechner v. Phoenix Ins. Co. 65 N. Y. 195, 207.

[18] Kenton Ins. Co. v. Shea, 6 Bush (69 Ky.) 174, 99 Am. Dec. 676. See also Schenck v. Mercer County Mutual Fire Ins. Co. 24 N. J. Law, 447; McEwen v. Montgomery County Mutual Ins. Co. 5 Hill (N. Y.) 101; Sexton v. Montgomery County Mutual Ins. Co. 9 Barb. (N. Y.) 191; Planters' Mutual Ins. Co. v. Lyons, 33 Tex. 253; Hendrickson v. Queen's Ins. Co. 31 U. C. Q. B. 547.

[19] Simpson v. Pennsylvania Ins. Co. 38 Pa. St. 250.

[20] Eureka Ins. Co. v. Robinson, 56 Pa. St. 256, 94 Am. Dec. 65.

The required notice of other insurance does not extend to that which is not in existence when the loss occurs, as where insured did not until after the loss receive notice of the acceptance of other insurance theretofore applied for to another insurer.[1] So a policy of fire insurance containing a stipulation making it null and void if the insured omits to give notice of any additional insurance on the property covered, is not avoided by omission to give notice of an additional insurance which never became effective.[2] But it is decided that, inasmuch as declarations in a proposal are in the nature of continuing declarations up to the time the policy is issued, if between said proposal and the issue of the policy assured obtained insurance in another company without notice to, or insurer's consent, the first policy was void.[3] Again, where a statute so provides it must appear that assurer was injured by breach of a condition, or that loss resulted therefrom, or there will be no forfeiture and the failure to give notice or to obtain the consent of assurer to additional insurance does not of itself operate to forfeit the policy.[4] In a Federal case it was urged that assured had to show affirmatively what policies of other insurance were held on the insured property as a basis for recovery under a policy in the standard form, providing that insurer should not be liable for any greater proportion of any loss than the "amount hereby insured shall bear to the whole insurance," etc. Said policy also required that the proofs of loss should contain a sworn statement showing all other insurance on the property, and in accordance therewith the proofs containing a schedule of all other insurance were made out in apparent conformity with assurer's requirements and were accepted by it without objection, and were produced by it upon the trial upon assured's demand. It was held that assurer had full notice, under the sworn statement of all other insurance upon the property and it having been admitted in evidence without objection, the objection was altogether too technical to avail insurer, that it was only admitted to show compliance with the terms of the policy and could not, therefore, constitute proof of other insurance.[5]

It is decided that even though the owner of property does not

[1] Commercial Union Ins. Co. v. Temple, 18 Can. S. C. 206, 18 Canadian L. T. 387.

[2] Equitable Fire & Accident Office Ltd. v. Ching Wo Hong [1907] L. R. A. C. 96, 76 L. J. C. P. (N. S.) 31, 96 L. T. (N. S.) 1, 23 Times L. R. 200n, 1 B. R. C. 34n. See §§ 2475, 2478 herein.

[3] Marshall & Scottish Employers' Liability Co. In re, 85 L. T. 757.

[4] Lagden v. Concordia Mutual Fire Ins. Co. 188 Mich. 689, 154 N. W. 87; Pub. acts 1911, No. 128.

[5] Humboldt Fire Ins. Co. v. W. H. Ashley Silk Co. 185 Fed. 54, 107 C. C. A. 274, 40 Ins. L. J. 757.

know that the mortgagee has taken out a policy in said owner's name, loss payable to himself as interest may appear, still the policy is void where notice is not given by insured as required.[6] And it is held that properly mailing a notice of additional insurance is insufficient where the receipt thereof is denied by insurer,[7] and in such case knowledge cannot be imputed to insurer or its officers, even though the letter is in its possession, if the secretary, to whom it was mailed, never received it.[8]

Notice to insurer's agent is held sufficient,[9] even though written consent of insurer is required.[10] Notice of additional insurance is sufficient if given one to whom such notice might properly have been given, as to an employee who solicited the original insurance, occupies a desk in the office of the agent, and his duties are to solicit insurance for the exclusive benefit of such agent, and to take to him all risks secured.[11] If an insurance agent is part owner of the insured property as heir to one deceased subsequently to the execution of a mortgage on the property, and also one of the makers of the mortgage note, his failure, when issuing the policy, to notify his company of these facts, or that there was a prior policy upon the property issued to such mortgagee, does not void the policy last issued, although the amount of insurance is in excess of the amount permitted as concurrent insurance.[12] But notice given casually to assurer's officer is not sufficient.[13]

**§ 2484. Permission to obtain other insurance.**—In many cases policies are issued which contain a clause permitting other insurance to a certain specified amount, or subsequent to their issuance permission is indorsed for further insurance, the policy also permitting such other insurance. This will be construed to be a consent to insurance in other companies to the amount named, and the condition will not be violated by a renewal of the policies of

[6] Perry v. Liverpool & London & Globe Ins. Co. (Can.) 34 N. B. 380.

[7] Fairfield Packing Co. v. Southern Mutual Fire Ins. Co. 193 Pa. 184, 44 Wkly. N. C. 533, 44 Atl. 317.

[8] Shelden v. Michigan Millers' Mutual Fire Ins. Co. 124 Mich. 303, 82 N. W. 1068 (a question of evidence was involved herein under the statute, the secretary having died, and evidence of the contents of the letter was excluded).

[9] Utz v. Insurance Co. of North America, 139 Mo. App. 153, 122 S. W. 318.

As to notice to and knowledge of agent, see §§ 515 et seq. herein.

[10] Utz v. Orient Ins. Co. 139 Mo. App. 552, 123 S. W. 538.

[11] Arff v. Star Fire Ins. Co. 125 N. Y. 57, 10 L.R.A. 609, 21 Am. St. Rep. 721, 25 N. E. 1073. *Compare* Morris v. Orient Ins. Co. 106 Ga. 472, 33 S. E. 430.

[12] Magoun v. Firemen's Fund Ins. Co. 86 Minn. 486, 91 Am. St. Rep. 370, 91 N. W. 5.

[13] Monk v. Penn Township Mutual Fire Assoc. of L. C. (Pa.) 21 Lanc. L. Rev. 222.

other insurance upon their expiration.[14] A permission of this nature is held to refer to both subsequent and prior insurance, and to include the aggregate amount of both.[15] So a permission to effect other insurance is construed to mean other and additional insurance so as to preclude a forfeiture.[16] If the policy permits other insurance to a certain amount, any insurance beyond that amount will avoid the policy where it is conditioned to be void in case of other insurance without notice and consent. It is the same as if the policy were conditioned to be void in case other insurance should be effected beyond the amount specified.[17] So attaching an eighty per cent clause average coinsurance clause operates as a permission for other insurance to the extent and only to the extent so specified.[18] And a permit to take a limited amount to other insurance does not nullify a condition of forfeiture for existing or subsequent additional insurance, but the policy is not avoided under such a permit, by a slight excess of additional insurance in the absence of proven fraudulent intent in procuring the same.[19] When partial insurance is taken on property, other insurance being permitted, the company assumes the risk not on any definable portion of the property, but on an undivided proportion of the whole property.[20] Permits for other insurance in a certain amount specified in each of two different policies issued by the same insurer at different times are not cumulative and preclude additional total insurance in excess of the largest amount so specified in either policy as that permitted, effected contrary to a provision against other insurance.[1]

A permission to obtain "—— additional insurance" has no effect whatsoever, although the policy is conditioned that it shall be void for procuring other insurance except as otherwise therein.[2]

[14] Parsons v. Standard Fire Ins. Co. 3 Leg. News (Montr.) 335.

[15] Carruge v. Atlantic Ins. Co. 40 Ga. 135, 2 Am. Rep. 567; Blake v. Exchange Ins. Co. 12 Gray (78 Mass.) 265; Kimball v. Howard Ins. Co. 8 Gray (74 Mass.) 33; Warner v. Peoria Ins. Co. 14 Wis. 318.

[16] Griscom-Spencer Co. v. Mechanics Ins. Co. (1909) — N. J. L. —, 32 N. J. L. Jour. 277.

[17] Allen v. German-American Ins. Co. 123 N. Y. 6, 25 N. E. 309; Blake v. Exchange Ins. Co. 12 Gray (78 Mass.) 265; Elliott v. Lycoming Ins. Co. 66 Pa. St. 22, 5 Am. Rep. 323.

[18] Nestler v. Germania Fire Ins. Co. 89 N. Y. Supp. 782. See Woolford v. Phœnix Ins. Co. 190 Mass. 233, 76 N. E. 722, 35 Ins. L. J. 316; Rudy v. Safety Mutual Fire Ins. Co. 64 Leg. Intel. 596, 16 Pa. Dist. R. 920.

[19] Teter v. Norfolk Fire Ins. Corp. 74 W. Va. 461, 82 S. E. 201.

[20] Teague v. Germania Fire Ins. Co. 71 Ala. 473.

[1] De Loach v. Ætna Ins. Co. 4 Ga. App. 746, 62 S. E. 473.

[2] Fountain v. Standard Fire Ins. Co. 155 Iowa, 96, 134 N. W. 1090. See also Philadelphia Underwriters' Ins. Co. of North America v. Bigelow, 48 Fla. 105, 37 So. 210; Miller v. St. Paul Fire & Marine Ins. Co. 26 S. Dak. 154, 128 N. W. 609.

**§ 2484a. Permission continued: concurrent insurance.**—If a specified amount of "total concurrent insurance" is permitted "including this policy" a permission is thereby given to effect additional insurance to the amount so specified even though the policy amount is the same as that so permitted.[3] If a policy of insurance on buildings contains a clause providing that it shall become void if the insured then has, or shall thereafter make or procure, any other contract of insurance, unless otherwise provided by agreement indorsed on, or added to, the policy, and it has attached to it an indorsement slip, of the same date, containing a description of the property insured, the amount of insurance written thereon, and a clause reciting that "two thousand five hundred dollars total insurance permitted," such sum being the amount of insurance written in the original policy, such indorsement slip and clause construed in connection with the whole policy permit other concurrent insurance in the sum named therein.[4] Where a certain amount of "total insurance" is permitted "concurrent herewith" on buildings, boilers, engines and machinery and other insurance is permitted "concurrent herewith" on stock, such limitation contemplates the amount so written in the policy and not additional insurance to that amount. The words "total insurance" mean the entire insurance and the expression "concurrent herewith" relates to the terms "total insurance" and the policy provides the subjects upon which there must be concurrence; that is, the total insurance must operate at the same time and upon the same property as is fixed by the policy.[5] Separate insurance subsequently procured on a sample room building connected by a covered board walk with a hotel, which with the attached building is insured, is within a policy limitation of the amount of concurrent insurance permitted.[6] If Lloyds marine policies are concurrent in time as well as concurrent as to the property which is covered, they are within a provision of fire policies permitting "other concurrent insurance," even though the former are not, as to the latter, concurrent in kind or method of adjustment. In cases of a permission of this character, if the insurer intends that the concurrent insurance should be identical in terms with that which it issues, it should so clearly express its

[3] Western Assurance Co. v. Ferrell, — Miss. —, 40 So. 8, 35 Ins. L. J. 314, *citing* as deciding precisely the same point, L'Engle v. Scottish Union & National Fire Ins. Co. 48 Fla. 82, 67 L.R.A. 581, 37 So. 462.

[4] L'Engle v. Scottish Union & National Fire Ins. Co. 48 Fla. 82, 67 L.R.A. 581, 111 Am. St. Rep. 70, 37 So. 462.

[5] Senor v. Western Millers' Mutual Fire Ins. Co. 181 Mo. 104, 79 S. W. 689, 33 Ins. L. J. 455.

[6] Interstate Fire Ins. Co. v. Nelson, 105 Miss. 437, 62 So. 425.

intent as to admit of no doubt as to its meaning, since the rule of construction in cases of doubt or ambiguity is against insurer.[7] Where the following clauses were indorsed upon the policy, "Other insurance permitted concurrent in form herewith," and "Loss, if any, payable to T., executor, to the extent of his mortgage interest," and subsequently other insurance was obtained, but it was not concurrent in form, it was held, the company having claimed that the policy was forfeited, that the indorsements upon the policy were not a part of the same, and that it was not necessary that the provisions in the other policies should be concurrent in form.[8] And where a policy to insured permitted total concurrent insurance, but, as construed by the court, did not permit additional insurance beyond the amount specified as "total insurance," the intention being to limit it to said amount, and the policy also stipulated as to the interest existing thereunder in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance, the conditions contained in said policy should apply in the manner expressed in such provisions and conditions of insurance relating to such interest as should be "written upon, attached or appended" thereto, and a slip was attached to the policy as a part of the contract providing for a certain party's interest, but none of the conditions violating the policy as to insured were to be found in said appended agreement and none of the conditions were written upon, attached, or appended to the policy, it follows that said party's interest is not in any way affected by conditions rendering the policy void as to assured, and this applies to other insurance taken out by assured which invalidates the policy as to him, especially so, where said party whose interest was so provided for had no notice or knowledge of the issuance of other insurance to insured.[9] If other insurance covers only part of the insured property it does not avoid a policy prohibiting additional insurance by permitting other concurrent insurance.[10] A clause in a fire policy permitting concurrent insurance will cover policies written by marine insurance companies upon the property although they render the insurer liable only in case of total loss, and the method of adjustment is different from

[7] Globe & Rutgers Fire Ins. Co. v. Alaska-Portland Packers' Assoc. 49 L.R.A.(N.S.) 374, 205 Fed. 32, 123 C. C. A. 340, 42 Ins. L. J. 1331.

[8] Caraher v. Royal Ins. Co. 63 Hun (70 N. Y.) 82, 17 N. Y. Supp. 858, 44 N. Y. St. Rep. 141, aff'd 136 N. Y. 645, 32 N. E. 1015.

[9] Senor v. Western Millers' Mutual Fire Ins. Co. 181 Mo. 104, 79 S. W. 689, 33 Ins. L. J. 455.

[10] Gough v. Davis, 52 N. Y. Supp. 947, 24 Misc. 245. *Examine* Washburn-Halligan Coffee Co. v. Merchants Brick Mutual Fire Ins. Co. 110 Iowa, 423, 81 N. W. 707, 29 Ins. L. J. 234, *considered* under § 2480 herein.

that of fire policies, if they are concurrent in time and as to property covered.[11] But obtaining other insurance without insurer's consent is not authorized by a clause "——other concurrent insurance permitted."[12]

§ 2485. **Consent to other insurance: indorsement on policy.**—In connection with the provision as to notice, above considered, there is generally the requirement of an indorsement to assent to other insurance upon the policy. There are a few cases which hold that there must be a strict compliance with this provision, as it is a condition precedent to recovery, and that verbal notice without a written indorsement is not sufficient.[13] Thus, it has been held that a letter expressing willingness to give consent to the insured's taking out additional insurance does not satisfy a condition in a policy that if the insured takes out other insurance without obtaining a consent of the company indorsed on the policy the policy shall be void.[14] If the charter of a mutual company contains a provision requiring indorsement as necessary to the continued validity of the policy,[15] it would be necessary to comply with this provision, but if it is simply a provision of the policy, it would seem that the requirement as to the indorsement might be waived by the company and its agent the same as any condition avoiding the policy. The later cases, and in fact the weight of authority, may be said to support this proposition.[16] Consequently, a strict compliance with the provisions is not in all cases necessary, and there are many instances in which a notice of other insurance will be sufficient to preserve the policy. And though the policy may require the consent to be indorsed thereon, yet it has been held that a consent in writing to the other insurance will be sufficient though not indorsed as required.[17] But where the policy provides that it shall

[11] Globe & Rutgers Fire Ins. Co. v. Alaska-Portland Packers' Assoc. 205 Fed. 32, 123 C. C. A. 340, 49 L.R.A.(N.S.) 374n.

[12] Miller v. St. Paul Fire & Marine Ins. Co. 26 S. Dak. 154, 128 N. W. 609. See also Philadelphia Underwriters Ins. Co. of North America v. Bigelow, 48 Fla. 105, 37 So. 210; Fountain v. Standard Fire Ins. Co. 155 Iowa, 96, 134 N. W. 1090.

[13] *United States.*—Carpenter v. Providence-Washington Ins. Co. 16 Pet. (41 U. S.) 495, 10 L. ed. 1044 (see citations to this case under § 2483 herein).

*Louisiana.*—Meyers v. Germania Ins. Co. 27 La. Ann. 63.

*Missouri.*—Hutchinson v. Western Ins. Co. 21 Mo. 97, 64 Am. Dec. 218.

*New York.*—Gilbert v. Phœnix Ins. Co. 36 Barb. (N. Y.) 372.

*Ohio.*—Fellows v. Madison Ins. Co. 2 Disn. (Ohio) 128, 13 Ohio Dec. 79.

*Pennsylvania.*—Simpson v. Pennsylvania Ins. Co. 38 Pa. St. 250, 256.

[14] Allemania Fire Ins. Co. v. Hurd, 37 Mich. 11, 26 Am. Rep. 491.

[15] See §§ 34–36, 332–334, 434–439, and chapter XXV. herein.

[16] See § 2487 herein.

[17] Mattocks v. Des Moines Ins. Co. 74 Iowa, 233, 37 N. W. 174. See National Ins. Co. v. Crane, 16 Md. 260, 77 Am. Dec. 289; Kenton Ins. Co. v.

be void in case of other insurance without notice and consent of the company, other insurance without such notice or consent will, in the absence of a waiver of the provision, avoid the policy.[18] And procuring other insurance without written consent indorsed upon the policy as required thereunder avoids the contract even though at the time of obtaining the second policy insured believed the first one had expired.[19] Where, however, a contract for present insurance and for a policy on the same risk is made subject to the conditions contained in the printed policy of the insurer, a condition in the printed policy that all additional insurance, whether prior or subsequent, shall be mentioned in or indorsed on the policy does not require that either prior or subsequent insurance should be mentioned or indorsed on the contract.[20]

If a policy assented to by the insured, provides that it shall become void if the insurer contracts other insurance on the property without the written consent of the company, indorsed on the policy, additional insurance, obtained without the required indorsement, renders the policy void, although the secretary of the company consents, by letter, to the additional insurance.[1] If, however, the policy is silent concerning where or by whom the consent shall be indorsed, the attachment of a printed slip used for that purpose, signed by an agent of the company, will be sufficient.[2]

A requirement that notice be given and written consent obtained from insurer if additional insurance is effected is not superseded or nullified by a permissive eighty per cent coinsurance clause, so that if the additional insurance carries the total insurance to a sum in excess of the total value of the property, the policy is avoided.[3] Under an Ohio decision, additional insurance taken

Shea, 6 Bush (69 Ky.) 174, 99 Am. Dec. 676.

[18] Ben Franklin Ins. Co. v. Weary, 4 Ill. App. 74; Johnson v. American Ins. Co. 41 Minn. 396, 43 N. W. 59.

See also Independent School District of Doon v. Fidelity Ins. Co. 113 Iowa, 65, 84 N. W. 956.

[19] Wilson v. Anchor Fire Ins. Co. 143 Iowa, 458, 122 N. W. 157.

[20] Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612.

[1] O'Leary & Bros. v. Merchants & Bankers Mutual Ins. Co. 100 Iowa, 173, 62 Am. St. Rep. 555, 66 N. W. 175, 69 N. W. 420.

[2] Grubbs v. Virginia Fire & Marine Ins. Co. 110 N. C. 108, 14 S. E. 516.

[3] Woolford v. Phenix Ins. Co. 190 Mass. 233, 76 N. E. 722, 35 Ins. L. J. 316, *citing* Cutler v. Royal Ins. Co. 70 Conn. 566, 572, 41 L.R.A. 150, 40 Atl. 529; Allen v. Germania Ins. Co. 123 N. Y. 6, 25 N. E. 309, and declaring that: "In so far as the cases of Pool v. Milwaukee Mechanics' Ins. Co. 91 Wis. 530, 51 Am. St. Rep. 919, 65 N. W. 54, and Catoosa Springs v. Linch, 41 N. Y. Supp. 377, 18 Misc. 209, 210, cited by the plaintiff, are inconsistent with this view, we cannot follow them." Hammond, J. See also Rudy v. Safety Mutual Fire Ins. Co. 64 Leg. Intel. 596, 16 Pa. Dist. R. 920. See Nestler v. Germania Fire Ins. Co. 89 N. Y. Supp. 782.

without the consent of the prior insurer, increases the risk as matter of law, so that a statutory provision as to the liability on a policy in the absence of any change increasing the risk without the consent of the insurers, does not apply.[4] The granting by the insurer of the required consent for the procuring of another policy will extend to the renewal of that policy.[5] If an agent acts in a dual capacity for insured and insurer, as where he is employed by the insured bank as cashier, and he effects other and additional insurance on the bank building without insurer's consent indorsed on the policy as required, and insurer had no knowledge thereof until after the loss, the policy is avoided in the absence of waiver.[6]

**§ 2485a. Same subject: when indorsement effects new contract.**—If an indorsement made upon an "open policy" previously issued by the same insurer provides for additional insurance upon and from the time of notice before known loss, and the premium to be charged is fixed upon the same terms and conditions, so far as applicable, as had been previously agreed upon when the risk was originally accepted, such indorsement is equivalent to issuing an entirely new and distinct contract or policy as of its date when so indorsed, and one containing all the stipulations set forth in the original except those which the said indorsement expressly, or by necessary implication negatived.[7]

**§ 2486. Return of premium in case of refusal to indorse consent to other insurance.**—If the policy provides that it shall be void, in case of other insurance upon the property, unless notice has been given and the company's consent indorsed upon the policy, the company cannot, in case of its refusal to indorse consent, be compelled to return the premium for the remainder of the term which the policy would have had to run,[8] unless the policy provides that the insured may cancel upon returning the premium for the unexpired term. In such case the insurer must either cancel the policy and return the premium, or else the policy will continue in full force and effect.[9]

[4] Sun Fire Office of London v. Clark, 53 Ohio St. 414, 38 L.R.A. 562, 42 N. E. 248, Rev. Stat. sec. 3643.

[5] New Orleans Ins. Co. v. Holberg, 64 Miss. 51, 8 So. 175.

[6] First National Bank of Nome v. German American Ins. Co. 23 N. Dak. 139, 38 L.R.A.(N.S.) 213, 134 N. W. 873, 41 Ins. L. J. 899.

[7] Corporation of London Assurance v. Paterson, 106 Ga. 538, 52 S. E. 650, 28 Ins. L. J. 385. See § 2479 herein.

[8] Phœnix Ins. Co. v. Stevenson, 78 Ky. 150; Johnson v. American Ins. Co. 41 Minn. 396, 43 N. W. 59.

[9] Demill v. Hartford Fire Ins. Co. 4 Allen (9 N. B. Rep.) 341; Mississippi Home Ins. Co. v. Dobbins, 81 Miss. 623, 33 So. 504, 506, 32 Ins. L. J. 364, 366.

**§ 2487. Waiver of provisions as to other insurance: estoppel: notice: consent: indorsement on policy.**—A violation of the provisions of the policy as to other insurance will avoid the policy where it is so conditioned, unless there has been a waiver of such provision. Though the courts were at first inclined to require a strict compliance with the provisions as to notice and consent to other insurance when required to be in writing, the weight of authority clearly sustains the rule that a strict compliance is not necessary, and the provisions may be waived by the company,[10] and in many instances by the agents of the company.[11] But in order to establish a waiver of a condition against additional insurance, it must appear that the subject matter of the waiver and consent was in the minds of the parties, and that it was consciously and purposely done by the minds of the parties coming together upon the proposition.[12] The fact that the company has actual knowledge of the other insurance at the time of issuing the policy, though no formal notice has been given, will prevent it from setting up additional insurance to defeat a recovery;[13] and it is declared to be well settled that issuing a policy with full knowledge of the facts voiding it in its inception, if insisted on, constitutes a waiver or operates as an estoppel from setting up the breach.[14] So notice

As to return of premiums and assessments, see c. XLV. (§§ 1390 et seq.) herein.

[10] *Alabama.*—Alabama State Mutual Assur. Co. v. Long Clothing & Shoe Co. 123 Ala. 667, 26 So. 655.

*Florida.*—Southern States Fire Ins. Co. v. Vann, 69 Fla. 549, L.R.A. 1916B, 1189, 68 So. 647; Eagle Fire Ins. Co. v. Lewillen, 56 Fla. 246, 47 So. 947, 38 Ins. L. J. 320.

*Georgia.*—See Carrugi v. Atlantic Ins. Co. 40 Ga. 135, 2 Am. Rep. 567.

*Kentucky.*—North British & Mercantile Ins. Co. v. Robertson, 134 Ky. 529, 121 S. W. 630; Kenton Ins. Co. v. Shea, 6 Bush (69 Ky.) 174, 99 Am. Dec. 676.

*Missouri.*—Horwitz v. Equitable Mutual Ins. Co. 40 Mo. 557, 93 Am. Dec. 321; Rogers v. Home Ins. Co. of N. Y. 155 Mo. App. 276, 136 S. W. 743, 40 Ins. L. J. 1434.

*New York.*—Pitney v. Glens Falls Ins. Co. 65 N. Y. 6; Bigler v. New York Ins. Co. 22 N. Y. 402, and other cases under this section.

[11] See §§ 556–558 herein.

[12] Hartford Fire Ins. Co. v. Small, 66 Fed. 490, 14 U. S. C. C. A. 33, 35, per Bruce, D. J.

[13] Richardson v. Westchester Fire Ins. Co. 15 Hun (N. Y.) 472; Whited v. Germania Ins. Co. 76 N. Y. 415, 32 Am. Rep. 330; Eureka Ins. Co. v. Robinson, 56 Pa. St. 256, 94 Am. Dec. 65. See also Niagara Fire Ins. Co. v. Johnson, 4 Kan. App. 16, 45 Pac. 789.

[14] Gray v. Germania Fire Ins. Co. 155 N. Y. 215, 49 N. E. 674, 27 Ins. L. J. 474.

Where policy delivered without agreed upon permission for other insurance, agent's knowledge is knowledge of company, and it will be held to its agreement, and policy will be reformed in conformity therewith. Salzman v. Machinery Mutual Assoc. 142 Iowa, 99, 120 N. W. 697. *Examine* Commercial Assur. Co. of London v. New Jersey Rubber Co. 61 N. J. Eq. 446, 49 Atl. 155.

to a company at the time of the issuance of a policy, that there is a prior insurance, will estop it from asserting that the policy is void under a condition against other insurance.[15] And delivery of an insurance policy, knowing of the existence of other insurance upon the premises, waives a condition in the policy that it shall be void if there is any other insurance thereon.[16] So notice of additional insurance with a request that insurer authorize the increase or cancel the policy, if acceded to is a waiver.[17] The company may also waive its right to insist upon the forfeiture provided for by inducing by its silence the insured to believe that no objection would be made.[18] And insurer is estopped by receiving a letter from insured notifying it of additional insurance and requesting an answer but it does not answer it.[19] So it has been held that it is the duty of the insurer, upon being notified of other insurance, to either indorse consent or notify the insured of its refusal to carry the risk, and that a failure to do so will estop the company from setting up in defense the fact that consent was not indorsed.[20] Again, notice to an insurer or its agent for receiving such notice, of additional insurance, and its failure to object or cancel the policy because thereof, is a waiver of a provision in the policy rendering it void in case of such additional insurance unassented to in writing by the insurer.[1] And a provision in a policy and in the by-laws of the insurer, that procuring additional insurance on the insured property shall avoid the policy unless

[15] Reed v. Equitable Fire & Marine Ins. Co. 17 R. I. 785, 18 L.R.A. 496, 24 Atl. 833; Continental Ins. Co. v. Reynolds, 107 Md. 96, 68 Atl. 277 (upon pleadings insurer estopped by notice of additional insurance).

[16] Anderson v. Manchester Fire Assur. Co. 59 Minn. 182, 28 L.R.A. 609, 63 N. W. 241; Hood v. Prudential Ins. Co. of America, 61 Leg. Int. 198, 13 Pa. Dist. R. 305 (subsequently executing and delivering other policies by same insurer constitutes waiver).

[17] Neimeyer v. Clayborne, 87 Ark. 72, 112 S. W. 387.

[18] Crescent Ins. Co. v. Griffin, 59 Tex. 509.

[19] Rauch v. Michigan Millers Mutual Fire Ins. Co. 131 Mich. 281, 91 N. W. 160.

[20] Planters' Mutual Ins. Co. v. Lyons, 38 Tex. 253. See also Phœnix Ins. Co. v. Spiers, 87 Ky. 285, 8 S. W. 453, 10 Ky. L. Rep. 254; Potter v. Ontario & Livingston Mutual Ins. Co. 5 Hill (N. Y.) 147; Westlake v. St. Lawrence Ins. Co. 14 Barb. (N. Y.) 206. But see Johnson v. American Ins. Co. 41 Minn. 396, 43 N. W. 59.

[1] Phenix Ins. Co. v. Grove, 215 Ill. 299, 25 L.R.A.(N.S.) 1n, 74 N. E. 141.

Failure to cancel after notice of additional insurance is evidence of waiver, especially so where attempted cancelation is based on another ground. Phenix Ins. Co. v. Holcombe, 57 Neb. 622, 73 Am. St. Rep. 533, 78 N. W. 300.

On whether failure of insurer to speak or act after notice of breach of policy constitutes a waiver thereof, see notes in 25 L.R.A.(N.S.) 1, and 51 L.R.A.(N.S.) 261.

the written consent of the insurer shall be indorsed thereon, is waived by the failure of the insurer to cancel the policy or indorse its consent thereon within a reasonable time after notice to it of the additional insurance before the loss.[2] So failure to repudiate or cancel after knowledge and retaining a premium note is a waiver,[3] as is also a failure to object within a reasonable time after notice;[4] and refusal on other grounds to pay the loss may operate as an estoppel, where insurer has knowledge of prior insurance.[4a] And insurer is estopped from asserting that the policy is void by collecting further premiums after notice received of additional insurance.[5] So accepting premiums with knowledge and without objection thereto until after the loss constitutes a waiver.[6] A provision in a policy that it shall be void if the insurer has other policies in force on the same life, unless consent to the additional insurance is indorsed thereon, is waived by a receipt of premiums on the new policy the beneficiary in which is ignorant of the former insurance, although, by reason of faulty bookkeeping the attention of the insurer was not in fact called to the breach of the condition.[7] If the application states that there is "no other insurance in this company," and said policy, as well as a prior one, is issued by the same insurer, and both applications are taken by the same agent, and the company acts on both applications, receives the premiums, and issues both policies, it cannot be heard to question the validity of either.[8] So a provision requiring written consent, indorsed on the policy, for other insurance, is waived where, at the time a policy of insurance is written, other insurance exists upon the same property, and the fact is known to the agent, who communicates it to the company, and the company accepts the premium, and does not deny the validity of its policy on account of such other in-

[2] Swedish-American Ins. Co. v. Knutson, 67 Kan. 71, 100 Am. St. Rep. 382, 72 Pac. 526.

[3] Kalmutz v. Northern Mutual Ins. Co. 186 Pa. 571, 42 Wkly. N. C. 538, 40 Atl. 816.

[4] Alabama State Mutual Assur. Co. v. Long Clothing & Shoe Co. 123 Ala. 667, 26 So. 665; North British & Mercantile Ins. Co. v. Robertson, 134 Ky. 529, 121 S. W. 630 (silence for unreasonable time after knowledge, is waiver).

[4a] Power v. Monitor Ins. Co. 121 Mich. 364, 80 N. W. 111.

[5] Lutz v. Anchor Fire Ins. Co. 120 Iowa, 136, 98 Am. St. Rep. 349, 94 N. W. 274. See §§ 1369 et seq.

[6] Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 67 L.R.A. 518, 37 So. 62.

[7] Monahan v. Mutual Life Ins. Co. 103 Md. 145, 5 L.R.A.(N.S.) 759n, 63 Atl. 211.

On effect of condition against other insurance in same company, see note in 5 L.R.A.(N.S.) 759.

[8] Emlaw v. Travelers' Ins. Co. 108 Mich. 554, 66 N. W. 469. See Copeland v. Dwelling-House Ins. Co. of Boston, 77 Mich. 554, 18 Am. St. Rep. 414, 43 N. W. 991.

surance until after a loss occurs, and the waiver will apply, not only to the other insurance as it existed when its policy was written, but to any policy subsequently issued in lieu or renewal of such other insurance.[9] But it is held that demanding payment of a premium note is not of itself sufficient although it is material evidence of an intention to waive, when insured is justified in concluding that there is no forfeiture.[10] Again, assurer's knowledge obtained after loss, its nondeclaration of forfeiture and negotiating for a settlement constitutes a waiver.[11] Where a policy of insurance against fire was conditioned to be void in case other insurance should be made without the insurer's consent, and the loss having occurred, the insurer, with knowledge that other insurance had been made contrary to the terms of the policy, called upon the insured for further proofs of loss without insisting upon the forfeiture, and the proofs were made, it was held that the forfeiture was waived.[12] So a failure to repudiate the policy until after loss is adjusted and assured had settled with other insurers, estops insurer.[13] A forfeiture of a policy, by taking additional insurance in violation of its conditions, may be waived by the company when, with knowledge of the forfeiture and supposing it to be waived, it fails to notify the insured of its intention to insist on the forfeiture until after its adjuster has visited the insured and obtained from him all the information asked for in relation to the extent and value of his loss. Such action by the company will warrant the jury in finding a waiver of the forfeiture, and that question should be submitted to it.[14] The mere fact, however, that insurance adjusters report the total amount of insurance and the proportionate share of the loss to be paid by each of several companies interested is not of itself a waiver by a company not represented by them of a condition in the policy of such company limiting the amount of insurance, but if such company receives such report showing overinsurance, and that it is expected to pay its proportionate share of the adjusted loss, and retains such report without objection, it thereby waives the protection of the condition limiting the amount of insurance to

[9] Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 67 L.R.A. 518, 37 So. 62.

[10] Glasscock v. Des Moines Ins. Co. 125 Iowa, 170, 100 N. W. 503.

[11] British America Ins. Co. v. Bradford, 60 Kan. 82, 55 Pac. 335.

[12] Webster v. Phœnix Ins. Co. 36 Wis. 67, 17 Am. Rep. 479.

[13] Columbus Dry Goods Co. v. Globe & Rutgers Fire Ins. Co. 127 N. Y. Supp. 589, 142 App. Div. 561.

[14] Cleaver v. Traders' Ins. Co. 71 Mich. 114, 15 Am. St. Rep. 275, 39 N. W. 571.

be carried.[15] Again, a rider pro rata clause attached operates as consent to prior insurance and waives a forfeiture.[16]

A condition against other insurance may be shown to have been waived, or that assurer is estopped, although the facts may be such as to justify a submission of the question to a jury.[17] So whether failure to object after knowledge obtained of other insurance, or requesting proofs of loss and permitting assured to thereby incur expense, constitutes a waiver, is for the jury.[18]

**§ 2487a. When no waiver of provisions as to other insurance.**— There is no waiver of a condition as to other insurance by issuing a policy with notice of intent to take out other insurance.[19] And the clause "— total concurrent insurance permitted" is neither a permission nor a waiver.[20] Nor does the failure to return the premium constitute a waiver, even though the policy was void when issued, because of overinsurance.[1] Nor does retention of the premium constitute a waiver where insured has not by reason thereof incurred expense or inconvenience;[2] nor is sending notices of assessments and receiving payment thereof;[3] nor an assessment of the premium note;[4] or collecting assessments without knowledge of the breach, or failure to return the same, a waiver.[5] And where insurer has no notice of the procurement of overinsurance, its retention of the premium does not constitute a waiver, even

[15] Everett v. London & Lancashire Ins. Co. 142 Pa. St. 332, 24 Am. St. Rep. 499, 21 Atl. 819. But see Phœnix Ins. Co. v. Stevenson, 78 Ky. 150; Jewett v. Home Ins. Co. 29 Iowa, 562.

[16] Bolte v. Equitable Fire Assoc. 23 S. Dak. 240, 121 N. W. 772, 38 Ins. L. J. 886.

[17] Reliance Ins. Co. of Philadelphia v. Dalton, — Tex. Civ. App. —, 178 S. W. 966; Power v. Monitor Ins. Co. 121 Mich. 364, 80 N. W. 111.

[18] Walters v. Mutual City & Village Fire Ins. Co. 120 Mich. 35, 78 N. W. 1011.

[19] Lancashire Ins. Co. v. Stanley, 70 Ark. 1, 62 S. W. 66.

A notice at the time of procuring fire insurance of intention to procure additional insurance in the future is not a notice of existing conditions, so as to make the reception of the premium with such notice operate as an estoppel against the insurer. Black v. Atlanta Home Ins. Co. 148 N. Car. 169, 21 L.R.A.(N.S.) 578, 61 S. E. 672.

[20] Philadelphia Underwriters Ins. Co. of North America v. Bigelow, 48 Fla. 105, 37 So. 210. See Miller v. St. Paul Fire & Marine Ins. Co. 26 S. Dak. 154, 128 N. W. 609; Fountain v. Standard Fire Ins. Co. 155 Iowa, 96, 134 N. W. 1090.

[1] Georgia Home Ins. Co. v. Rosenfield, 95 Fed. 358, 37 C. C. A. 96.

[2] Alabama State Mutual Assur. Co. v. Long Clothing & Shoe Co. 123 Ala. 667, 26 So. 665.

[3] Mouk v. Penn Township Mutual Fire Assoc. of L. C. (Pa.) 21 Lanc. L. Rev. 222.

[4] Carleton v. Patrons' Androscoggin Mutual Fire Ins. Co. 109 Me. 70, 39 L.R.A.(N.S.) 951n, 82 Atl. 649, 41 Ins. L. J. 1067.

[5] A. M. Todd & Co. Ltd. v. Farmers' Mutual Fire Ins. Co. 137 Mich. 188, 100 N. W. 442.

though its agent had been informed by assured at the time of taking out the policy that he intended to carry concurrent insurance.[6] Nor is there a waiver by submitting the loss to arbitration when it is stipulated that appraisal does not waive;[7] nor is an adjustment without knowledge of excess insurance a waiver;[8] nor is assurer estopped by notice denying liability on other grounds if the defenses are consistent.[9] And although assured settles with other assurers there is no waiver if he was not misled by insurer into such settlement.[10] So a delay of eight days after loss to ascertain particulars of other insurance does not constitute a waiver.[11]

§ 2487b. **Waiver continued: agents.**—A provision in a fire policy voiding it for procuring other insurance without an agreement therefor indorsed thereon being inserted for insurer's benefit may be waived by it or its agent even though the latter's powers are limited by the policy, for the limitation clause may itself be waived nor does such limitation supersede the law making the principal liable for the negligent, wrongful, or fraudulent act of his agent, or the law of equitable estoppel.[12] If insurer's agent, with authority to make the contract and to indorse insurer's consent to other insurance, is advised and has full knowledge thereof and executes and delivers the contract, and receives the premium from assured, assurer is bound by his knowledge whether it be called a waiver or estoppel.[13] And knowledge of insurer's agent of other insurance, as where he consents that it may be effected and issues a slip showing such consent, estops insurer from insisting upon a forfeiture.[14]

[6] Harwood v. National Union Fire Ins. Co. 170 Mo. App. 298, 156 S. W. 475, 42 Ins. L. J. 1002.

[7] Holbrook v. Baloise Fire Ins. Co. 117 Cal. 561, 49 Pac. 555.

[8] Spann v. Phœnix Ins. Co. of Hfd. 83 S. Car. 262, 65 S. E. 232.

[9] Kerr v. Milwaukee Mechanics Ins. Co. 117 Fed. 442, 54 C. C. A. 616.

[10] Huff v. Century Fire Ins. Co. 136 Iowa, 464, 113 N. W. 1078.

[11] Shelden v. Michigan Millers Mutual Fire Ins. Co. 124 Mich. 303, 82 N. W. 1068.

[12] Southern States Fire Ins. Co. v. Vann, 69 Fla. 549, L.R.A.1916B, 1189, 68 So. 647. See §§ 439, 556 et seq. herein. Bank of Anderson v. Home Ins. Co. of N. Y. 14 Cal. App. 208, 111 Pac. 507 (general agent may waive without indorsement on policy); Taylor v. State Ins. Co. 98 Iowa, 521, 67 N. W. 577 (agent with power to issue and renew policies cannot orally permit additional insurance).

[13] Western National Ins. Co. v. Marsh, 34 Okla. 414, 42 L.R.A. (N.S.) 991, 125 Pac. 1094, 41 Ins. L. J. 1726. As to agent's powers; other insurance, see §§ 556 et seq. herein.

[14] American Central Ins. Co. v. Hardin, — Tex. Civ. App. —, 151 S. W. 1152; Palatine Ins. Co. v. McElroy, 100 Fed. 391, 40 C. C. A. 441 (knowledge of broker justifies finding of estoppel); Swain v. Macon Fire Ins. Co. (Macon Fire Ins. Co.

But a condition against other insurance, contained in a policy, is not waived by the issuance of the policy after notice to a mere soliciting agent, of the existence of additional insurance.[15] The rule which imputes an agent's knowledge at the inception of the risk to the principal does not apply where the agent acts in a dual capacity for insurer and insured; and the character of his employment as such for the latter and his financial interest in the latter's business should be considered as in such case it would not be assumed that he would impart information prejudicial to his interests or to those of insured.[16] So an express provision in a policy, forbidding other insurance, will override any supposed agreement to consent to such insurance from the fact that the insurer's agent knew of an intention to procure it.[17] And if a statute providing a standard form of fire policy requires cancelation by insurer of a policy at once upon learning of a breach of condition voiding the policy, but said provision is not contained in later statute as to such policies, no waiver can be based upon the knowledge of insurer's agent that concurrent insurance had been procured, and the failure to cancel the policy, since the moral risk is increased by such procurement.[18] Again an agreement by insurer's agent that a future breach by insured of a condition as to other insurance will be condoned and not be allowed to forfeit the policy, does not constitute a waiver of such future breach, and this

v. Swain) 102 Ga. 96, 29 S. E. 147 (agent's knowledge of prior insurance when issuing policy estops); Insurance Co. of North America v. DeLoach & Co. 3 Ga. App. 807, 61 S. E. 496 (agent's knowledge at time policy was issued estops); Independent School District of Doon v. Fidelity Ins. Co. 113 Iowa, 65, 84 N. W. 956 (knowledge of agent who procured risk is company's knowledge and waiver); Fields v. German American Ins. Co. 140 Mo. App. 158, 120 S. W. 697, 38 Ins. L. J. 979 (notice to and knowledge of agent when policy issued is waiver).

[15] Reed v. Equitable Fire & Marine Ins. Co. 17 R. I. 785, 18 L.R.A. 496, 24 Atl. 833.

[16] First National Bank of Nome v. German American Ins. Co. 23 N. Dak. 139, 38 L.R.A.(N.S.) 213, 134 N. W. 873, 41 Ins. L. J. 899, *distinguishing* Leisen v. St. Paul Fire & Marine Ins. Co. 20 N. Dak. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 839; Northern Assurance Co. of London v. Grand View Building & Loan Assoc. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. 133, rev'g 101 Fed. 77, 41 C. C. A. 207 (no waiver of written consent by notice to or knowledge of agent when effecting insurance); Traders Ins. Co. v. Letcher, 143 Ala. 400, 39 So. 271 (knowledge of agent who issued policy after agency terminated no waiver).

On effect of insurance broker's knowledge as to other insurance, see note in 38 L.R.A.(N.S.) 638. On effect of knowledge of agent acting in double capacity, see note in 3 L.R.A.(N.S.) 444.

[17] United Firemen's Ins. Co. v. Thomas, 47 L.R.A. 450, 82 Fed. 406, 27 C. C. A. 42, 53 U. S. App. 517, 92 Fed. 127, 34 C. C. A. 240, 47 L.R.A. 455.

[18] Hronish v. Home Ins. Co. of N. Y. 33 S. Dak. 428, 146 N. W. 588.

applies where insured informed the agent that he expected to take out concurrent insurance.[19] And if assured obtains other insurance of one of the members of a firm of agents who had issued the first policy, this does not constitute consent to other insurance, even though assured does not know of the fact of dissolution, nor that the agency had terminated for the first company.[20]

Although it is claimed that the acts of the adjuster constitute a waiver, such claim will not be sustained where it does not appear that there is anything in his conduct from which a relinquishment of a known right can be implied, or anything therein which tends to mislead assured to his injury or prejudice, or lull him into a false security in the matter of his rights, and this applies where an independent fire insurance adjuster employed by insurer had stated that: "You will hear from me," made at an examination by the state fire marshal as to the circumstances attending the loss and at which the adjuster was present and asked some questions.[1] And it is held that the fact that insurer's adjuster, after the loss, acquired knowledge of additional insurance and did not object does not waive insurer's right to defend on that ground, where the policy requires consent thereto to be indorsed on the policy.[2]

**§ 2488. Insurer is chargeable with knowledge of prior policies issued by it.**—A company is chargeable with knowledge of the existence of other prior policies issued by it.[3] But where both policies were issued by the same company, and the prior policy was conditioned to be void in case of other insurance, it was held that the prior policy was avoided by the subsequent one.[4] And in New York it has been held that if an agent knows of a prior insurance, which he mistakenly believes to have expired, and, acting under such belief, procures a second policy on the same property which contains a condition that it shall be void if the insured "shall have any insurance on the property hereby insured, not indorsed, known, or consented to by this company or its authorized agent in writing,

[19] Harwood v. National Union Fire Ins. Co. 170 Mo. App. 298, 156 S. W. 275, 42 Ins. L. J. 1002; Lippman v. Ætna Ins. Co. 108 Ga. 391, 33 S. E. 897, 28 Ins. L. J. 886 (mere oral permission by agent to effect other insurance no estoppel); Morris v. Orient Ins. Co. 106 Ga. 472, 33 S. E. 430 (promise to give other insurance no waiver).

[20] Greenwich Fire Ins. Co. v. Sabotnick, 91 Ga. 717, 17 S. E. 1026.

[1] Bakhaus v. Germania Fire Ins. Co. 176 Fed. 879, 100 C. C. A. 349, 39 Ins. L. J. 1049.

[2] First National Bank of Nome v. German American Ins. Co. 23 N. Dak. 139, 38 L.R.A.(N.S.) 213, 134 N. W. 873, 41 Ins. L. J. 899.

[3] Lanigan v. Prudential Ins. Co. 44 N. Y. St. Rep. 234, 18 N. Y. Supp. 287, 63 Hun, 408.

[4] Duclos v. Citizens' Mutual Ins. Co. 23 La. Ann. 332.

this policy shall be void," this pre-existing policy is a breach of the condition, and avoids the second policy.[5]

**§ 2489. Recovery: prior policies: marine insurance: contribution: where no pro rata clause.**—If several policies of marine insurance are issued upon the same property and risk, and contain no clause as to apportionment of the liability of the insurers, the rule in England and the common-law rule in the United States is, that the insured may recover a proportionate part of the loss from each of the insurers, or he may recover the entire amount from any one of the insurers, and the insurer may demand contribution from the others. Where several policies are issued by different insurers upon the same property, they are, as between themselves, sureties.[6]

[5] Sanders v. Cooper, 115 N. Y. 279, 12 Am. St. Rep. 801, 5 L.R.A. 638, 22 N. E. 212.

[6] Davis v. Gildart, 1 Marshall on Ins. (ed. 1810) 148; Godin v. London Assur. Co. (1758) 1 Burr. 489, 1 W. Black. 103; Clark v. Western Assur. Co. 29 Week. L. C. 237; Newley v. Reed, 1 W. Black. 116; Thurston v. Koch, 4 Dall. (4 U. S.) 348, 1 L. ed. 862; Millaudon v. Western Mutual Ins. Co. 9 La. 27, 29 Am. Dec. 433; Wiggin v. Suffolk Ins. Co. 18 Pick. (35 Mass.) 145, 29 Am. Dec. 576; Lucas v. Jefferson Ins. Co. 6 Cow. (N. Y.) 635; Howard Ins. Co. v. Scribner, 5 Hill (N. Y.) 298; Peters v. Delaware Ins. Co. 5 Serg. & R. (Pa.) 473, per Duncan, J. In this case, however, the court held upon the facts that the case was one of double insurance, and that the insured should not recover from the second insurer where he could recover against the first, unless plaintiff could show that in the event which had happened the defendants were liable, and not the other insurance company whose policy was of prior date: Sloat v. Royal Ins. Co. 49 Pa. St. 14, 88 Am. Dec. 477; Lebanon Ins. Co. v. Kepler, 106 Pa. St. 28. This was first settled in the case of Davis v. Gildart, 1 Marshall on Ins. (ed. 1810) 148. In that case Lord Mansfield said: "The question seems to be whether the insured has not two securities for the loss which has happened. If so, there can be no doubt that he may bring an action against either. It is like the case of the two sureties where if all the money be recovered from one of them he may recover a portion from the other." And in the later case of Godin v. London Assur. Co. 1 Burr. 489, 1 W. Black. 103, Lord Mansfield again said: "As between the insurer and the insured, upon the foot of commutative justice merely, the insurers were bound to pay the insured the whole, for they have received a premium for the whole risk. If the insured be to receive but one satisfaction, natural justice says that the several insurers shall all of them contribute pro rata to satisfy that loss against which they have insured . . . and if the whole should be recovered from one, he ought to stand in the place of the insured to receive contribution from the other, who was equally liable to pay the whole." In Thurston v. Koch, 4 Dall. (4 U. S.) 348, 1 L. ed. 862, this last cited case and the rule stated therein was approved and adopted. The court said: "Such being the law of England as to double insurances before and at the commencement of our regulation, which divides the loss ratably among the insurers. It was also the law of this country, and is so now. It is of authoritative force, and must govern the present case. Besides, if the court were at liberty to elect a

**§ 2490. To enforce contribution policies must cover same interest in same property.**—Contribution cannot be enforced unless the policies cover the same interest in the same property.[7] So a provision for apportionment of loss if there is other insurance, applies only to cases where the insurance covers the same interest.[8] And where the consignee had insured goods of the consignor in pursuance of a contract with the consignor to keep his goods insured, it was held that the insurer under the policy could not claim contribution from other companies which had issued policies upon goods in the same warehouse belonging to other consignees.[9] But where warehousemen insured "merchandise" in their warehouses "their own or held by them in trust, or in which they have an interest or liability," and depositors of the merchandise, to whom advances had been made by the warehousemen, took out other policies upon the same goods for their own protection and that of the warehousemen, it was held to constitute double insurance, and to render the insurers liable to bear the loss proportionately.[10] In case of a policy issued upon the mortgagor's interest and of another policy by a different company upon the mortgagee's, the fact that the mortgagor had, after payment of the loss to the mortgagee, compelled the latter to account to him as trustee ex maleficio will not permit the company which insured the equity of redemption to enforce contribution against the other insurer, since there is no double insurance.[11]

rule, I should adopt the English regulation, which divides the loss ratably among the insurers. It is the most convenient, equal, and consonant to natural justice, and has been practiced upon nearly half a century by the first commercial nation in the world." This case contains a review of all the prior decisions involving this point, and also a thorough and lengthy discussion of the principles involved.

As to compound policies: prorating loss, see § 3457 herein.

On contribution in case of Lloyd's policies, see note in 55 L.R.A. 201.

[7] Fox v. Phœnix Ins. Co. 52 Me. 333; Liverpool & London & Globe Ins. Co. v. Verdier, 33 Mich. 138; Tuck v. Hartford Fire Ins. Co. 56 N. H. 326; Adams v. Greenwich Ins. Co. 9 Hun (N. Y.) 45, aff'd 70 N. Y. 166; Hastings v. Westchester Fire Ins. Co. 73 N. Y. 141; Ætna Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90.

[8] Niagara Fire Ins. Co. v. Seammon, 144 Ill. 490, 19 L.R.A. 114, 28 N. E. 919, 32 N. E. 914; Traders Ins. Co. v. Paeaud, 150 Ill. 245, 41 Am. St. Rep. 355, 37 N. E. 460.

On what constitutes double insurance for purpose of apportionment of loss, see note in 15 L.R.A. 127.

[9] Lowell Manufacturing Co. v. Safeguard Fire Ins. Co. 88 N. Y. 591.

[10] Home Ins. Co. v. Baltimore Warehouse Co. 93 U. S. (3 Otto) 527, 23 L. ed. 868. See also Robbins v. Firemen's Fund Ins. Co. 16 Blatchf. (C. C.) 122, Fed. Cas. No. 11,881.

[11] Niagara Fire Ins. Co. v. Seammon, 35 Ill. App. 582, 28 N. E. 919.

**§ 2491. Rules as to recovery and contribution in fire insurance where there are several policies constituting other insurance.**—In the absence of any provisions in fire policies covering the same property, and issued by different companies, as to liability in case of other insurance, the rule which we have stated in a preceding section as applicable to marine policies under similar conditions will control.[12] The insured can in no case recover more than the amount of loss which it has been proved that he has sustained, and if, where there are several policies upon the property, he has recovered the amount of that loss upon a part of the policies, the liability of the remaining insurers to him has ceased, and they are only liable for contribution to those who have paid.[13]

If a policy on merchandise is taken out by a warehouseman and policies covering the same goods are taken out by depositors of the merchandise who received advances thereon from the warehouseman it is a case of double insurance and they bear a loss proportionately.[14] Where three companies insured goods in every part of a building, and one of them made a further insurance of goods in the upper stories only, and a loss occurred which in the lower stories exceeded the amount of the first insurance, and in the upper stories exceeded the amount of the second insurance, it was held that the second insurance was payable in full, and that the first policies did not contribute to it.[15] And if one has insurance in

[12] *United States.*—Home Ins. Co. v. Baltimore Warehouse Co. 93 U. S. 527, 23 L. ed. 868; Barnes v. Hartford Fire Ins. Co. 3 McCrary (C. C.) 226, 9 Fed. 813.

*Georgia.*—Williamsburg City Fire Ins. Co. v. Gwinn, 88 Ga. 65, 13 S. E. Rep. 837.

*Illinois.*—Peoria Fire & Marine Ins. Co. v. Lewis, 18 Ill. 553.

*Louisiana.*—Keller v. Merchants' Ins. Co. 7 La. Ann. 29.

*Maryland.*—Baltimore Fire Ins. Co. v. Loney, 20 Md. 20.

*Massachusetts.*—Wiggins v. Suffolk Ins. Co. 18 Pick. (35 Mass.) 145, 9 Am. Dec. 576.

*New York.*—Howard Ins. Co. v. Scribner, 5 Hill (N. Y.) 298.

*Pennsylvania.*—Lebanon Ins. Co. v. Kepler, 106 Pa. St. 28; Royal Ins. Co. v. Roedel, 78 Pa. St. 19, 22, 21 Am. Rep. 1; Sloat v. Royal Ins. Co. 49 Pa. 14, 88 Am. Dec. 477.

Compound policies: prorating loss, see § 3457 herein.

On jurisdiction of equity to adjust losses between concurrent insurance policies on same property, see note in 32 L.R.A.(N.S.) 941.

[13] Williamsburg City Fire Ins. Co. v. Gwinn, 88 Ga. 65, 13 S. E. 837. See also cases *cited* in preceding note.

[14] Home Ins. Co. v. Baltimore Warehouse Co. 93 U. S. 527, 23 L. ed. 868. *Cited* in Meigs v. London Assur. Co. 126 Fed. 781, 785; Robbins v. Peoples Ins. Co. Fed. Cas. No. 11,885; Home Ins. Co. v. Koob, 113 Ky. 360, 369, 24 Ky. L. Rep. 223, 58 L.R.A. 58, 101 Am. St. Rep. 354, 68 S. W. 453; Lowell Manufacturing Co. v. Safeguard Fire Ins. Co. 88 N. Y. 591, 597.

[15] Royal Ins. Co. v. Roedel, 78 Pa. St. 19, 21 Am. Rep. 1.

two companies but there is a doubt about his ability to recover from either, he may claim the full amount of the loss from each without being guilty of an attempt at fraud, which by the terms of one of the policies would prevent a recovery thereon.[16] An agreement by insurance agents to insure property for a certain specified amount in certain specified companies at a certain per cent is held to mean that there is to be an equal division of the risk among those companies.[17] Though the policies may provide that the insured shall in case of loss furnish a statement giving the details of the loss and the amount claimed, it is not necessary for the insured to apportion, or attempt to apportion, the loss among the different companies in the proof of loss.[18]

**§ 2492. Rule where fire policy contains pro rata clause.**—Most policies of fire insurance contain a clause providing that the insurer shall not be liable for any greater proportion of any loss which may occur than the amount named in the policy shall bear to the entire amount of insurance upon the property.[19] The fact that at the time a policy containing such a condition is issued there is another policy upon the property does not bind the insured to continue such other policy in force, or prevent him from canceling the same, in the absence of an express agreement that it shall be continued, and the insured may recover the full amount to the extent of the company's liability where such other policy has been canceled or has expired.[20] But if the loss does not equal the full amount of all the policies, the measure of damages against each insurer is the proportion of the loss which the amount of insurance in the policy sued upon bears to the whole insurance.[1] By inserting this clause the insurer limits the amount of recovery upon that particular policy to the proportionate amount which that policy bears to the entire amount of the policies. In the absence of such a clause the

[16] Bennett v. Council Bluffs Ins. Co. 70 Iowa, 600, 31 N. W. 948.

[17] Fitton v. Phœnix Assurance Co. 25 Fed. 880. In this case the agents agreed to insure certain buildings for twelve thousand dollars at three per cent in four companies.

[18] Fuller v. Detroit Fire & Marine Ins. Co. 36 Fed. 469, 1 L.R.A. 801.

[19] The clause in the standard form of the New York fire policy is as follows: "This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers covering such property."

As to compound policies: prorating loss, see § 3457 herein.

[20] Hand v. Williamsburgh City Fire Ins. Co. 57 N. Y. 41. See also Lattan v. Royal Ins. Co. 45 N. J. L. 453; Quarrier v. Peabody Ins. Co. 10 W. Va. 507, 27 Am. Rep. 582.

[1] German Ins. Co. v. Heiduk, 30 Neb. 288, 27 Am. St. Rep. 402, 46 N. W. 481.

insured could recover the whole amount from any one of the insurers, and leave him to obtain contribution from the other insurers.[2] A provision in a policy that in case of any other insurance upon the property insured, made prior or subsequent to the policy, the assured shall be entitled to recover no greater proportion of the loss than the sum insured bears to the whole amount so insured therein, applies only to cases where the insurance covers the same interests, and can have no application to insurance obtained upon another distinct insurable interest in the property.[3]

An invalid policy is held to be other insurance within a clause that insurer shall not be liable for a greater proportion of the loss than the amount insured shall bear to the whole insurance "whether valid or invalid or by solvent or insolvent insurers." [4]

If the policy contains a pro rata clause, "without reference to the solvency or liability of other insurers," it is held that though the other insurers become insolvent, or though the policy be avoided, yet the other insurance will be considered as reducing the liability of the company issuing the policy which contained such a condition.[5] But a clause providing for a pro rata liability if there be any other insurance, "valid or invalid," does not apply where other policies are procured without the consent or ratification of the insurer.[6] And if the policy provides that if other insurance shall be taken upon the property the company shall only be liable for its proportion of the loss, a judgment against the company for the full amount of the policy is erroneous where the pleadings show that other insurance was taken to which the company consented.[7] In determining the liability of the insurer under the provision of the policy as to pro rata liability, it is necessary to determine whether the other policies which it is claimed cover the goods do so in fact, and this must be done by construction of the other policies or otherwise, without regard to the fact that the insurers who have issued

[2] Schmaelzle v. London & Lancashire Fire Ins. Co. 75 Conn. 397, 60 L.R.A. 536, 96 Am. St. Rep. 233, 53 Atl. 863, 33 Ins. L. J. 632, 635—Prentice, J.; Scottish Union & National Ins. Co. v. Moore Mill & Gin Co. 43 Okla. 370, 143 Pac. 12, 44 Ins. L. J. 659, 663.—Turner, J.

[3] Traders' Ins. Co. v. Pacaud, 150 Ill. 245, 41 Am. St. Rep. 355, 37 N. E. 460; Niagara Fire Ins. Co. v. Scammon, 144 Ill. 490, 19 L.R.A. 114, 28 N. E. 919, 32 N. E. 914.

[4] Bateman v. Lumberman's Ins. Co. 189 Pa. 465, 42 Atl. 154, 28 Ins. L. J. 159. But *compare* Gurnett v. Atlas Mutual Ins. Co. 124 Iowa, 547, 100 N. W. 542 (under statute). See § 2478 herein.

On applicability of provisions for prorating where other policy is invalid, see note in 36 L.R.A.(N.S.) 350.

[5] Cassity v. New Orleans Ins. Co. 65 Miss. 49, 3 So. 138.

[6] London & Lancashire Fire Ins. Co. v. Turnbull, 86 Ky. 230, 5 S. W. 542, 9 Ky. L. Rep. 544.

[7] Continental Ins. Co. v. Coons, 14 Ky. L. Rep. 110.

such other policies are parties or not.[8] Where by the articles of agreement of an insurance company a loss sustained by the company was "to be borne by each and every one of the several subscribers or members in proportion to the sum of money by them subscribed, it was held in case of loss they were liable in solido like an ordinary partnership, though the insured was a member of the company.[9] But where an insurance policy provides that in case of additional insurance "the insured shall not recover any greater portion of loss sustained than the amount hereby insured bears to the whole amount of the insurance," and that "the company shall only be obliged to pay as if they had insured two-thirds of the actual cash value of the said property," it was held that, in case of total loss, where the property was insured in two companies the first was not entitled to prorate with the second.[10]

Under a condition voiding the policy if insured without insurer's consent "now or shall hereafter make or procure any other contract of insurance whether valid or not" the policy does not become ipso facto void by a breach of the condition, but whether or not this be so, the other insurance should be considered as insurance in estimating assurer's liability under a stipulation limiting its liability to no greater proportion of the loss than the amount insured bore to the whole insurance whether valid or not.[11] Again,

[8] Fire Ins. Assoc. v. Merchants' & Miners' Transportation Co. 66 Md. 339, 59 Am. Rep. 162, 7 Atl. 905.

[9] Shubrick v. Fisher, 2 Desaus. Eq. (S. C.) 148.

[10] Lebanon Mutual Ins. Co. v. Kepler, 100 Pa. St. 28.

[11] Southern National Ins. Co. v. Barr, — Tex. Civ. App. —, 148 S. W. 845, 41 Ins. L. J. 1496. The court per Rice, J., after declaring that the policy did not become ipso facto void by the breach of such condition as to other insurance, said: "But we do not place this decision wholly upon this ground; for we think, irrespective of the fact whether or not said first policy became ipso facto void upon the taking out of the second policy without the consent of the first company, that it should be considered as insurance in estimating appellant's liability under the clause contained in its contract which was that it was liable for no greater amount, in the event of loss, than its policy bore to the whole amount of the insurance, whether valid or not. See Wilson v. Ætna Ins. Co. 12 Tex. Civ. App. 512, 33 S. W. 1085; National Union Ins. Co. v. Dorroh, — Tex. Civ. App. —, 133 S. W. 477, 40 Ins. L. J. 484; Cassity v. New Orleans Ins. Assoc. 65 Miss. 49, 3 So. 138; Gandy v. Orient Ins. Co. 52 S. Car. 224, 29 S. E. 658; Rickerson v. German American Ins. Co. 39 N. Y. Supp. 547, 6 App. Div. 550; Liverpool & London & Globe Ins. Co. v. Verdier, 35 Mich. 395; Hartford Fire Ins. Co. v. Peterson, 209 Ill. 112, 70 N. E. 757; Webb v. Concordia Fire Ins. Co. 167 Mich. 144, 36 L.R.A.(N.S.) 350, 132 N. W. 523; Cooley's Briefs on the Law of Insurance, vol. 4, p. 3101.

"In Wilson v. Ætna Ins. Co., supra, Mr. Justice Collard held, as shown by the syllabus, that 'a policy providing that it should be void if the insured had or should thereafter procure "any other insurance wheth-

a clause in a policy providing that the insurer shall be liable only for its pro rata share of the entire insurance on the property,

er valid or not," was voided by afterwards procuring another policy, which by reason of a similar clause therein, was void and never attached.'

"In National Union Insurance Co. v. Dorroh, supra, The Texarkana court held, in construing a policy declaring a forfeiture in the event of additional insurance, whether valid or not: 'The condition "whether valid or not," includes an invalid or void policy, and is enforceable,' citing the Wilson case with approval.

"These cases are authority, we think, in this state for the contention that a clause, 'insurance whether valid or not,' includes a void policy, or a policy in the same attitude as the Royal policy in this case. But cases have gone to judgment in other jurisdictions where the exact point in question here presented has been discussed and determined in favor of appellant's contention. In Cassity v. New Orleans Ins. Co., supra, the Supreme Court of Mississippi, passed upon the following provision in a policy of insurance, to wit: 'The insured shall not recover any greater proportion of the loss than the amount hereby insured bears to the whole sum insured on said property . . . without reference to the solvency or liability of other insurers.' At the time of taking out of the New Orleans Insurance Company's policy assured had another policy in the home company which provided for a forfeiture if other insurance be taken out. The assured claimed that the home policy was void from the inception of the policy sued on, and did not constitute insurance within the meaning of the contribution clause, above quoted, which is the same contention as is urged in the case at bar. The court, in passing upon this question said: 'In the absence of a stipulation of this character, the assured might recover from any one of a number of insurers the whole loss sustained by him, leaving the party from whom full recovery had been had recourse on the other insurers for contribution of the loss paid. Under such circumstances, it would devolve upon the company seeking contribution to establish the validity of the several contracts of insurance; and it would bear its proportion of the loss arising from the insolvency of one or more of its coinsurers. To obviate this inconvenience and hazard, the clause under consideration is inserted in the policy. It casts upon the assured not only the loss which may arise from insolvency of any company insurer, but also the obligation of looking to such other insurers for a proportionate part of the loss, regardless of the liability of such insurer upon its policy. We cannot distinguish between a policy of insurance on which there is "no liability of the insurer" and an "invalid policy." We cannot yield our assent to this construction (assured's construction) of the contract. We cannot, in applying the rule which construes the instrument most strongly against the insurer, *close our eyes to the manifest purpose of the clause and so refine upon language as to defeat the object sought to be accomplished.*'

"In Gandy v. Orient Insurance Company, supra, a question similar to the one under consideration was determined in accordance with appellant's contention. There a policy in the home company was issued prior to the Orient policy, and contained a provision making it void if other insurance was secured. It was claimed that the home policy was void from the inception of the Orient policy, and therefore it was not within the condition 'other insurance, valid or not,' in the contribution clause of the Orient policy; but the court held that, regardless of the question as to whether the home policy was

whether valid or invalid, applies even in cases where existing policies are by their terms rendered void, by the issuance of the policy

void or voidable, it was insurance, within the condition of the contribution clause.

"In the recent case of Webb v. Concordia Fire Ins. Co., supra, by the Supreme Court of Michigan, the facts were as follows: The insured secured a policy in the Mutual Company October 8, 1903. This policy provided for its forfeiture if other insurance were secured. Later another policy sued upon was secured. The last company had notice of the first policy; but the first company had no notice of the last policy. The last policy contained a clause: 'This company shall not be liable for a greater proportion of any loss than the amount hereby insured bears to the whole insurance, whether valid or not.' The defendant company settled with the assured and paid him its proportion of the loss; both parties assuming that the Mutual Company would pay its proportion. The Mutual Company refused to pay any part of the loss, on the ground that the additional insurance, procured without notice to it, avoided the policy. Assured thereupon instituted suit to cancel the settlement with defendant and recover the balance of the insurance. The assured secured judgment in the lower court. The court reversing the judgment said: 'The single question presented for our determination is: Does the pro rata clause apply to a case where the prior policy becomes void ipso facto upon the issuance of the subsequent policy? Counsel for the defendant contend that the phrase "whether valid or not" was inserted in the policy to cover just such a case as this; that manifestly the pro rata clause can have no effect and cannot become operative until there has been a loss, and that loss ascertained. Therefore, whether a policy has been forfeited and is invalid at the time of the loss, or whether it is still in force, makes absolutely no difference under the working of the policy. The contention of complainant was that, "by reason of the taking of the policy in the defendant, the first policy became wholly void; that the fact that the claim was made under the first policy would not annul the second policy; . . . that the first policy became void upon the day of the issuance of the new policy in defendant company; that it became void for all purposes, not only for the purpose of avoiding liability upon that policy, but it was so void that there was no policy in existence after that date for any purpose whatever, except the policy of defendant; and that the defendant was the sole insurer of the property at the time of the loss, and was liable for the full loss of the property covered by their policy.'

"After so stating the contentions of each party, the court, proceeding said: 'We think it was the legislative purpose in requiring this provision in the statutory policy that all policies in existence at the time of the loss should be taken into account, whether void or valid. In the Verdier Case, Chief Justice Cooley said: "The plaintiff in error required the insured to stipulate in their policy that in adjusting a loss other existing policies should be taken into account, even though forfeited, the plain purpose being to protect the company against the necessity of contesting with the assured any question of the validity or invalidity of existing policies, and this was a competent provision and not unreasonable." In Donogh v. Farmers' Fire Insurance Company, 104 Mich. 503, 62 N. W. 721, Justice Montgomery said: "Plaintiff contends that, inasmuch as the policy attempted to be taken out in the Liverpool, London & Globe Insurance Company contained a clause like that relied upon

containing the clause, so that from the date of the latter policy it is the only existing insurance on the property.[12] If an owner and a mortgagee of the same property have procured insurance on their separate interest therein, and the owner seeks to recover on his policy, the defendant insurer is not entitled to contribution against the insurer of the mortgagee's interest.[13] And one insuring a mortgagor's interest cannot, in case of loss, prorate the loss with a policy issued on the mortgagee's independent interest, or compel contribution from the insurer of such interest, under a clause providing for prorating merely in case of "other insurance" on the property.[14] Insurance of a lessor's interest on the premises, on which the lessee also had procured insurance for the lessor's benefit, as his lease required him to do, will cover such part of the loss insured against as remains after the application of the policies taken by the lessee, where they fail to cover the whole loss because of a stipulation in them for prorating with all other insurance on the

by defendant, such policy was void and did not operate to forfeit the first policy. There is authority to sustain this contention of plaintiff to the extent that, where there is a stipulation in the policy merely that it shall be voided by subsequent insurance, the first policy is not avoided by taking out a new policy which is wholly inoperative and void. (Citing authorities). But the stipulation in this case goes further. It provides that the policy shall be void if the assured now has or shall hereafter make or procure any other contract of insurance, whether valid or not. Language could not well be more specific. The evident purpose of the provision is to guard against the possibility of all apparent motive or inducement to commit fraud." As remarked by the author of May on Insurance (volume 2, p. 365b): "It is difficult to see why the words 'valid or not' do not in all common sense cover a void policy."

"We think the clause in appellant's policy limiting its liability to no greater proportion of the loss than the amount insured bore to the whole insurance, whether valid or not, must control. It is the solemn agreement of the parties, which the court is bound to enforce, in the absence of fraud or other circumstances authorizing us to set aside the contract. To hold otherwise would be to make a new contract for the parties, which we are not authorized to do. As the parties have bound themselves, so must they be bound.

"We therefore hold that, whether such other insurance was valid or not at the time of the fire, it must be taken into consideration in determining appellant's liability under the contract. So believing, it becomes our duty to reverse the judgment of the trial court and here render judgment in behalf of appellant, which is accordingly done."

[12] Webb v. Concordia Fire Ins. Co. 167 Mich. 144, 36 L.R.A.(N.S.) 350 (annotated on applicability of provision for prorating where other policy is invalid), 132 N. W. 523.

[13] Home Ins. Co. of N. Y. v. Koob, 113 Ky. 360, 58 L.R.A. 58, 101 Am. St. Rep. 354, 68 S. W. 453, 22 Ky. L. Rep. 223.

[14] Home Ins. Co. of N. Y. v. Koob, 113 Ky. 360, 58 L.R.A. 58, 101 Am. St. Rep. 354, 68 S. W. 453, 22 Ky. L. Rep. 223.

premises.[15] Again a policy taken out by one who holds the proceeds as trustee ex maleficio for the owner is not, as to the latter, "other insurance" within the meaning of the apportionment clause in his own policy, although he has obtained the benefit thereof by compelling such trustee to account to him for the proceeds, where he did not in any other way ratify the action of the latter in taking out such policy.[16] Where a policy of insurance provides that, in the event of other, or additional insurance, the assured shall recover no greater proportion of the loss than the sum named in the policy bears to the total amount of the insurance, proof of additional insurance, and that the loss is less than the total amount of insurance, will limit the recovery of the assured to the sum stipulated for in the policy, and he is not entitled to recover the market value of the goods destroyed.[17]

§ 2493. **Specific insurance and general policy.**—If a general policy on goods provides that if there is any specific insurance upon the goods the insurer will only be liable for the excess of the loss insured against, over and above such specific insurance, the clear intent is to throw the loss upon the specific insurance, and in such a case the insurer will only be liable on such a policy for the excess of the value of the goods lost over the amount insured by such specific insurance.[18] But where four companies insured the same property in buildings in a described inclosure, and each policy contained the following condition, "If at the happening of any fire the assured shall have insurance upon a floating policy or policies not specific, but covering goods generally in various places not designated, and yet within limits which include the property herein insured, such policy, as between the assured and this company, shall be considered as covering any excess of sound value of the subject insured beyond the amount covered by the specific insurance thereon; and to determine the amount for which this company is liable in case of loss, such floating policy shall be considered an insurance on the property to the extent of such excess," and other companies insured on specific property in the same inclosure, it was held that the liability of the four companies was not confined

[15] Sun Ins. Office v. Varble, 103 Ky. 758, 41 L.R.A. 792, 46 S. W. 486.

[16] Niagara Fire Ins. Co. v. Scammon, 144 Ill. 490, 19 L.R.A. 114, 28 N. E. 919, 32 N. E. 914.

[17] German Ins. Co. v. Heiduk, 30 Neb. 288, 27 Am. St. Rep. 402, 46 N. W. 481.

[18] Fairchild v. Liverpool & London Fire & Life Ins. Co. 51 N. Y. 65, aff'g 48 Barb. 420.

Compound policies: prorating loss, see § 3457 herein.

On adjustment between blanket and specific fire insurance policies, see note in L.R.A.1915B, 509.

to the excess of loss above that covered by the specific insurances.[19] In case an insurance policy only covers the interest of the insured, and provides that "goods on storage must be separately and specifically insured," and they have been so insured by the depositors of the goods, the insurer will not be liable for contribution to the company which has specifically insured the property.[20] Again, where cotton is specifically covered by a fire policy while stored in a particular warehouse it does not, until by removal from the warehouse or otherwise it loses the protection thus afforded, come within the operation of a "floating" policy which expressly stipulates that it shall not be held to apply to or cover any cotton which at the time of the loss may be covered by any more specific insurance; and, therefore, in prorating the claim under said policy the floating policies are not to be held as other insurance, and it was declared, relying upon an earlier case under the same policy form, in the same state, that "a floating policy of insurance, which declares that it does not cover cotton on which there is any more specific insurance, does not embrace or apply to any cotton which is specifically insured in another company, and therefore is not subject to share with the other company the burden of loss sustained by the latter or by the insured in respect to the cotton covered by the more specific insurance; and for this reason the company issuing the floating policy cannot be called upon to contribute to a loss resulting from destruction of the cotton covered by the more specific insurance although the policy touching the latter contains a clause declaring that" in case of other prior or subsequent insurance assured shall be entitled "to recover of this company no greater proposition of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, whether by specific or floating policies." [1]

§ 2494. **Agreement between insurers to share expenses of defense pro rata.**—An agreement between insurers to share the expenses of defense to a claim made for a loss is enforceable as between themselves, but cannot affect those to whom certain expenses of making the defense are due. Thus, where several insurers combined by such an agreement to defend a claim for a loss by fire, and hired an expert to assist them in their defense, it was held that he might recover the entire amount of his claim against any one of the companies, and that the other companies would be liable

[19] Merrick v. Germania Fire Ins. Co. 54 Pa. St. 277.

[20] Home Ins. Co. v. Gwathney, 82 Va. 923, 1 S. E. 209.

[1] Macon Fire Ins. Co. v. Powell, 116 Ga. 703, 43 S. E. 73, 32 Ins. L. J. 283,—Simmons, C. J. *quoting* from United Underwriters Ins. Co. v. Powell, 94 Ga. 359, 21 S. E. 565.

to that company for contribution.[2] In determining the amount of the contribution it was held that if any of the companies were insolvent, the amount of contribution was to be determined without reference to them.[3]

**§ 2495. Effect under pro rata clause of payment by any company of more than its share.**—If several policies of insurance are issued upon the same interest and risk, and one of them only contains a pro rata clause, and the others or any of them which do not contain such clause pay more than their share, they will be entitled to contribution from the underwriters of the policy which contains this clause.[4] An insurance company is bound, however, to pay its ratable share of loss, and can derive no benefit from excess of payment made by another company where property is insured in several fire insurance companies, and each policy contains a clause that in case of loss the assured shall not be entitled to receive of the company issuing such policy any greater proportion of the loss than the amount insured by such policy bears to the whole amount insured upon the property, and if one of the companies pays more than its ratable share of loss under such a clause, it cannot claim contribution from others which have not paid their share, but must enforce its remedy, if it have any, against the assured.[5]

**§ 2496. "American clause:" "shall only be liable for deficiency."**—A clause known as the "American clause" has been used for many years and to a great extent in marine policies. It defines the insurer's liability both in case of prior and subsequent insurance. In substance, it provides that in case of prior insurance the insurer shall be liable only for the deficiency between the amount of such prior insurance and the actual amount or value of the amount insured, but in case of subsequent insurance, the insurer will be liable to the full extent of the amount subscribed in the policy.[6] Such a condition is binding, and in case of loss, where there has been double insurance, the insurer is only liable for the

[2] Security Ins. Co. v. St. Paul Fire & Marine Ins. Co. 50 Conn. 233.

[3] Security Ins. Co. v. St. Paul Fire & Marine Ins. Co. 50 Conn. 233.

[4] Finley v. Lycoming Ins. Co. 30 Pa. St. 311, 72 Am. Dec. 705. See Lucas v. Jefferson Ins. Co. 6 Cow. (N. Y.) 635.

[5] Fitzsimmons v. City Fire Ins. Co. 18 Wis. 234, 86 Am. Dec. 761. See also Bardwell v. Conway Ins. Co. 118 Mass. 465; Connecticut Fire Ins. Co. v. Merchants' & Mechanics' Ins. Co. 1 Va. Dec. 592, 15 Ins. L. J. 615.

[6] One of the forms in use is as follows: "If the insured shall have made any other insurance upon the subject insured prior in date to this policy, the assurers shall be answerable only for so much as the amount of such prior insurance may be deficient toward fully covering the subject insured, and shall return the premium upon so much of the sum by them assured as they shall be by such prior insurance exonerated from; and in case of any insurance upon the subject matter subsequent in date to this policy, the assurers shall never-

amount of loss not covered by the prior policy.[7] In Murray v. Pennsylvania Insurance Company[8] this question arose. It appeared that the owners of a vessel had effected insurance upon the same in New York for four thousand dollars, valuing her at that sum, and subsequently procured insurance in Philadelphia for the same sum, valuing her at six thousand dollars. Both contained the "American clause." An action was brought for a partial loss, and it was held that the second insurer was only liable for so much of the loss as the prior insurance failed to cover.

If, however, several policies of different dates are issued upon a ship, but the entire amount does not exceed the estimated value of the property insured, then it is held that the insurers are all liable pro rata. The "American clause" is held only to apply in cases of double insurance.[9] So where insured, the interests and the risks covered differ under two different sets of policies the American clause even though in all the policies, is not applicable, especially so where insurance in one case is under an open policy.[10]

Where the policy contains this clause the insurer cannot, of course, claim contribution from subsequent insurers.[11]

theless be answerable for the full extent of the sum by them subscribed, without right to claim contribution from such subsequent assurer, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent insurance had been made." This was in substance the rule laid down in the French Code of Commerce, sec. 3598, and which was the ancient rule in England (see African Co. v. Bull, 1 Show. 132) prior to the rule laid down by Lord Mansfield.

The marine ins. act of 1906 (6 Edw. VII. c. 41) sec. 80; Butterworth's Twentieth Cent. Stat. (1900–1909) p. 420; Chitty's Stats. Eng., p. 903, provides: "Right of contribution. 80 (1) Where the assured is over insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute ratably to the loss in proportion to the amount for which he is liable under his contract.

"(2) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt." See also sec. 32, of act of 1906.

[7] American Ins. Co. v. Griswold, 14 Wend. (N. Y.) 399; Murray v. Pennsylvania Ins. Co. 2 Wash. (U. S. C. C.) 186, Fed. Cas. No. 9,961.

[8] 2 Wash. (C. C.) 186, Fed. Cas. No. 9,961.

[9] Whiting v. American Ins. Co. 15 Md. 297. In this case it appeared that the ship was valued at twenty-two thousand dollars, and that three policies of different underwriters were issued, two being for seven thousand three hundred dollars and one for seven thousand four hundred dollars, and each containing the American clause.

[10] Gross v. New York & T. Steamship Co. (U. S. D. C.) 107 Fed. 516.

[11] American Ins. Co. v. Griswold, 14 Wend. (N. Y.) .399. See Peninsular & O. Ins. Co. v. Atlantic Mut. Ins. Co. 185 Fed. 172, 40 Ins. L. J. 1274; Atlantic Mut. Ins. Co. v. Peninsular & O. Ins. Co. 194 Fed. 84, 114 C. C. A. 162, s. c. 225 U. S. 704, 56 L. ed. 1265, 32 Sup. Ct. 837.

If at the time of the making of the subsequent policy containing the "American clause" the property is fully covered by prior insurance, the policy does not attach.[12] And where a vessel is insured with navigation limited to certain waters and the policy stipulates that deviation beyond said limits shall only operate to suspend the risk until the return of the vessel within the prescribed limits when the policy again becomes in force, and upon being refused permission to go outside said waters another policy was effected with another insurer which with the other policies exceeded the total permitted, and the last policy stipulated for liability only for the deficiency of the amount of prior insurance which totaled the vessel's value, it was held that there was no overinsurance, for the reason that although the vessel went outside the limited waters still since she returned within said limits the last policy was thereby suspended and there was never any excess of insurance.[13] But if, however, at any time during the life of such subsequent policy and before a loss the property insured is not fully covered by the prior policies, then the subsequent one will attach. It is held, however, that it will not attach from the mere fact that some of the prior insurers have become insolvent.[14] Where a policy was issued upon a vessel and outfits, "on provisions, oil-casks, iron boilers, and whaling apparatus generally, and on oil, bone, and other takings, empty casks, and whaling apparatus generally, homeward," and also provided that "as fast as oil, bone, or other articles of cargo are procured this insurance is to attach," and a subsequent policy on catchings was effected which contained the "American clause," it was held that, as the amount of catchings was at all times fully covered by the first policy, there was no liability on the part of the subsequent insurers in any manner.[15] Where a bailee's agent, under a contract to procure insurance on the property, insures only a part of it for the benefit of itself, its principal and the owners, and part of the owners insure their interests in a separate company for their own benefit, in case of loss the first insurance will be applied to the risks covered by it alone, to wit, those of the bailee and owners uninsured by the other company and thus incidentally to the benefit of the agent, before contribution will be enforced in favor of the second insurer towards paying the loss of the owners insured by it.[16] It is held that a pro-

[12] Ryder v. Phœnix Ins. Co. 98 Mass. 185.

[13] St. Paul Fire & Marine Ins. Co. v. Knickerbocker Life Ins. Co. 93 Fed. 931, 36 C. C. A. 19.

[14] Ryder v. Phœnix Ins. Co. 98 Mass. 185.

[15] Lewis v. Manufacturers' Fire & Marine Ins. Co. 131 Mass. 364.

[16] Deming v. Merchants Cotton-Press & Storage Co. 90 Tenn. 306, 13 L.R.A. 518, 17 S. W. 89.

vision, in a policy on cargo and catchings, that if the assured shall have made any prior insurance on the catchings the underwriters shall be answerable for so much only as the amount of the prior insurance is deficient in fully covering the property at risk, remains in force after a prior policy effecting such insurance is canceled by agreement of the parties thereto without the consent of the other underwriters, although it is canceled before any loss occurs.[17] In case a policy is issued containing the "American clause," a prior policy cannot, by an agreement between the prior insurer and the assured, be canceled to the prejudice of the subsequent underwriter.[18] And it is held to be error, in those cases where a marine policy contains the "American clause," to determine whether other policies are prior or subsequent thereto by the date of the attaching of the risk. In other words the date of the policy, and not that of the attaching of the risk, must govern the question whether other insurance is prior or not, under a clause in a policy of marine insurance, providing that other insurance prior in day of date shall be first applied in payment of a loss.[19] So it is held in another case that under the express provisions of this clause, though it be contained in an open policy, not immediately attached to any specific risk, the date which determines whether other insurance is prior or subsequent in day of date to the policy, is not that upon which the policy attached to a specific risk, but that upon which the policy was issued.[20] Again, marine policies issued on different days, but taking effect on the same future day, are not simultaneous within the meaning of the third part of what is known as the "American clause," which provides that other insurance "of date the same day as this instrument shall be deemed simultaneous herewith," so that the insurer shall not be liable for more than a ratable contribution in proportion to the sum thereby insured to the aggregate of such simultaneous insurance.[1]

**§ 2496a. Other insurance as affected by coinsurance: "average" or "distribution" clause.**—While coinsurance is a condition or agreement that insured keeps a certain amount or percentage of additional insurance in force and upon his failure to do so he becomes a coinsurer to the extent of the percentage amount agreed

[17] Macy v. Whaling Ins. Co. 9 Met. (50 Mass.) 354.

[18] Seamans v. Loring, 1 Mason (U. S. C. C.) 127, 128, Fed. Cas. No. 12,-583; Macy v. Whaling Ins. Co. 9 Met. (50 Mass.) 354.

[19] Deming v. Merchants' Cotton-Press & Storage Co. 90 Tenn. 306, 17 S. W. 89, 13 L.R.A. 518.

[20] Corporation of London Assurance v. Paterson, 106 Ga. 538, 32 S. E. 650, 28 Ins. L. J. 385.

[1] Carleton v. China Mutual Ins. Co. 174 Mass. 280, 46 L.R.A. 166, 54 N. E. 559.

upon,[2] still it may constitute a condition the breach of which will avoid the policy when the coinsurance clause is itself not prohibited either expressly or impliedly by statute.[3] This clause, however, relates more particularly to the measure of liability under the policy containing it, in connection with other insurance and the conditions contained therein as affecting their validity and also the consequent liability of other insurers.[4] If a statute prohibits insurer from requiring any coinsurance clause except at insured's option, or from limiting the amount payable in case of loss below the actual cash value of the property if within the amount of insurance for which the premium is paid, but standard policies are issued with a liability per cent requirement and providing also that if insurance is not kept up to said per cent, insurer shall be liable only for such portion of the loss or damage as the amount insured shall bear to said liability per cent, in such case the statute does not aid assured where he had impliedly elected under the policies to exercise his option and he is, therefore, not entitled to full indemnity, in view of the fact that the premium had been reduced in consideration of said proportionate liability clause.[5]

[2] See definition in note to Northwestern Fuel Co. v. Boston Ins. Co. 131 Minn. 19, 154 N. W. 513, 41 Ins. L. J. 715, 720, given under this section. See also definition in Oppenheim v. Firemen's Fund Ins. Co. 119 Minn. 417, 138 N. W. 777, 42 Ins. L. J. 297, 300, under § 2480a herein.

[3] See Hartford Fire Ins. Co. v. Shlenker, 80 Miss. 667, 32 So. 155, 31 Ins. L. J. 938, where the validity of the policy was based upon such coinsurance agreement although the clause was held contrary to the statute and unenforceable. See this case under § 2496b herein.

[4] See decisions under this and the next following section.

[5] Stephenson v. Agricultural Ins. Co. 116 Wis. 277, 93 N. W. 19, Rev. Stat. 1898, sec. 1943a.

As to statutes expressly or impliedly prohibiting coinsurance clause, or making same optional with insured, see:

*Georgia.* — Civ. Code 1895, sec. 2110 (requiring payment of full amount of loss except in case of certain personal property when only actual value recoverable. Held in Firemen's Fund Ins. Co. v. Pekor, 106 Ga. 1, 31 S. E. 779, 28 Ins. L. J. 953, that coinsurance clause not invalid even though statute makes void all stipulations contra). See Code 1911, sec. 2545 (sec. 2110); sec. 2546 (sec. 2111); (but that loss in Georgia is unliquidated claim which must be ascertained after loss and is open to adjustment, see Norwich Union Fire Ins. Co. v. Bainbridge Grocery Co. 16 Ga. App. 432, 85 S. E. 622).

*Indiana.*—Burns's Ann. Stat. 1908, secs. 4623, 4624.

*Iowa.*—Code 1907, sec. 1758a, subdiv. III.; Code Supp. (1898–1910) p. 364, sec. 1758a; Code 1897, sec. 1746 (other insurance: pro-rating); Code Supp. 1913, sec. 1746 (coinsurance), am'd by Acts & Res. 1917, p. 208, c. 185.

*Kentucky.*—Stat. sec. 700 (valued policy law; coinsurance clause held void in Sachs v. London & Lancashire Fire Ins. Co. of London, 113 Ky. 88, 23 Ky. L. R. 2397, 67 S. W. 23, 31 Ins. L. J. 426); Russell's Stat. 1909, p. 1039, sec. 4307 (as to liability of insurer for value of property as fixed in policy); Id. sec. 4308.

A coinsurance clause is neither unreasonable, invalid, nor against public policy which provides that in consideration of the policy and the basis upon which the rate of premium is fixed that assured shall "maintain insurance on each division of property as per division of this policy, to the extent of the actual cash value thereof and failing to do so, shall be an insurer to the extent of such deficit and in that event" his proper proportion of any loss.[6] Where a Massachusetts standard form of fire policy has a rider coinsurance clause attached requiring insured to maintain coinsurance to at least eighty per cent of the actual cash value of the property insured, and making him liable, if he fails to do so, for the deficiency to the extent that he shall bear his proportion of the loss, said rider does not violate the statute prescribing such standard form and providing for adding to or modifying those provisions contained therein, nor does said rider diminish the full indemnity which seeks to secure mortgagees by protecting their interest against any act of the mortgagor.[7] In a New York case decided in 1903, where it was declared that the question involved was new, insured obtained policies to an amount not exceeding

*Louisiana.*—Act 1900, No. 135, p. 209 (valued policy law held not to prohibit coinsurance in Simon v. Queen Ins. Co. of America, 120 La. 477, 45 So. 396). See La. L. 1914, p. 493, act No. 255 (adopting N. Y. Standard forms; and that standard policy law repealed valued policy law so far as inconsistent, see § 176d, herein).

*Michigan.*—L. 1907, No. 307; 3 Howell's Stat. Annot. pp. 3396, 3401, sec. 8328 (standard form: not liable for greater proportion than amount insured bears to whole insurance whether valid or not by solvent or insolvent insurers; extent of contribution may be provided for by agreement or condition, written or indorsed on policy, etc.)

*Minnesota.* — Rev. L. 1905, sec. 1642, am'd Gen. L. 1907, c. 446, p. 639; Rev. Laws Suppl. 1909, sec. 1642; Gen. Stat. 1913, sec. 3322 (see Minn. case at end of this section).

*Mississippi.*—Code 1906, sec. 2592, L. 1912, c. 224 (construed in Darden v. Liverpool & London & Globe Ins. Co. 109 Miss. 501, 68 So. 485).

*Missouri.*—L. 1903, p. 209, 2 Mo. Rev. Stat. 1909, sec. 7021 (as to property insured in more than one company); Id. sec. 7023 (provision as to liability as coinsurer prohibited, etc., with exception as to personal property in certain cases.)

*New Jersey.*—L. 1902, c. 134, sec. 78, p. 438; Comp. Stat. (1709–1910), p. 2863, sec. 78 (optional with insured to accept policy with coinsurance clause).

*Oklahoma.*—Rev. Stat. 1903, sec. 3199, Snyder's Comp. L. 1909, pp. 903–906, sec. 3800 (standard form: in effect March 25, 1909: not liable for greater proportion, etc.; contribution may be provided for in agreement, etc.).

*Tennessee.* — L. 1903, c. 539; Shannon's Supp. Code (1897–1903) p. 536, sec. 3348 (coinsurance clause optional, except in certain cities). See § 2496b herein.

[6] Pennsylvania Fire Ins. Co. v. Moore, 21 Tex. Civ. App. 528, 51 S. W. 878.

[7] Quinn v. Fire Assoc. of Phila. 180 Mass. 560, 62 N. E. 980, 31 Ins. L. J. 460; Mass. Stat. 1894, c. 22, sec. 60. See § 2795 herein.

sixty thousand dollars on certain buildings, under a standard form policy, which amount was thereafter reduced by mutual consent leaving forty thousand five hundred dollars as the amount of insurance. The policy contained an apportionment clause whereby insurer was not to be liable for a greater proportion of any loss than the amount insured should bear to the whole insurance "whether valid or not by solvent or insolvent insurers." Other insurance was thereafter procured in four companies to an amount not exceeding seventeen thousand five hundred dollars. As the maximum of liability each of the last-mentioned policies contained a "percentage coinsurance clause" stipulating for liability in no greater proportion than the sum insured bore to eighty per cent of the cash value of the insured property at the time of loss, "nor more than the proportion which this policy bears to the total insurance." It was held that the maximum sum which in any event can be collected under a policy, and not the smallest sum which can be collected under special circumstances is the amount of insurance effected by the policy; that the "whole insurance" means the face value of the first policy together with that of the face value of all the contributing policies, making sixty thousand dollars, but that insured was not entitled to recover his entire loss as he had agreed in a certain contingency to stand part of the loss and the amount he had agreed to bear must be included in apportioning the loss; that the "percentage coinsurance clause" meant insurance by insurer and insured or owner dependent on the percentage or proportion which the insurance bore to the value, and the owner was coinsurer for any deficiency, that is, if the property was insured to the full specified per cent of its value or more, in case of a total loss the whole sum became due, but if insurance and the loss are both less than said stipulated per cent, the owner became a coinsurer proportionately; that "the sum hereby insured" meant that amount of insurance, and said sum was always the same, fixed, definite and certain without regard to actual liability under special circumstances.[8] In a Minnesota case in an action to determine and ap-

[8] Farmers' Feed Co. of N. J. v. Scottish Union & National Ins. Co. 173 N. Y. 241, 65 N. E. 1105, 32 Ins. L. J. 162, rev'g 72 N. Y. Supp. 732, 65 App. Div. 70, 31 Ins. L. J. 84. The court, per Vann, J., said: "The plaintiff claims that the amount due from the defendant under its policy 'by reason of the fire loss' was $38,177.26, while the defendant claims that such amount was but $32,102.50, which it has paid to the plaintiff under an agreement that such payment should be without prejudice. The appellate division rendered judgment in favor of the plaintiff for the difference between these sums, amounting to $6,074.76, with interest thereon from November 28, 1900.

"The decision of the controversy turns on the meaning of the words 'whole insurance' as used in the ap-

portion the liability of twenty insurers under forty policies of tornado insurance, it appeared that there were two forms of poli-

portionment clause of the defendant's policy. It was there provided that the defendant should not be liable for a greater proportion of any loss than the amount insured by its policy should bear to the whole insurance on the property. There is no disagreement as to the amount of insurance made by the defendant's policy, which was absolute, but the controversy is over the amount made by the four other policies, which were not absolute, owing to the coinsurance clause. . . .

"The four companies stipulated that they should 'be liable for no greater proportion' of the loss, which was $45,321.18, 'than the sum hereby insured,' or $17,500, 'bears to 80 per cent of the cash value of the property,' which was $99,728. Their liability, therefore, is represented by the following proportion: as $99,728, is to $17,500, so is $45,321.18 to the amount required, or $7,962.84. Was this 'the whole insurance' effected by the four policies containing the coinsurance clause? If so, that clause has no effect in this case. We think it was not, for if the loss had been greater, the amount called for by the policies would have been greater also, and yet it could not have exceeded the amount of the insurance. The largest sum which in any event can be collected under a policy, and not the smallest sum which may be collected under special circumstances, is the amount of insurance effected by the policy. There is no limit to the possible liability under the four policies, except the amount that the companies stipulated it should not exceed, aggregating $17,500, which they would have been obliged to pay if the loss had been total. Under an open policy if the loss is less than the insurance, the former measures the liability; but if the loss is greater than the insurance the latter measures the liability, yet in either event the amount of insurance is the same. The amount of the insurance, therefore, is the largest sum that the company, under any circumstances, according to the terms of the policy, can be required to pay. This is the popular understanding as well as the legal definition. The test is what is the extent of the indemnity furnished under any possible circumstances? The insurance effected by the four policies was for a proportion of the cash value of the property less 20 per cent, which can always be represented by a fraction, the numerator being unchangeable while the denominator may vary from time to time. The enumerator is the highest amount which the companies could be required to pay, while the denominator is 80 per cent of the cash value of the property. The amount of the insurance does not vary, but the cash value of the property is subject to change; still that change does not reduce the amount of insurance. The fact that the owner ran his own risk, or became his own insurer as to the 20 per cent of the cash value of the property, did not lessen the amount of insurance, because if the loss had been total the whole $17,500 would have been due upon the four policies. Thus the effect of the coinsurance clause is that if the property is insured to 80 per cent of its value, or more, in case of a total loss the whole sum insured becomes due, but with insurance for less than 80 per cent of the value and a loss also of less than 80 per cent, the owner becomes, in effect, a coinsurer proportionately. He could have procured insurance to 80 per cent of the value, but not having done so he became his own insurer pro tanto. This accords with the way the clause is characterized in the policies, for it is entitled, 'Percentage Coinsurance Clause,' which means insurance by the company and the owner, depending upon the percentage or

cies, in both of which the description of the property was the same, but one form provided for "necessary alterations and repairs and

proportion which the insurance bears to the value. The object is through lower premiums to induce the owner either to take out insurance to 80 per cent of value, or to become a coinsurer with less risk to the company in case of a loss falling below such percentage of value. Where either the loss or the insurance equals or exceeds 80 per cent of value the clause has no effect, but when both are less, the insured and the insurer bear the loss in certain proportions. The amount of insurance is not the variable factor, but the amount of loss. The amount of insurance is at all times the same, but when the loss is partial the insurer stands only a part, unless the insurance is for the full percentage, whereas if the loss is total the insurer stands all, not exceeding the limit stated in the policy, the limit is the amount made by the policy because the company may be required to pay to that extent.

"The words of the coinsurance clause, viz.: 'the sum hereby insured,' indicates that amount of insurance. That sum is fixed, definite and always the same. It should not be confounded with the actual liability under special circumstances, for all open policies are necessarily indefinite as to the sum to be paid until the amount of the loss is known. The liability can never exceed the value of the property, but the insurance may; for a house worth but $1,000 may be insured for $2,000. If thus insured by two companies, one-half in each, and the property was wholly destroyed by fire, neither would have to pay $1,000, the amount of its policy, but only $500, the amount of its liability, owing to the apportionment clause. This would be true even if one of the companies was insolvent, so that the insured by taking out other insurance may reduce his security while intending to increase it. In the case before us the plaintiff by procuring the four policies reduced his security in the event of a partial loss, but increased it in the event of a total loss. For the purpose of apportionment the face value of the policies should be resorted to, regardless of the cash value of the property, and thus the whole amount of the insurance can be ascertained by a simple inspection of the policies. The face value of a policy is not reduced by the actual value of the property, or by the duty of apportioning the loss, or by the effect of a coinsurance clause in another policy on the same property. The amount of insurance is fixed at the inception of the policy, but the amount of liability is not fixed until a loss has occurred. The one depends upon the sum for which the policy is written, but the other depends upon a number of contingencies which may or may not happen, and hence cannot be known in advance. The fact that they are not known and may never come into existence does not effect the amount of the policy.

"The question involved is new, and we are without controlling authorities to guide us, but the discussion of a subject somewhat related in a recent case has aided us in reaching the conclusion announced: Continental Ins. Co. v. Aetna Ins. Co. 138 N. Y. 16, 21, 33 N. E. 724.

"It may be asked why, if the whole insurance was $60,000, the plaintiff is not entitled to recover his entire loss, which was but $45,321.18, and the answer is that he agreed in a certain contingency to stand part of the loss himself.

"He accepted four policies which provided for the payment to him of not exceeding $17,500 in case of a total loss, or in case the loss was partial and his insurance amounted to 80 per cent of the cash value, but he agreed that if both loss and insurance were each less than the 80 per cent to

for other concurrent insurance" while the other form provided for "necessary alterations and repairs and for additional construction, this policy to cover same, and for other insurance." All the policies contained the following coinsurance clause; "It being optional with the assured and the assured having elected to accept a coinsurance clause in this policy in consideration of a reduced rate of premium, the assured hereby agrees to maintain insurance, during the life of this policy, upon the property hereby insured, to the extent of fifty per cent of the actual cash value thereof, and that if at the time of the loss the whole amount of insurance on said property shall be less than such fifty per cent this company shall, in case of loss or damage less than such fifty per cent, be liable for only such portion thereof as the amount insured by this policy shall bear to the said fifty per cent of such cash value of such property. When this clause is attached to and made a part of a policy covering two or more items, this clause shall be construed as applying separately to each item of the policy." It was held that the policies which did not purport to cover subsequent construction covered property in the process of construction at the time they were issued, and that the other policies of like form issued prior to commencement of the work of construction did not cover such property. It was also decided that a provision requiring percentage coinsurance was satisfied, though such coinsurance did not cover all of the property insured by the defendants, it being sufficient in amount and there being no provision that such coinsurance should be concurrent and cover the property as a whole. The insurance policies being Wisconsin contracts, and the governing law of Wisconsin not being pleaded nor proved, and the Minnesota statute being without application, this construction was given without reference to the Minnesota statute or the local law of Wisconsin; also that the "average" or "distribution" clause contained in some of the policies, providing that the amount insured should attach in the proportion that the value of the property covered by the policy contained in each of certain places where loca-

take less than the amount of his loss and thus become a coinsurer for the difference. The defendant pursuant to its apportionment clause, is entitled to the benefit of all other insurance, whether made by another company alone, or by a contract between another company and the insured, by which, in case of partial loss, each stands part as a coinsurer.

"We think that the 'whole insurance' was $60,000, the face value of all the policies, and that the judgment appealed from should, therefore, be reversed and judgment ordered for the defendant on the merits with costs."

As to reinsurance and pro rata clause, see Home Ins. Co. v. Continental Ins. Co. 180 N. Y. 389, 73 N. E. 65, 34 Ins. L. J. 331.

ted bore to the value of all of it, has no application where the insured property is in one place.[9] Under another and earlier case

[9] Northwestern Fuel Co. v. Boston Ins. Co. 131 Minn. 19, 154 N. W. 513, 46 Ins. L. J. 715. The court, per Dibell, C., Id. 720, said: "The defendants appealing contend that the provision for coinsurance could be satisfied only by insurance covering the whole property the same as did their policies. The question presented is not free of difficulty. It is entirely different from a question of concurrent insurance. A provision for concurrent insurance is a privilege extended to insured which, as usually framed, results in a forfeiture of the policy if the insured exceeds the privilege. A provision for coinsurance is an obligation imposed upon the insured to keep a specific amount or a percentage of additional insurance in force; and if he fails to do so he becomes a coinsurer to the extent of the omitted insurance. There was no requirement that the insurance be concurrent; that is, that it cover all of the property covered by the policies containing the coinsurance clause. The policies did provide that when the requirement of coinsurance was in a policy covering two or more items the requirement for coinsurance should be construed as applying separately to each item of the policy. The construction which we are required to adopt is one favorable to the plaintiff and one which will afford it indemnity rather than put it to a loss. We are not cited to authority, nor do we find any, which serves as a precedent or is persuasive as an argument. When the adjustment company representing the appealing companies made the adjustment, it made two computations, one on the basis that all companies contributed ratably, and the other upon the basis that form 2 companies paid all the loss. No question was made at the time that there was a lack of coinsurance, nor does it seem to have been suggested up to the time of action brought. This is perhaps of some, though not great, importance as a practical contemporaneous construction; but it in no sense amounts to a waiver of the provision in the policies, for at the time of the adjustment a nonwaiver agreement was signed. Nothing that occurred at the trial, as we view it, is of force as a practical construction, though so urged by counsel.

"In view of the rule of construction favorable to the insured, the uncertainty of the precise application of the language of the coinsurance clause, and the disfavor with which the law regards provisions for coinsurance the trial court properly held that the condition as to coinsurance was satisfied.

"The insurance contract under consideration are Wisconsin contracts and the law of Wisconsin is the governing law. They are not to be construed as Minnesota policies would be. Myers v. Chicago, St. Paul, M. & O. R. Co. 69 Minn. 476, 65 Am. St. Rep. 579, 72 N. W. 694. It may be conceded that the coinsurance clause would be invalid in Minnesota. G. S. 1913, sec. 3322. The governing law of the policies, that is, the Wisconsin law, is not pleaded nor proved, and we determine the question presented without reference to the local law of Wisconsin or the statute of Minnesota. We make this plain so that confusion will not arise in a subsequent construction of policies governed by the Minnesota statute.

"Three of the policies contained an 'average' or 'distribution' clause as follows:—

" 'It is understood and agreed that the amount insured by this policy shall attach in each of the above-named premises in that proportion of the amount hereby insured that the value of property covered by this policy contained in each of said places shall bear to the value of such prop-

in the same state, if the coinsurance clause as permitted by a statute is attached to a fire policy and insurance is maintained by insured on the building to the amount which he is by such clause required to carry, in case the loss is total the insurable value as stated in the policy, and not the actual value at the time of the fire, is the basis of determining the amount recoverable under the policy. Where the loss is partial insured may recover the actual amount of his loss, and this cannot be based on the insurable value.[10]

**§ 2496b. Effect of three-fourths value provisions: valued policy laws: concurrent insurance: other or double insurance: coinsurance: prorating.**—The rule as to forfeiture for overinsurance will not be strictly applied to a policy on a stock of goods of fluctuating value under a policy permitting other concurrent insurance not to exceed at any time three-fourths of the cash value of each item covered.[11] And where a "rider" stated that since the statute prohibited it from taking a risk at a ratio greater than three-fourths of the value of the property insured it was a condition of the policy that the total insurance on the property was limited to three-fourths of its cash value, such clause constitutes a permit for other insurance up to said limit.[12] So other concurrent insurance to the amount of two thousand five hundred dollars is permitted by an indorsement slip containing a description of the property insured, with the amount of insurance thereon and the clause: "Two thousand five hundred total concurrent insurance permitted," bear-

erty contained in all of above-named premises.'

"This clause has no application to the present situation. It can apply only when different portions of the insured property have different locations. If the policies had covered the superstructures on the company's docks across the harbor at Duluth along with those on its Superior docks, there might then be an argument for its application. There is none now."

[10] Oppenheim v. Firemen's Fund Ins. Co. 119 Minn. 417, 138 N. W. 777, 42 Ins. L. J. 297. "We hold that the mere attaching of the 'coinsurance' clause to the policy, though with the consent of both parties to the contract, did not wipe out the 'insurable value' stated in the policy, and render the policy an open one, and that under such a clause, the insurer becomes a coinsurer within the purview of G. L. 1907, c. 446, only where he fails to take out concurrent insurance to the amount specified and required by such clause."—Brown, J. Rev. Laws 1905, sec. 1642, as am'd by Gen. Laws 1907, c. 446, Rev. L. Supp. 1909, sec. 1642.

[11] Burge Bros. v. Greenwich Ins. Co. 106 Mo. App. 244, 80 S. W. 342.

[12] Sheets v. Iowa State Ins. Co. 153 Mo. App. 620, 135 S. W. 80, 40 Ins. L. 955; Teter v. Franklin Fire Ins. Co. 74 W. Va. 344, 82 S. E. 40. See Palatine Ins. Co. v. Ewing, 92 Fed. 111, 34 C. C. A. 236, 28 Ins. L. J. 461; Wynn v. Caledonian Ins. Co. 100 S. Car. 46, 84 S. E. 306.

On statutory provisions regulating valued policies as affecting provisions of policy for prorating loss in case of concurrent insurance, see note in L.R.A.1916F, 997.

ing the same date as, and attached to, a policy of insurance for two thousand five hundred dollars on two buildings, which contained a clause providing that the entire policy, unless otherwise provided by agreement indorsed on the policy or added thereto, should be void if the insured had or thereafter procured any other contract of insurance, whether valid or not, on the property covered by the policy; notwithstanding another indorsement slip stating the insurable value of the property to be two thousand five hundred dollars, this being attached in compliance with a Florida statute requiring the insurable value to be fixed by the insurer and written in the policy, as the measure of damages in case of loss.[13]

Under a Mississippi decision its valued policy law cannot be waived by coinsurance, three-quarters valuation, or any other clauses which are contrary to the statute and, therefore, a policy stipulation would not be sustained which provided that in consideration of a reduction of rates insured should maintain insurance to an amount not less than the cash value of the whole property insured, and that in case of loss insurer should be liable only for such proportion of the whole loss which should not exceed said actual market value as the amount of the insurance bore to the cash market value of the whole property at the time of the fire, and it was also stipulated that assured agreed to waive the benefits of the statute which provided that in case of total loss of property, real or personal, except personal property constantly changing in specifics and quantity, the insurer should pay the amount named in the policy; and in case of partial loss of such property, insured must pay the amount of actual damage, not to exceed the policy amount, and that insurer should not be permitted to deny that the insured property was worth at the time of issuing the policy the full value upon which the insurance was calculated, with the same prohibition as to a three-quarters valuation clause.[14] A coinsurance clause is also void as being contrary to the valued policy law making insurer liable for the full estimated value of the property insured, as said value is fixed in the policy, and providing that in case of partial loss insurer's liability shall not exceed insured's actual loss, except that the estimated value may be diminished to the extent of its depreciation.[15] So where a provision of a statutory policy not

[13] L'Engle v. Scottish Union & National Ins. Co. 48 Fla. 82, 67 L.R.A. 581, 111 Am. St. Rep. 70, 37 So. 462; Fla. act May 31, 1899, c. 4677, p. 31.

[14] Hartford Fire Ins. Co. v. Shlenker, 80 Miss. 667, 32 So. 155, 31 Ins. L. J. 938, under Laws 1896, c. 56, amd'g L. 1894, c. 63. See Darden v. Liverpool & London & Globe Ins. Co. 109 Miss. 501, 68 So. 485, L. 1912, c. 224.

[15] Sachs v. London & Lancashire

only conclusively fixes the value of insured real property, but also establishes conclusively the absolute liability of insurer to pay a fixed sum, such standard policy fixes the value of real property on total loss by the total amount of all the insurance, that is, the amount of the policy and the concurrent insurance, and the total amount of the loss is the sum total of all the insurance, and each insurer must pay, as to such loss, no more and no less than the amount of his own policy, and, therefore, the different policies cannot be prorated as the value of the property is conclusively fixed at a sum equal to the loss, and this was so held although the code provided in case of double insurance for ratable contribution, as the case was not one of double insurance.[16]

Under the valued policy statute of Louisiana, however, a stipulation for coinsurance may be validly made and is not against public policy.[17] And a coinsurance clause does not contravene a statute which provides for a recovery of the full amount of the loss, provided it is within the amount insured, but that if there are several policies on the same property a pro rata recovery as to the insured amount may be had from each insurer and also providing that all stipulations in such policies to the contrary shall be void.[18] And where by statute insurers are limited to writing policies for not more than the value of the property which value is to be stated in the policy and to be fixed before or at the time it is issued, and it also provides for contributive insurance and that if the aggregate of all the insurance exceeds such fixed value then each insurer shall be liable pro rata in case of total or partial loss, it was held that the policy sued on should be prorated with other insurance.[19]

**§ 2497. Where policies of different dates attach and property subsequently diminished.**—If several policies of different dates are issued by different insurers and all of the policies have attached, and if subsequently the property is so diminished that at the time of the loss the amount of insurance in the earlier policies will fully cover the property insured, the question has arisen whether the first insurer is liable to the full amount of the policy, or whether he can claim contribution from the subsequent underwriters. As we have seen, the common law is now settled both in England and the United States that the insurer may recover from

Fire Ins. Co. of London, 113 Ky. 88, 23 Ky. L. Rep. 2397, 67 S. W. 23, 31 Ins. L. J. 426.

[16] Lawver v. Globe Mutual Ins. Co. 25 S. Dak. 549, 127 N. W. 615, 39 Ins. L. J. 1588; Sess. L. 1905, c. 126; Code secs. 1877, 1878.

[17] Simon v. Queen Ins. Co. of America, 120 La. 477, 45 So. 396, act La. 1900, p. 209, No. 135.

[18] Firemen's Fund Ins. Co. v. Pekor, 106 Ga. 1, 31 S. E. 779, 28 Ins. L. J. 953, Code sec. 2110.

[19] Cave v. Home Ins. Co. of N. Y. 57 S. Car. 357, 35 S. E. 577, 29 Ins. L. J. 452, 22 Stat. at L. p. 113.

any underwriter the amount of loss to the full extent of the policy, and that the insurer may enforce contribution from the other insurers. Consequently, this question will now only present itself in those cases where the policies provide that the insurers shall only be liable for the deficiency between the amount of the prior insurance and the actual amount or value of the property at risk. In American Insurance Company v. Griswold,[20] this question arose, and it was there held that where goods are insured to a specified amount on a trading voyage under a policy on time, and the value of the whole cargo exceeds the sum insured, the insurer is liable to the full amount of the subscription if after landing a portion of the cargo in safety the residue is totally lost by one of the perils insured against, provided that at the time of the loss the goods on board equaled in amount the sum insured, and the subsequent insurers are not liable for contribution. The facts were as follows: Goods to the value of forty-seven thousand and ninety-six dollars were shipped on board a vessel for South America; the plaintiff in error insured the cargo for twenty thousand dollars by a policy containing the American clause. Subsequently, other insurance was effected in other companies, one policy being for ten thousand dollars and the other for fifteen thousand dollars. All were for eighteen months, and were similar to the prior policy in all respects except date. The policies all attached. Before the vessel reached the end of the voyage she was seized, having already disposed of her cargo to the amount of twenty-one thousand dollars. The loss was apportioned by an underwriter in proportion to the amount each had underwritten. The two latter companies paid, but the American refused to. An action was brought in the supreme court, and was again referred by consent to a broker for adjustment, who subsequently submitted it to the court of errors for decision. The insurers claimed they were only liable in proportion to the amount which their policy (twenty thousand dollars) bore to the value of the entire property when the insurance was effected, which was forty-seven thousand and ninety-six dollars.

This case was considered at great length, and presents an elaborate discussion of the principles involved, and was concurred in by a large majority of the court. Senators Jones and Tracy only dissented, while twenty senators concurred in the opinion. Mr. Phillips criticizes this decision [1] and asserts that the better doctrine is, that in such case, the loss shall "be ratably apportioned to the

[20] 14 Wend. (N. Y.) 399.

See marine ins. act 1906, of England, sec. 80, given in note 6, under § 2496 herein.

[1] 2 Phillips on Ins. (3d ed.) sec. 1261.

several policies." From a careful examination of the case, however, and of the opinion there given both by the majority and the minority of the court, we must say that the opinion as expressed by the majority seems clearly the better law. In those cases where the policies contain such a clause as was before the court for construction, it would hardly seem that any other rule could properly be applied than was there stated by the court. The clause in question provided for a ratable return of premium for so much as they should be by prior insurance exonerated from, and also provided for liability without right of contribution from subsequent insurers. This clause is one in most frequent use and we fail to see how a different construction could have been given. If there were only a provision that the insurer should only be liable for so much as the amount of such prior insurance might be deficient toward fully covering the subject insured, and there were no further provisions as to the premium, or as to liability "without right of contribution" from subsequent insurers, then the dissenting opinion would certainly be of much weight. Mr. Phillips considers the clause in reference to the return premium as sustaining his rule, but with all due deference to that learned author we fail to see how it so operates. He says[2] "The construction that a diminution of the amount affects the policies proportionately seems conclusively to result from the usual provision that the premium shall be returned upon so much of the sum insured as the underwriter shall be exonerated from by the prior insurance, thus specifically providing for a concurrence of the exoneration from risk and return of premium, and requiring the return in case of exoneration." The provision in the policy is that the assurer shall be answerable only for so much as the amount of such prior insurance may be deficient toward fully covering the subject insured, and shall return the premium upon so much of the sum by them assumed as they shall be by such prior insurance exonerated from. We think that the construction contended for by Mr. Phillips cannot reasonably be given to this clause. If construed as worded and as apparently intended, the rule stated in American Insurance Company v. Griswold,[3] is the proper one. But we have the further provision of this clause as an aid, and the entire clause must be construed as a whole. The clause is this: In case of subsequent insurance "the assurers shall nevertheless be answerable for the full extent of the sum by them subscribed, without right to claim contribution from such subsequent assurer, and shall accordingly be entitled to retain the premium by them received in the same

[2] 2 Phillips on Ins. (3d ed.) 126. [3] 14 Wend. (N. Y.) 399.

manner as if no such subsequent insurance had been made." The clause construed as a whole certainly evidences a clear intention to hold the prior insurers liable for the full loss, without right of contribution from subsequent underwriters. And Mr. Phillips, in speaking of this condition, says [4] "Under this provision the amount of interest in respect to the subsequent policy against the same risks is the excess of the value over the amount insured by the previous policies." This is undoubtedly the true rule in all cases, and it is in conformity to the established practice in this country. In marine insurance the liability of the several insurers for a total loss, whether actual or constructive, where the policies are not simultaneous, is in the order of the dates of the several policies; no liability attaching to the second or other subsequent policy except as to the excess of the loss over the amount of all previous policies on the same interest. If two or more policies bear date upon the same day, they are deemed to be simultaneous, and the liability of the insurers in simultaneous policies is to contribute ratably with each other. The insolvency of any of the insurers does not affect the proportionate liability of the other insurers. The liability of all insurers on the same marine interest for a partial or average loss is to contribute ratably.[5] Although, as noted above,[6] the rule laid down in American Insurance Company v. Griswold [7] has been criticized, yet we think it clearly in accord with the expressed intention of the parties, and both reasonable and just.

§ 2498. **Presumption as to basis of settlement where settlement made with one of two insurers.**—Where the insured, in case of double insurance, accepts one half the loss from one of such companies, after deducting certain set-offs, he will be deemed prima facie to have elected to adjust the loss against the other upon the same basis.[8]

§ 2499. **Double insurance for "whom it may concern."**—Insurers have no insurable interest in the property insured by them regarded in the light of owners, and therefore can have no action on a policy of double insurance made for the benefit of "whom it may concern." [9]

[4] 2 Phillips on Ins. (3d ed.) 1251.

[5] Deering's Annot. Civ. Code Cal. sec. 2642.

[6] Referring to Mr. Phillips criticism.

[7] 14 Wend. (N. Y.) 399.

[8] Wiggin v. Suffolk Ins. Co. 18 Pick. (35 Mass.) 145, 29 Am. Dec. 576.

[9] Alliance Marine Assurance Co. v. Louisiana Ins. Co. 8 La. 1, 28 Am. Dec. 117.

# TITLE X.

## VOID AND ILLEGAL INSURANCES AND EXCEPTED RISKS AND LOSSES.

### CHAPTER LXVIII.

### VOID AND ILLEGAL INSURANCES.

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**§ 2506. General principles as to void or illegal contracts.**—(a) As we have noted elsewhere, contracts are presumed to be made with reference to the laws and constitution of the land existing and in force at the time the contract is entered into, so far as such laws are applicable, and also with reference to valid and subsisting commercial treaties between this country and foreign states, so far as the same may be applied.[10] So also the power of Congress under

[10] See § 194, herein. As to the binding force of treaties upon subjects of the contracting powers, see The Eenrom, 2 C. Rob. 1, 6, where it is said: "Every treaty is a part of the public law of the country, which has entered into that treaty, and is as binding on the subjects as any part of their municipal laws," per Sir William Scott. The Neutralitet, 3 C. Rob. 295, 296; Cooley's Constitutional Limitations (6th ed.) 18; Wilson v. Marryat, 8 Term Rep. 31, 1 Bos. & P. 430. But see Leber v. Fletcher, reported in 1 Marshall on Ins. (ed. 1810) 61, and *examine* note on this case in 2 Arnould on Marine Ins. (Maclachlan's ed. 1887) 693, as to how far existing law enters into and forms part of the contract. It is said in 2 Story on the Constitution (5th ed.) secs. 1383, 1384: "But much diversity of opinion has been exhibited on another point, how far the existing law enters into and forms a part of the contract. It has been contended by some learned minds that the muni-

cipal law of a place where a contract is made forms part of it, and travels with it wherever the parties to it may be found. If this were admitted to be true, the consequence would be that all the existing laws of a state, being incorporated into the contract, would constitute a part of its stipulations, so that a legislative repeal of such laws would in no manner affect it. . . . Although the law of the place acts upon a contract and governs its construction, validity, and obligation, it constitutes no part of it. The effect of such a principle would be a mischievous abridgment of legislative power over subjects within the proper jurisdiction of states by arresting their power to repeal or modify such laws with respect to existing contracts. . . . The law acts upon contracts. It performs the office of interpretation. But this is very different from supposing that every law applicable to the subject matter as a statute of limitations or a statute of insolvency enters into the contract and becomes a part of the contract; such a supposition is neither called for by the terms of the contract, nor can be fairly presumed to be contemplated by the parties as matters ex contractu. The parties know that they must obey the laws, and that the laws act upon their contracts, whatever may be their intention." " 'The obligation of a contract,' it is said, 'consists in its binding force on the party who makes it. This depends upon the laws in existence when it is made. These are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate according to their settled legal meaning:' " Cooley's Constitutional Limitations (4th ed.) pp. 349, *285, *citing* McCracken v. Hayward, 2 How. (43 U. S.) 612, 11 L. ed. 228; Ogden v. Saunders, 12 Wheat. (25 U. S.) 213, 259, 6 L. ed. 606, per Washington, J. "Contracts made within a state where an insolvent law exists between citizens of that state are to be considered as made in reference to the law, and are subject to its provisions:" Cooley's Constitutional Limitations (4th ed.) pp. 360, *294. See §§ 194 et seq. herein.

But notwithstanding any previous or existing treaty provisions on the same subject an act of Congress passed after a treaty takes effect must be respected and enforced (Alvarez y Sanchez v. United States, 216 U. S. 167, 30 Sup. Ct. 367, 54 L. ed. 432) and must be upheld when clear and explicit, even though such act does override an earlier treaty. Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. 1016; Horner v. United States, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. 522; Botiller v. Dominguez, 130 U. S. 238, 9 Sup. Ct. 525, 32 L. ed. 926; The Cherokee Tobacco, 11 Wall. (78 U. S.) 616, 20 L. ed. 227; Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 11 L.R.A.(N.S.) 105, 112 N. W. 395. See The Chinese Exclusion case (Chae Chan Ping v. United States) 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. 623; Head Money Cases (Cunard Steamship Co. v. Robertson, Coll.; Edye v. Robertson, Coll.) 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. 247.

If an act of Congress has been wholly or partly superseded by a subsequent treaty with a foreign nation, like principles control as in cases of alleged inconsistent statutes, that is, effect must be given both if by any reasonable interpretation it can be done. United States v. Lee Yen Tai, 185 U. S. 213, 46 L. ed. 878, 22 Sup. Ct. 629.

the constitution extends[11] to the regulation of navigation, and also to every species of commercial intercourse between the United States and foreign nations, and among the several states; it further extends to all vessels, whether propelled by the instrumentality of steam machinery or winds and sails.[12] But, as we have stated elsewhere herein, a policy of insurance is not commerce under the Federal constitution, even though the parties reside in different states; the contract is merely one of indemnity. When Congress has, under the constitution, a right to legislate upon a subject, the exercise of the right by Congress renders inoperative a state law upon the subject.[13]

(b) In matters relating to the form or stipulations of the contract, the express provisions of the law may be varied from where they are not prohibitory and concern neither the essence of the contract, nor public property, nor good morals, but if the law is prohibitory, and relates to matters which are of the essence of the contract itself, it must be conformed to in effecting the contract.[14] The contract, therefore, may be void because it violates the prohibitory law,[15] or for the same reasons stipulations of the contract may be

[11] Art. 1, § 8.

[12] Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23, per Marshall, C. J. See Lord v. Steamship Co. 102 U. S. 541, 26 L. ed. 224, as to how far this power is exclusive. See Cooley's Constitutional Limitations (6th ed.) 595, 720–32.

[13] Caldwell v. St. Louis Perpetual Ins. Co. 1 La. Ann. 85.

Insurance business not commerce, see Paul v. Virginia, 8 Wall. (75 U. S.) 168, 19 L. ed. 357; State v. Phipps, 50 Kan. 609, 18 L.R.A. 657, 31 Pac. 1097.

As to state regulation: insurance business, see §§ 327, 328a et seq. herein.

[14] Emerigon on Ins. (Meredith's ed. 1850) c. ii. sec. 7, p. 48; White v. Connecticut Life Ins. Co. 4 Dill. (U. S. C. C.) 177, Fed. Cas. No. 17,545.

That stipulations in violation of prohibitory terms of statutes are void, see Dugger v. Mechanics & Traders Ins. Co. 95 Tenn. 245, 28 L.R.A. 796, 32 S. W. 5; *citing* Wall v. Equitable Life Assurance Soc. 32 Fed. 273, aff'd 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. 822; Fletcher v. New York Life Ins. Co. 13 Fed. 526, s. c. 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. 837; White v. Connecticut Mutual Life Ins. Co. 4 Dill. (U. S. C. C.) 177, Fed. Cas. No. 17,545; Emery v. Piscataqua Fire & Marine Ins. Co. 52 Me. 322; Oshkosh Gaslight Co. v. Germania Ins. Co. 71 Wis. 454, 5 Am. St. Rep. 233, 37 N. W. 819; Thompson v. Citizens' Ins. Co. of Missouri, 45 Wis. 388; Reilly v. Franklin Ins. Co. 43 Wis. 449, 28 Am. Rep. 552; Bammessel v. Brewers' Fire Ins. Co. of America, 43 Wis. 463.

Whether common and statutory law part of contract, see §§ 176, 194 et seq. herein.

When statute not a part of policy, see Equitable Life Assurance Soc. v. Babbitt, 11 Ariz. 116, 13 L.R.A. (N.S.) 1046 (annotated on effect of statute providing for application of reserve to the purchase of extended or paid up insurance), 89 Pac. 531.

[15] See Greene v. Walton, 59 Hun (N. Y.) 102, 35 N. Y. St. Rep. 881. 13 N. Y. Supp. 147; Buckley v. Humason, 50 Minn. 195, 16 L.R.A. 423,

unenforceable. So a contract may be illegal because contrary to positive law, as in case of a statute against insurance of lottery tickets; such insurance is, however, of itself against public policy;[16] or an agreement may be void both on the ground of public policy and because contrary to a statute;[17] or a statute may affect the validity of acts of the assurer, as in case of making assessments;[18] and a contract based upon an illegal contract is void, although in case of the latter contract money paid to one party for the benefit of the other may be recovered by the party for whose benefit it was paid.[19] And as to the form of the contract it may be instanced that a policy issued in the adopted name of the applicant rather than that given him by his parents is valid.[19a]

(c) In these and in numerous other cases noted throughout this work statutory provisions may naturally affect the question of the validity of the contract, and the right to enforce the same, or the rights acquired and obligations to be performed. But the contract must depend upon the laws in existence when it was made. These, as above stated, are necessarily referred to in every contract, and form a part thereof as the measure of the obligation to perform them by one party and the rights acquired by the other, and such laws are not retroactive, nor may they impair the obligation of contracts.[20]

(d) The Marine Insurance Act of 1906, of England, also contains certain provisions relative to the legality of contracts.[21]

(e) In connection with what is above stated, as to a contract being void because it violates the prohibitory law, we will state that the British "Trading with the Enemy Proclamation" of Sept. 9, 1914, was amended on Oct. 8, 1914, by an "Order in Council"

52 N. W. 385, 36 Am. St. Rep. 637; Arkansas Stave Co. v. State, 94 Ark. 27, 27 L.R.A.(N.S.) 255, 125 S. W. 1001.

[16] Mount v. Waite, 7 Johns. (N. Y.) 434. See 2 Story on Constitutional Law (5th ed.) secs. 1383, 1384. As to contracts in violation of statutes, see 1 Story on Contracts (5th ed.) p. 719, secs. 750 et seq. See § 2531 herein.

[17] Reichard v. Manhattan Life Ins. Co. 31 Mo. 518.

[18] Naill v. Kansas Farmers' Fire Ins. Co. 47 Kan. 223, 27 Pac. 854; Davis v. Oshkosh Upholstery Co. 82 Wis. 488, 52 N. W. 771.

[19] Hartford Fire Ins. Co. v. City of Houston. — Tex. —, 116 S. W. 36.

[19a] Smith v. United States Casualty Co. 197 N. Y. 420, 26 L.R.A. (N.S.) 1167, 90 N. E. 947. See §§ 177, 310 herein.

[20] Ogden v. Saunders, 12 Wheat. (25 U. S.) 213, 259, 6 L. ed. 606, per Washington, J.; McCracken v. Hayward, 2 How. (43 U. S.) 612, 11 L. ed. 228, per Mr. Justice Baldwin; Trustee of Internal Improvement Co. v. Bailey, 10 Fla. 112, 81 Am. Dec. 194; Hope Mutual Ins. Co. v. Flynn, 38 Mo. 483, 90 Am. Dec. 438.

[21] See sec. 3 (1), and sec. 41 of said enactment given in Appendix C, herein.

which prohibited transactions, treaties, or contracts with an enemy in respect to marine, life, fire, or other policy or contract of insurance or reinsurance, and this covered not only new contracts, but affected also those current at the outbreak of the war to which the enemy was a party and included those with an enemy having a branch locally situated in British, allied, or neutral territory.[22]

After the entry of our Country into the "Great War" the President of the United States, on July 13, 1917, issued a Proclamation, prohibiting branch establishments of insurance companies incorporated in Germany and engaged in the transaction of business in the United States, under the laws of the several states, from continuing the transaction of the business of marine and war risk insurance, either as direct insurers or reinsurers; also prohibiting insuring or reinsuring such risks with said branch companies, no matter where located, and, subject to certain exceptions, suspending existing contracts during the period of the war. There are also certain provisions as to the payment of premiums and return of premiums, the disposition of funds, of such German companies, etc. The reason, however, for issuing this Proclamation, as stated therein, is to prevent information of the movements of ships and cargoes from reaching alien enemies, whereas the British Proclamation or Order apparently goes to the illegality of such contracts in that

[22] The British "Trading with the Enemy Proclamation," of date Sept. 9, 1914 (3 Statutory Rules & Orders, 1914, p. 326), was amended (Id. p. 329) Oct. 8, 1914, by the following Order in Council whereby "all persons resident carrying on business or being in Our Dominions" were warned "6. Not to make or enter into any new marine, life, fire or other policy or contract of insurance (including re-insurance) with or for the benefit of an enemy; nor to accept, or give effect to, any insurance of, any risk arising under any policy or contract of insurance (including re-insurance) made or entered into with or for the benefit of an enemy before the outbreak of war; and in particular as regards treaties or contracts of re-insurance current at the outbreak of war to which an enemy is a party or in which an enemy is interested not to cede to the enemy or to accept from the enemy under any such treaty or contract any risk arising under any policy or contract of insurance (including re-insurance) made or entered into after the outbreak of war, or any share in any such risk. . . . 5. Notwithstanding anything contained in Paragraph 6 of the Trading with the Enemy Proclamation, No. 2, where an enemy has a branch locally situated in British, allied or neutral, territory, which carries on the business of insurance or re-insurance of whatever nature, transactions by or with such Branch in respect of the business of insurance or re-insurance shall be considered as transactions by or with an enemy."

As to effect of subsequently enacted prohibitory law, see §§ 2527, 2528 herein.

As to effect of war on pre-existing valid contract, see §§ 289–291 herein.

That subject of one of two or more allied powers may not trade with common enemy, see § 2564 herein.

it places the making thereof under the classification of "Trading with the Enemy." [23]

[23] "[Marine and war risk insurance by the German companies prohibited]. By the President of the United States of America, a proclamation.

"Whereas, certain insurance companies, incorporated under the laws of the German Empire, have been admitted to transact the business of marine and war risk insurance in various States of the United States, by means of separate United States Branches established pursuant to the laws of such States, and are now engaged in such business under the supervision of the Insurance Departments thereof, with assets in the United States deposited with Insurance Departments or in the hands of resident trustees, citizens of the United States, for the protection of all policy-holders in the United States;

"And whereas, the nature of marine and war risk insurance is such that those conducting it must of necessity be in touch with the movements of ships and cargoes, and it has been considered by the Government of great importance that this information should not be obtained by alien enemies;

"Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the powers vested in me as such, hereby declare and proclaim that such branch establishments of German Insurance Companies now engaged in the transaction of business in the United States pursuant to the laws of the several States are hereby prohibited from continuing the transaction of the business of marine and war risk insurance either as direct insurers or re-insurers; and all individuals, firms, and insurance companies incorporated under the laws of any of the States or Territories of the United States, or of any foreign country, and established pursuant to the laws of such States and now engaged in the United States in the business of marine and war risk insurance either as direct insurers or re-insurers are hereby prohibited from re-insuring with companies incorporated under the laws of the German Empire, no matter where located; and all persons in the United States are prohibited from insuring against marine or war risks with insurance companies incorporated under the laws of the German Empire or with individuals, firms, and insurance companies incorporated under the laws of any of the States or Territories of the United States or of any foreign country and now engaged in the business of marine or war risk insurance in the United States, which re-insure business originating in the United States with companies incorporated under the laws of the German Empire, no matter where located.

"The foregoing prohibitions shall extend and operate as to all existing contracts for insurance and re-insurance which are hereby suspended for the period of the war, except that they shall not operate to vitiate or prevent the insurance or re-insurance of, and the payment or receipt of, premiums on insurance or re-insurance under existing contracts on vessels or interest at risk on the date of this proclamation, and such insurance or re-insurance, if for a voyage, shall continue in force until arrival at destination, and if for time, until thirty days from the date of this proclamation, but if on a voyage at that time, until the arrival at destination.

"Nothing herein shall be construed to operate to prevent the payment or receipt of any premium, return premium, or claim now due or which may become due on or in respect to insurances or re-insurances not prohibited by this proclamation.

"That all funds of such German

**§ 2507. Distinctions to be observed.**—In considering however, the question of illegal and void insurances, there is a difference between those cases where the invalidity of the contract rests upon some law which relates to the contract itself, and the rights acquired and obligations to be performed thereunder, and those cases where the illegality or invalidity rests upon some law which does not define, or attempt to define, the rights and duties of the parties.[1] There is also a distinction between an agreement to do a thing which cannot be performed without violating the law and an agreement to perform in an illegal manner a contract which can be legally performed. In the latter case the intention to break the law must be shown.[2] A distinction further exists between those cases where by the terms of the insurance it is made a necessary condition that the illegal act shall be done, or which are in effect insurances of an illegal traffic, and cases where the subject matter insured is susceptible of a lawful use, and concerning which no one can be held to contract concerning it in an illegal manner, unless the contract itself is for a directly illegal purpose. Collateral contracts in which no illegal design enters are not illegal because remotely connected with an illegal transaction.[3] In certain cases a contract may be valid, even though it is connected with an independent illegal transaction which it in no way is designed to aid

companies now in the possession of their managers or agents, or which shall hereafter come into their possession, shall be subject to such rules and regulations concerning the payment and disposition thereof as shall be prescribed by the insurance supervising officials of the State in which the principal office of such establishment in the United States is located, but in no event shall any funds belonging to or held for the benefit of such companies be transmitted outside of the United States, nor be used as the basis for the establishment, directly or indirectly, of any credit within or outside of the United States to or for the benefit or use of the enemy or any of his allies without the permission of this Government.

"In Witness Whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done at the District of Columbia this thirteenth day of July in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States the one hundred and forty-second.

Woodrow Wilson.

"By the President:
Frank L. Polk
Acting Secretary of State."

[No. 1386.]

The use in this Treatise of the above copy of the President's Proclamation is permitted through the courtesy of the Honorable William C. De Lanoy, Director of the Bureau of War Risk Insurance.

As to license and authority conferred thereby, see §§ 293, 2570, 2571 herein.

[1] See 1 Duer on Marine Ins. (ed. 1845) 314.

[2] Waugh v. Morris, L. R. 8 Q. B. 202, 208. 28 L. T. 265, 42 L. J. Q. B. 57, 21 W. R. 438, per Blackburn, J.

[3] Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124, per Campbell, J.

or promote.[4] There is also a distinction between contracts founded on a transaction malum in se, or which is prohibited by statute on the ground of public policy, and which influences the public welfare, and contracts founded on transactions prohibited for the benefit of particular individuals, as distinguished from the public at large, and which are not intended to affect the general welfare; as in case of a statute designed solely for benefit of the ship's crew, such as carrying a certain quantity of water under deck, and providing a remedy in favor of the crew.[5]

**§ 2508. Sanitary inspection of buildings not within insurance law.**—The business of "inspection and certification as to the sanitary conditions of buildings and premises" is not within the purview of the insurance law of the state of New York, and is not authorized to be carried on by a corporation under the statute providing for the organization of casualty insurance companies, and the attorney general may refuse to attach his certificate of approval to the declarations and charter which specify such business as a part of that proposed to be carried on.[6]

**§ 2509. Life insurance a valid contract.**—(a) A policy of insurance upon life is a valid contract.[7] And the validity of a policy or certificate constituting a contract between a benefit society and a member thereof is not destroyed by the adoption of some impracticable scheme for the execution of the contract.[8]

(b) *Invalidity of rider: war risk excepted: life policy: partial illegality: statute.* A rider is invalid, under a New York decision, where, although attached to the policy it does not comply with and is in violation of the statute of that state governing standard accident and health policies in that it has not been filed with or approved by the superintendent of insurance prior to the delivery of the policy and does not bear the signature of an executive officer of the company; nor is the rider made legal by the fact that assured signed such rider, as a provision of the policy which does not comply with and is expressly forbidden by the statute, cannot be made valid by agreement of the parties; and this applies where said rider provides that the policy "does not cover any loss

[4] Ocean Ins. Co. v. Polleys, 13 Pet. (38 U. S.) 157, 10 L. ed. 105, per Story, J.; *citing* Armstrong v. Toler, 11 Wheat. (24 U. S.) 258, 6 L. ed. 468.

[5] Warren v. Manufacturers' Ins. Co. 13 Pick. (30 Mass.) 518, 25 Am. Dec. 341, per Wilde, J.; Ward v. Wood, 13 Mass. 539, 546. See § 2542 herein.

[6] People ex rel. Woodward v. Rosendale, 142 N. Y. 126, 36 N. E. 806, 58 N. Y. St. Rep. 629, aff'g 57 N. Y. St. Rep. 447, aff'g 76 Hun (N. Y.) 103, 27 N. Y. Supp. 837.

[7] Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38. See Preliminary chapter, § VII. herein.

[8] Failey v. Fee, 83 Md. 83, 32 L.R.A. 307, 34 Atl. 839.

or disability resulting from bodily injuries caused directly or indirectly by any act of any of the belligerent nations engaged in the present European war." The illegal part, however, may be discarded and the legal part retained and the policy be enforced where the intent of the statute, by the terms of a subdivision thereof, is to preserve the validity of the policy even though provisions inserted therein which violate the statute are not invalidated by said subdivision; and in case the illegal parts have been issued in wilful disobedience of the law the party so issuing the policy is subject to punishment under the statute.[8a]

**§ 2509a. Policy payable to "estate" valid.**—A policy insuring the "estate" of a deceased person against loss by fire is valid and enforceable.[9]

**§ 2509b. Policy on life of minor.**—A policy issued on the life of a minor, payable to him if living at maturity, and his executors, administrators, or assigns in case of death before maturity, is not absolutely void nor are notes given by him for premiums void, although the insured has power to elect to avoid both on arriving at majority; nor is his written assignment of such policy during minority necessarily void.[10]

**§ 2509c. Policy issued to person over age limit: statute.**—A policy issued by a mutual life association upon the life of a person over the age limit prescribed by statute, is ultra vires and void.[11] Under a Nebraska decision fraternal benefit societies are not permitted to take members above the age limit and to do this indirectly by purchasing the business and risks of a similar society and consolidating both constitutes a violation of law.[12]

[8a] Hopkins v. Connecticut General Life Ins. Co. 160 N. Y. Supp. 247, 174 App. Div. 23, under sec. 107 of the Insurance Law as added by the laws of 1913, c. 155. See Letts v. Excess Ins. Co. 32 T. L. R. 361,—Bailhache, J. (*considered* elsewhere herein); Coxe v. Employers' Liability Assur. Corp. 85 L. J. K. B. 1557 (1916) 2 K. B. 629 (1916) W. C. & I. Rep. 250, 114 L. T. 1180, 32 T. L. R. 664—Scrutton, J. (*considered* elsewhere herein).

As to standard policy; stipulations contra, additions, changes, etc., see § 176b, herein.

As to partial illegality, see §§ 2551 et seq. herein.

[9] Magoun v. Firemen's Fund Ins. Co. 86 Minn. 486, 91 Am. St. Rep. 370, 91 N. W. 5. "My estate" as beneficiary, see § 776 herein.

[10] Union Central Life Ins. Co. v. Hilliard, 63 Ohio St. 478, 53 L.R.A. 462, 59 N. E. 230.

Infants as parties to contract, see §§ 307–307b herein.

Infants as beneficiaries, see §§ 788, 808 herein.

As to warranties by infant, see § 1976a herein.

[11] Brenner v. Kansas Mutual Life Assoc. 6 Kan. App. 152, 51 Pac. 303. See Gray v. National Benefit Assoc. 111 Ind. 531, 11 N. E. 477. See §§ 1992 et seq. herein.

[12] State v. Bankers' Union of the World, 71 Neb. 622, 99 N. W. 531. *Examine* Catheart v. Equitable Mu-

**§ 2509d. Insurance without insured's consent.**—It has been broadly stated that insurance taken out by a person upon the life of another without the latter's consent, is against public policy and void, and generally speaking such a proposition ought to be supported on general principles. The cases which are generally cited as sustaining this assertion may, however, be divided into the following classes: (1) Those wherein the action was brought, not to enforce an illegal contract of insurance or any right arising thereunder, but was instituted to recover back premiums, assessments or dues paid, or in other words to recover money paid insurer without any consideration, upon the ground that the alleged contract had no inception and was void from the beginning; (2) where the contract was taken out by one without any insurable interest in the life insured and without the latter's knowledge or consent and, therefore, was within what are denominated as wager policies; (3) where the policy was issued by fraud to which the nominal insured was not a party and in case of assignment it was to one holding in good faith and not in pari delicto; (4) where the policy was issued contrary to the rules and regulations of the insuring society or association which expressly or in effect prohibited insurance upon another's life without his or her consent; (5) where the policy was taken out by the husband upon the life of the wife without her consent, or by the wife upon her husband's life without his consent; (6) where some prohibitory or permissive statute is involved; and (7) in cases where there is a question whether insured has consented to substituted insurance in place of a canceled or about to be canceled policy and, therefore, whether he has taken out other insurance. While these points have been considered elsewhere herein certain decisions which have been relied on as unqualifiedly supporting the statement made at the beginning of this section will be presented here for the purpose of showing in what connection such an assertion or determination was made, the extent to which it is of force and its limitations, and in accordance with all rules they carry weight only upon the points decided.

In an Indiana case the policy insured the life of one without his knowledge or consent, but it was held void and against public policy because of want of insurable interest in the life insured and in addition the statute made it a felony to knowingly secure a policy upon another's life without that other's knowledge and consent, but the case also involved the right of an assignee, induced by fraud of insurer's agent to take an assignment of the policy, to recover assessments paid which right was sustained as said as-

signee was not in pari delicto.[12a] In an Ohio case the action also was for a return of premiums paid and judgment was recovered therefor and affirmed. The insurance was taken out by the wife upon her husband's life without his knowledge or consent, or without his actual signature to the application, although it purported to be signed by him. He was never examined by any physician, never consented, did not know of the existence of the policy until about eight years after it was issued. None of the acts in obtaining insurance were in compliance with the rules and regulations of the society which provided that no policy on an adult life should be binding "unless the person against whose death it insured is aware of the insurance, consents to the same, is examined by a physician and personally signs the examination form after the answers in said form are recorded and not otherwise." So insurer did not incur any liability.[12b] In a Massachusetts case the plaintiff's claims that the policy was void and never attached, by reason of failure to comply with certain rules of assurer which required that assured should have knowledge of the insurance and should sign the application, was held to be sustained and that recovery of premiums paid could be had unless there was a wagering contract or plaintiff was a party to a fraud in procuring insurance.[12c] In Maine, however, the court does not go to this extent but declares that rules and regulations of insurer which make null and void a policy issued upon the life of a wife for the benefit of her husband without her knowledge and consent and examination by insurer's physician, and unless she personally signs the application, means voidable only and not void ab initio, and also that such rules and regulations may be waived as they are inserted for insurer's benefit. The case so asserting the law was, however, also one for return of premiums, the policy having been taken out by a husband upon his wife's life without her knowledge or consent.

tual Life Assoc. of W. 111 Iowa, 471, 82 N. W. 964.

As to effect of consolidation or merger, etc., see §§ 350r et seq. herein.

[12a] American Mutual Life Ins. Co. v. Bertram, 163 Ind. 51, 64 L.R.A. 935, 70 N. E. 258, 33 Ins. L. J. 491; act 1883, p. 203, sec. 9.

As to necessity of insurable interest in beneficiary, see § 729 herein.

As to necessity of insurable interest in assignee, see §§ 914 et seq. herein.

As to statutes, see also §§ 879, 1410c herein.

[12b] Metropolitan Life Ins. Co. v. Felix, 73 Ohio St. 46, 75 N. E. 941.

[12c] McCann v. Metropolitan Life Ins. Co. 177 Mass. 280, 58 N. E. 1026.

As to insurable interest: wager policy, see §§ 894 et seq. herein.

As to return of premiums, etc., where insurance without consent of insured, see § 1410b herein. Same subject: *statutes*, see § 1410c herein, see also as to consent, statutes, §§

and it was held that the action could not be sustained.[12d] It is declared in a Kentucky case that it is against public policy to procure a policy of insurance on the life of another without such one's knowledge or consent, even though the party procuring the insurance has an insurable interest in insured's life, and this applies to a policy obtained by a wife upon a husband's life without his consent or one procured by a husband upon the life of his wife without her consent. But although this was the basic principle upon which the decision rested the action was for a return of premiums paid by the wife out of his money on a policy so procured on his life.[12e] Under an Alabama decision if the statute permits wives to insure their husband's lives for their exclusive benefit, a policy is valid though taken out and kept by the husband without the wife's knowledge.[12f] In a Maine case it is declared, per Foster, J. that: "'He had not applied for or assented to any other insurance, had no knowledge that other insurance was contemplated, and had not at the time of loss any right of action against the defendant company.'"[12g] This quotation is from a New Hampshire case and applies where a policy may have been issued in good faith by insurer's agent as a substitute for another, but there is no such acceptance as to give the policy operative force, differing from an acceptance of an application in that the alleged insured had no knowledge of the existence of the policy prior to the fire.[12h]

**§ 2510. Stipulation valid suspending policy while matured premium note remains unpaid.**—A condition in an insurance policy that in case a premium note is not paid in full at maturity the policy shall be inoperative so long as it remains unpaid is a valid condition, and is a good defense to an action on the policy for a loss occurring during the period of default.[13]

879 et seq. herein, and Grems v. Travers, 148 N. Y. Supp. 200, 27 Misc. 644, 44 Ins. L. J. 226, aff'd 149 N. Y. Supp. 1085, *considered* under § 879 subd. (s) herein.

[12d] Malhoit v. Metropolitan Life Ins. Co. 87 Me. 374, 47 Am. St. Rep. 336, 32 Atl. 989.

[12e] Metropolitan Life Ins. Co. v. Monahan, 102 Ky. 13, 42 S. W. 924.

As to statutes exempting policy proceeds from creditors' claims for protection of wife and children, see §§ 879 et seq. herein.

[12f] Felrath v. Schonfield, 76 Ala. 199, 52 Am. Rep. 319; Code sec. 2733. See also §§ 879 et seq. herein.

[12g] Clark v. Ins. Co. of North America, 89 Me. 26, 35 L.R.A. 276, 35 Atl. 1008.

As to cancelation: when other insurance or substituted policy does not attach, see § 1655a, herein; when other or substituted policy attaches, see § 1655b herein.

That insurance by stranger will not constitute other insurance, see 2471 herein.

[12h] Stebbins v. Lancashire Ins. Co. 60 N. H. 65.

[13] Home Fire Ins. Co. v. Garbacz

**§ 2511. Waiver of condition rendering policy void from inception: title insurance.**—If a policy contains a condition which renders it void from its inception, the insurer having full knowledge thereof from the recitals of the policy or otherwise at the time of issuing the policy, he thereby waives the right to insist on the condition, and this rule applies to a policy of title insurance, and where it appears from certain contracts referred to and made a part of policy that the insurer must have known certain warranted representations to be false at the time of assuming the risk, it waives its right.[14]

**§ 2512. Insurance contract based on fraud invalid.**—In conformity with the general principle that fraud vitiates all contracts, a contract of insurance based on fraud is invalid;[15] as in case of a life risk where the policy is delivered in fraud of the company.[16]

**§ 2513. Marriage insurance.**—A contract of insurance is in effect a contract in restraint of marriage, where an association agrees with a member that he will not marry for two years, or will pay a certain sum to his wife.[17] So a contract to pay a certain sum of money to A on his marriage with B, on condition that A shall give the prom-

48 Neb. 827, 67 N. W. 864. See also St. Paul Fire & Marine Ins. Co. v. Coleman, 6 Dak. 458, 6 L.R.A. 87, 43 N. W. 693.

When stipulation is that policy void or risk suspended for nonpayment of note, see § 1209 herein.

Validity of condition as to forfeiture for nonpayment of premium note at maturity, see § 1205 herein.

[14] Quigley v. St. Paul Title Inv. & Trust Co. 60 Minn. 275, 62 N. W. 287, aff'd 64 Minn. 149, 66 N. W. 364.

As to waiver by delivery of policy; agent, see §§ 543 et seq. herein.

As to notice to and knowledge of agent; when insurer bound, when not, see §§ 515 et seq., 535 herein.

As to false representations, see §§ 1894 et seq. herein.

That warranties must be strictly true, etc. see §§ 1970 et seq. herein.

As to assurer's knowledge of facts; concealment, see §§ 1850 et seq. herein, also (marine risks) §§ 1806 et seq. herein.

[15] *United States.* — See Claflin v. Commonwealth Mutual Ins. Co. 110 U. S. 81, 28 L. ed. 76, 3 Sup. Ct. Rep. 507, per Matthews, J.; Alsop v. Commercial Ins. Co. 1 Sum. (U. S. C. C.) 451, Fed. Cas. No. 262.

*New Hampshire.*—Leach v. Republic Fire Ins. Co. 58 N. H. 245; Hersey v. Merrimack County Mutual Fire Ins. Co. 7 Fost. (27 N. H.) 149.

*New York.*—Atlantic Ins. Co. v. Lumar, 1 Sand. Ch. (N. Y.) 91; Goix v. Knox, 1 Johns. Cas. (N. Y.) 341, per curiam.

*Pennsylvania.* — Nassauer v. Susquehanna Mutual Fire Ins. Co. 100 Pa. St. 507, 509.

*England.*—Prince of Wales Assoc. v. Palmer, 25 Beav. 605; Barker v. Walters, 8 Beav. 92; Foster v. Charles, 7 Bing. 105, 8 L. J. (O. S.) C. P. 118, 31 R. R. 446; Haigh v. De La Cour, 3 Camp. 319, 13 R. R. 813, per Posanquet, J.

[16] Piedmont & Arlington Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610.

[17] State v. Towle, 80 Me. 287, 14 Atl. 195. When mutual, etc., societies or associations are and are not insurance companies, see §§ 344, 345 et seq herein.

isor "the exclusive right to carry the marriage benefit insurance" on A and B, is void.[18]

**§ 2514. Constitutionality of statute regulating printing conditions in policies.**—By a statute of the state of Virginia[19] it was provided that no violation of any of the conditions of an insurance policy issued after the date when such statute took effect should be a valid defense to an action on the policy, unless such condition or conditions as were relied on as a defense were printed either in type as least as large as that known as "long primer," or were written upon the policy, and it was held that such statute was legal, and not in conflict either with the United States constitution or that of the state of Virginia.[20]

**§ 2515. Statute requiring insurer to pay losses in full constitutional.**—A statute which provides that insurance companies shall pay losses in full not exceeding the amount of insurance expressed in the policy, and that stipulations to the contrary shall be null and void, does not deprive any person of his property without due process of law, and is not in violation of the federal constitution, section 1 of the fourteenth amendment, since the right to contract is not unlimited, but is subject to limitations imposed by public policy or the exercise of the police power, and is therefore to this extent the subject of legislative control.[1]

**§ 2516. Illegality of contract insuring mercantile credits.**—Under the Massachusetts statute[2] no authority is given to any insurer, domestic or foreign, to insure mercantile credits or accounts,

[18] James v. Jellison, 94 Ind. 292, 48 Am. Rep. 151.

[19] Code Va. sec. 3252.

[20] Dupuy v. Delaware Ins. Co. of Philadelphia, 63 Fed. 680, 24 Ins. L. J. 161.

As to statutory requirements, size of type, etc., see § 176e herein.

It was early declared that insurance companies should print restrictions of their liability in policies in type large enough to arrest the attention of the assured. Phoenix Ins. Co. v. Slaughter, 12 Wall. (79 U. S.) 404, 20 L. ed. 444. *Cited* in Levi v. New Orleans Mutual Ins. Assoc. 2 Woods, 63, 69, Fed. Cas. No. 8,290; Reaper Ins. Co. v. Jones, 62 Ill. 458, 460. And it was also said that insurance companies should declare their exemptions from liability in policies, in terms which cannot admit of controversy. Phoenix Ins. Co. v. Slaughter, 12 Wall. (79 U. S.) 404, 20 L. ed. 444.

[1] Dugger v. Mechanics & Traders' Ins. Co. 95 Tenn. 245, 28 L.R.A. 796, 32 S. W. 5, per Beard, J. (a well-considered case). In support of the general principle the court *cites* German Ins. Co. v. Eddy, 36 Neb. 461, 19 L.R.A. 707, 54 N. W. 856, 8 Am. Rail. & Corp. Cas. 115; Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 9 L.R.A. 45, 24 N. E. 1072; Truss v. State, 13 Lea (81 Tenn.) 311; Taylor v. Taylor, 12 Lea (80 Tenn.) 490; Coleman v. Satterfield, 2 Head (39 Tenn.) 259, 264.

As to valued policies: statutory regulations, etc., see §§ 163 et seq. herein. See also §§ 1392, 3027 herein.

[2] 1887, c. 214, sec. 78.

and an insurance which purports to bind the insurer, in consideration of a sum paid, to purchase at a fixed price the accounts which during one year a certain business firm should have against ascertained insolvent debtors or judgment debtors against whom execution should be returned unsatisfied, is invalid. and although the illegality of the contract is not set up as a defense nor noticed in the court below, yet the court will not consciously lend its aid for the enforcement of such illegal contract, such question having been brought to the attention of the counsel on argument, and an opportunity to file briefs being given.[3] Outside of any prohibiting statute, however, contracts of this character are valid, at least in so far as they constitute insurance contracts.[4]

§ 2517. **When insurance of growing grain ultra vires.**—Where neither the statute nor the articles of incorporation of a mutual company authorize the insurance of standing or growing grain, and the statute by its terms expressly forbids it, the insurance of standing grain against loss by hail is ultra vires and void.[5]

§ 2518. **When endowment insurance by beneficiary association ultra vires.**—If the act under which a beneficiary association is incorporated provides only for payment in case of death, or for payments in case a member is disabled by sickness or other disability, such society is not authorized to conduct an insurance payable at the expiration of a fixed period, that being an endowment insurance.[6] And where the certificate of incorporation of a mutual

[3] Claflin v. United States Credit System Co. 165 Mass. 501, 52 Am. St. Rep. 528, 43 N. E. 293, per Barker, J., *citing* on last point Snell v. Dwight, 120 Mass. 9; Dunham v. Presby, 120 Mass. 285; Riley v. Jordan, 122 Mass. 231, 233; Low v. Peers, Wilm. 364, 378. See also Rosenbaum v. United States Credit System Co. 64 N. J. L. 34, 44 Atl. 966.

[4] Lauer v. Grey, 55 N. J. Eq. 544, 37 Atl. 53, 26 Ins. L. J. 956. "No question has been or could be made against the validity of the issuance of the certificate of guaranty or policy of insurance to the appellants."—Lippincott, J.; State v. Phelan, 66 Mo. App. 548. See People v. Mercantile Credit Guarantee Co. 166 N. Y. 416, 60 N. E. 24. See § 339h herein.

[5] Same case Delaware Farmers' Mutual Fire Ins. Co. v. Wagner, 56 Minn. 240, 57 N. W. 656; Delaware Farmers' Mutual Fire Ins. Co. v. Knuppel, 56 Minn. 243, 57 N. W. 656.

[6] Walker v. Giddings, 103 Mich. 344, 61 N. W. 512, 26 Ins. L. J. 632, Laws Mich. 1869, How. Stats. c. 118, act No. 104; National Protective Legion v. O'Brien, 102 Minn. 15, 17, 112 N. W. 1050, 1051 (Rev. L. 1905, secs. 1594, 1703, construed. See also Calkins v. Burup, 120 Mich. 335, 6 Det. Leg. N. 182, 79 N. W. 491 (society incorporated under pub. acts 1869, act No. 104); State (ex rel. Supreme Lodge of Fraternal Union of America) v. Orear, 144 Mo. 157, 45 S. W. 1081. *Compare* State (ex rel. Clapp) v. Educational Endowment Assoc. 49 Minn. 158, 12 Am. St. Rep. 231, 51 N. W. 908. *Examine* Boyd v. Southern Mutual

benefit company declares its particular purpose to be that of giving "financial aid and benefit to the widows, heirs, or devisees of deceased members," certificates which undertake to pay a sum of money to members on arriving at a certain age are ultra vires and void such company not being an insurance company under the statute and the plea of ultra vires is maintainable by such a corporation as a defense to an action for such endowment insurance, by a member charged with knowledge of the want of power to make the contract, and whose payments of assessments had not been retained by the corporation to increase its property, but had been paid to those entitled thereto.[7] Nor can mutual assessment companies levy assessments to pay endowment policies where the statute prohibits applying assessments to any other purpose than death losses unless the purpose and object of such assessment are specially stated in the notice therefor.[8] But in a Federal case certain "five-year combination option policies" were claimed to be endowment policies because "the company undertook to pay or make return of a specified sum of money at the termination of certain designated periods during the lifetime of the assured," but they were declared not endowment policies in that they lacked some of the essential features of such contracts and that they were not so far variant from ordinary policies issued on the co-operative or assessment plan as to warrant a ruling that a company restricted to business on the assessment plan exceeded its power in issuing them.[9]

**§ 2519. Stipulations limiting place of bringing suits: ousting courts of jurisdiction.**—If a marine insurance contract issued in a foreign country provides that suits on the policy shall be prosecuted only in a specified foreign court, such stipulation is invalid.[10] So stipulations generally giving jurisdiction where the law has not given it are, as a rule, invalid;[11] although clauses conferring such jurisdiction have been upheld, especially in case of a mutual com-

Aid Assoc. 145 Ala. 167, 41 So. 164 (ten-year policies: association no power under charter to issue or levy and collect assessment to repay certificate amounts).

[7] Rockhold v. Canton Masonic Mut. Benefit Soc. 129 Ill. 440, 21 N. E. 794, aff'g 26 Ill. App. 141, s. c. 2 L.R.A. 420, 19 N. E. 710.

[8] Abraham Lincoln Mutual Life Ins. Co. (Opinion of Atty. Gen.) 35 Pa. Co. Ct. Rep. 585.

[9] Haydel v. Mutual Reserve Fund Life Assoc. 104 Fed. 718, 44 C. C. A. 169, 30 Ins. L. J. 289.

As to charter: corporate powers: ultra vires, see §§ 334, 350 herein.

As to powers as to other business, see § 350k, herein.

[10] Slocum v. Western Assurance Co. 42 Fed. 235.

[11] Hall v. People's Mutual Ins. Co. 6 Gray (72 Mass.) 185, per Shaw, C. J.; Nute v. Hamilton Mutual Ins. Co. 6 Gray (72 Mass.) 174.

Whether arbitration clauses oust courts of jurisdiction, see § 2530 herein.

pany or benefit order where the clause exists in the company's charter.[12]

A Lloyd's fire policy stipulating that no action shall be brought thereon except against attorneys in fact representing all the underwriters, each of whom agrees to abide by the result of such suit, is not invalid as an attempt to oust the jurisdiction of the courts, but may be upheld as tending to prevent a multiplicity of actions, where the attorneys in fact are not mere agents, but are themselves parties to the contract as underwriters.[13] And requiring the establishment of the accidental nature of an injury by a gunshot wound before liability attaches thereto under an accident policy is not against public policy as an attempt to modify or control the procedure of courts of justice.[14]

**§ 2520. Statute may affect right of recovery by enlarging rights of assured under its stipulations.**—The right of the assured to recover under the contract may be enlarged by statute, whereby a less limited construction is given to warranties and stipulations and the effect of misrepresentations than would otherwise be given; as where a statute provides that neither misrepresentations nor warranties shall affect the right of assured to recover unless material to the risk and fraudulent;[15] or a statute may provide when a contract may be avoided for mistake, etc.[16]

**§ 2521. Where assured has no such interest as statute requires.**—A contract may not be enforceable because the assured has not such an interest in the subject matter as the statute requires,[17] or because a statute prohibits insurance thereof.[18]

[12] Eggleston v. Centennial Life Assoc. 19 Fed. 201, s. c. 18 Fed. 14; Arnet v. Mechanics' Mutual Ins. Co. 22 Wis. 516; Boynton v. Middlesex Mutual Fire Ins. Co. 4 Met. (45 Mass.) 212; Portage County Mutual Fire Ins. Co. v. Stukey, 18 Ohio, 455.

As to exhausting remedies within association and by-laws excluding resort to civil courts, see §§ 352–352c, 372 et seq. herein.

[13] Enterprise Lumber Co. v. Mundy, 62 N. J. Law, 16, 55 L.R.A. 193, 42 Atl. 1063.

[14] Roch v. Business Men's Protective Assoc. 164 Iowa, 699, 51 L.R.A. (N.S.) 221 (annotated on validity and construction of provision requiring the fact or circumstances of loss to be established by eye witness), 145 N. W. 479.

[15] Kenton Ins. Co. v. Wigginton, 89 Ky. 330, 12 S. W. 668, 7 L.R.A. 81, 11 Ky. L. Rep. 539.

As to representations and warranties under statutes, see § 1916 herein.

[16] Sleeper v. New Hampshire Fire Ins. Co. 56 N. H. 401.

[17] Southern Ins. & Trust Co. v. Lewis, 42 Ga. 587; Muma v. Niagara District Mutual Ins. Co. 22 U. C. Q. B. 214. As to wager policies, see §§ 148–55 herein.

[18] Murphy v. Bell, 4 Bing. 567, 1 Moore & P. 493, 6 L. J. (O. S.) C. P. 118, 29 R. R. 630; Edgar v. Fowler, 3 East, 222, 7 R. R. 433; Lees v. Smith, 7 Term Rep. 338; Booth v. Hodgson, 6 Term Rep. 405. For other decisions upholding the principles under this section, see under 19 Geo. II. c. 37, sec. 1; Mortimer v. Broad-

**§ 2522. Navigation and convoy acts of England.**—In England, there are certain decisions concerning the construction of certain navigation laws now repealed, as well as of certain acts arising out of the French Revolution, and continuing in force only during the hostilities which occasioned their passage, and it was held that traffic and voyages carried on in contravention of the navigation laws were illegal, as well as insurances on risks contravening the convoy acts.[19]

**§ 2523. Effect upon valid contract of statute laying embargo.**—If, after a valid policy has attached upon a risk which was valid in its inception and origin, an act is passed laying an embargo, the contract is not dissolved,[20] and the arrest or detention, whether the embargo be that of the assured's own government or of any other government, is a peril covered by the policy, and a valid ground of abandonment.[21] And in case of a vessel detained in

wood, 20 L. T. 398, 17 Week. Rep. 653; under 6 Geo. III. c. 18, sec. 12; Branton v. Taddy, 1 Taunt. 6; under 14 Geo. III. c. 48; Dowker & Armour v. Canada Life Assurance Co. 24 U. C. Q. B. 591; Patterson v. Powell, 9 Bing. 320, 2 Moore & S. 399, 2 L. J. C. P. 13; Evans v. Bignold, 4 L. R. Q. B. 622, 38 L. J. Q. B. 293, 20 L. T. 659, 17 W. R. 882; under 30 Vict. c. 7, In re Arthur Average Assoc. (Ex parte Hargrove) 44 L. J. Ch. 569, 32 L. T. 525, 23 W. R. 939, 10 L. R. Ch. 542.

On validity of contract in violation of statute, see note in 12 L.R.A. (N.S.) 612.

[19] See I Arnould on Marine Ins. (Perkins' ed. 1850) 711, *708 et seq., 719, *717 et seq.; 2 Id. (Maclachlan's ed. 1887) 695 et seq.; (where navigation laws in force are noted); Id. (9th ed. Hart & Simey) p. 936, sec. 748.

[20] Upon this point in general, although several factors are involved in the determination of such questions, it is held that a subsequent law making unlawful an otherwise lawful contract to do a thing operates as a repeal of the contract obligation in ordinary contracts: Bradford v. Jenkins, 41 Miss. 328. See Louisville & Nashville R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 31 Sup. Ct. 265, 34 L.R.A.(N.S.) 297 (contract to issue annual passes unenforceable after prohibitory act passed); Edward Grey & Co. v. Tolme & Runge, 59 S. J. 218, 31 T. L. R. 137, 551 (contract incapable of performance by outbreak of war and embargo so that goods could not be shipped) contract also illegal as embargo was placed by Germany upon goods.) *Compare* State v. Missouri, Kansas & Texas R. Co. 99 Tex. 516, 5 L.R.A.(N.S.) 783, 91 S. W. 214 (combinations formed before prohibitory statute enacted).

Statute may provide that repeal of statute shall not affect any right which has accrued under it. Henley v. Meyers, 76 Kan. 723, 17 L.R.A. (N.S.) 779, 93 Pac. 168.

See §§ 2506 subd. (b), 2527, 2528, 2692 herein.

[21] Francis v. Ocean Ins. Co. 6 Cow. (N. Y.) 404, per Sutherland, J.; McBride v. Marine Ins. Co. 5 Johns. (N. Y.) 299, 318, per Kent, C. J.; Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (U. S. C. C.) 312, Fed. Cas. No. 10,423. See also Green v. Young, 2 Ld. Raym. 840, 2 Salk. 444; Touteng v. Hubbard, 3

port under a policy "at and from," the underwriter would be liable for the arrest and detainment.[22] If, however, the restraint will probably only be temporary, the assured may elect to prosecute the voyage when it is removed.[23]

**§ 2524. Effect of subsequently enacted statutes upon void or illegal insurances.**—An insurance which covers a risk void and illegal in its inception and origin, because contrary to an express law or prohibition of law, is not validated by a subsequently enacted law which expressly or impliedly repeals the former statute, since the validity of the policy must be judged by the statute in force when made. In applying this rule, however, to marine insurance consideration must be given to the fact whether the voyage insured is entire.[1] But cases of this character differ from those where the defense to a contract is based upon some information which does not affect the substantial equities, and which some subsequent statute in the nature of a retrospective law takes away by giving the contract a different effect than that which it has under the law under which it was made; for a party has no vested right in a defense of such a character.[2]

Bos. & P. 291, 302, 6 R. R. 791, per Lord Alvanley; Hagedorn v. Whitmore, 1 Stark. 157; Bazett v. Meyer, 5 Taunt. 824, 829. "From the moment of capture or arrest the owners are considered as having lost their power over the ship and cargo and are deprived of the free disposal of them; because in the opinion of the merchant his right of disposal being suspended or rendered uncertain is equivalent to a total deprivation:" 2 Marshall on Ins. (ed. 1810) *510, 563a, *citing* Lord Mansfield's judgment in Goss v. Withers, 2 Burr. 683, 696, 2 Ld. Ken. 325. See also Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 1, 30, 424.

[22] Green v. Young, 2 Salk. 444; Rotch v. Edie, 6 Term Rep. 413, 3 R. R. 222.

[23] I Duer on Ins. (ed 1845) 351, sec. 39. See Hadley v. Clarke, 8 Term Rep. 259, 4 R. R. 641, as to obligation to prosecute the voyage when the restraint is removed, the contract being a charter-party.

[1] Morck v. Abel, 3 Bos. & P. 35, reported in Marshall on Ins. (ed. 1810) 647; 1 Duer on Marine Ins. (ed. 1845) 373. The above rule is in conformity with that applicable to other contracts: Roby v. West, 4 N. H. 285, 17 Am. Dec. 423 (in this case the act was prohibited under penalty, and it was held not validated by the mere repeal of the statute); Banchor v. Mansel, 47 Me. 58; McCauley & Tevis v. Brooks, 16 Cal. 11; Gilliland v. Phillips, 1 S. C. 152; Murrel v. Jones, 40 Miss. 565. "It is also, at least, doubtful whether the intention to cover a future voyage prohibited by a law then existing but not yet in force would be sufficient to avoid the contract should the law be repeated before the contemplated voyage is begun:" 1 Duer on Marine Ins. (ed. 1845) 372.

[2] Cooley's Constitutional Limitations (6th ed.) 454 et seq., 460 et seq.; Pryce v. Security Ins. Co. of N. Y. 29 Wis. 270.

**§ 2525. Whether policy void: stamp, when required by statute.**—It is held that an instrument is not void for want of a stamp when required unless there be an intent to defraud the government,[3] and there are numerous cases which hold that unstamped papers are admissible as evidence, and also that Congress has no power to exclude unstamped papers from use as evidence in state courts, and that the law must be confined in its operation to the Federal courts.[4]

[3] Dudley v. Wells, 55 Me. 145; Mitchell v. Home Ins. Co. 32 Iowa, 421; *citing* Campbell v. Wilcox, 10 Wall. (77 U. S.) 421, 19 L. ed. 973; Latham v. Smith, 45 Ill. 29; Hunter v. Cobb, 1 Bush (64 Ky.) 239; Sayles v. Davis, 22 Wis. 225, see cases cited in next note. See also Weltner v. Riggs, 3 W. Va. 445; Hitchcock v. Sawyer, 39 Vt. 412; Hallock v. Jaudin, 34 Cal. 167; Howe v. Carpenter, 53 Barb. (N. Y.) 382; New Haven & Northampton Co. v. Quintard, 6 Abb. Pr. N. S. (N. Y.) 128 (contra to last case); Steeley's Creditors v. Steeley, 23 Ky. L. R. 996, 64 S. W. 642.

As to resettlement of estates based upon life policies: covenants to pay premiums and keep up policies: indentures when chargeable with ad valorem duties on full value of policies and not merely their value at date of indenture: under English Stamp Act 1891, sec. 104, see Northumberland (Duke of) v. Inland Revenue Comrs. [1911] 2 K. B. L. R. 343, 81 L. J. K. B. 240, 105 L. T. 485—C. A.

[4] *United States.*—Twitchell v. Commonwealth, 7 Wall. (74 U. S.) 321, 19 L. ed. 223.

*Alabama.*—McElvain v. Mudd, 44 Ala. 48, 4 Am. Rep. 106.

*Arkansas.*—Bumpass v. Taggart, 26 Ark. 398, 7 Am. Rep. 623.

*California.*—Duffy v. Hobson, 40 Cal. 240.

*Connecticut.*—Griffin v. Ranney, 35 Conn. 239.

*Illinois.*—Bowen v. Byrne, 55 Ill. 467; United States Express Co. v. Haines, 48 Ill. 248; Craig v. Dimock, 47 Ill. 308; Jacquin v. Warren, 40 Ill. 459.

*Iowa.*—Bashey v. Ivins, 22 Iowa, 163.

*Kentucky.*—Hunter v. Cobb, 1 Bush (64 Ky.) 339.

*Maine.*—Dudley v. Wells, 55 Me. 145.

*Massachusetts.*—Green v. Holway, 101 Mass. 243, 3 Am. Rep. 339; Carpenter v. Snelling, 97 Mass. 452; Trull v. Moulton, 12 Allen (94 Mass.) 396.

*Michigan.*—Clemens v. Conrad, 19 Mich. 170.

*Mississippi.*—Davis v. Richardson, 45 Miss. 499, 7 Am. Rep. 732.

*New York.*—Gustavous v. Dahlmer, 163 N. Y. Supp. 132, 98 Misc. 462; Moore v. Moore, 47 N. Y. 467, 7 Am. Rep. 466.

*North Carolina.*—Haight v. Grist, 64 N. C. 739.

*Vermont.*—Hitchcock v. Sawyer, 39 Vt. 412.

*Virginia.*—Hale v. Wilkinson, 21 Gratt. (Va.) 75.

Contra, Charteers & Robinson Turnpike Co. v. McNamara, 72 Pa. St. 278; Charters Turnpike v. Bridge, 7 Alb. L. J. 56, and note on p. 49; McLean v. Skelton, 18 La. Ann. 514; Maynard v. Johnson, 2 Neb. 16; Cooley's Constitutional Limitations (6th ed.) 592n, 2; May on Ins. (3d ed.) sec. 25. For English decisions under stamp acts, see Allan v. Morrison, 3 Moody & R. 70, 8 B. & C. 565, 7 L. J. (O. S.) K. B. 106; Hill v. Patten, 8 East, 373, 1 Camp. 72, 9 R. R. 469, 13 Eng. Rul. Cas. 595; Caldwell v. Dawson, 5 Exch. 1, 14

**§ 2526. Engaging in trade in expectation of repeal of existing law interdicting it.**—If insurance is effected upon a vessel intended to be engaged in a trade in violation of a law prohibiting it, and some act, such as commencing the voyage, is done in furtherance of the illegal intent, the expectation that such law will be repealed is not sufficient to validate an insurance thus void in its inception and origin, even though such expectation rests upon a possible contingency that the law may be repealed.[5]

**§ 2527. Effect of subsequently enacted prohibitory law.**—An insurance covering a risk valid in its inception and origin is not rendered void by a subsequently enacted law making the risk illegal if the prohibited acts are done, unless there be notice, express or implied, in the sense that actual knowledge may fairly be presumed. Where such presumption cannot reasonably be held to exist, it would seem that it would be incumbent upon the party seeking to avoid the contract obligation to sustain the burden of proof, but the fact that mere vague reports and loose, uncertain rumors heard by one whose relation to the assured is not such as to make his acts or knowledge binding upon assured, is not sufficient of itself to subject the latter to the consequences of an intentional violation of the prohibitory act; such, at least, is the rule deductive from a New York decision cited below.[6]

**§ 2528. Same subject: cases.**—In the case relied on as supporting the rule stated under the last section a valued policy "at and from" was effected on December 18th. The embargo act of Congress of 1807 was passed December 22d, but was not known at the port of New York, whence the ship sailed, at the time of the commencement of the risk, although there was a vague and uncertain rumor of an embargo having taken place of which the pilot, it seems, had heard on the morning the ship sailed, but no actual knowledge of the embargo was brought home to the master or owners. The vessel a few hours after she had sailed, and while within the harbor limits, was detained by the collector of

Jur. 316; Kensington v. Inglis, 8 East, 273, 9 R. R. 438; Ramstrom v. Bell, 5 Maule & S. 267; Rapp v. Allnutt, 15 East, 601; *Examine* 2 Arnould on Marine Ins. (Maclachlan's ed. 1887) 255 et seq.; Id. (9th ed. Hart & Simey) secs. 31 et seq. pp. 45 et seq.

On effect of omission to stamp an instrument on which the law requires a stamp, or to cancel the stamps on such an instrument, see note in 48 L.R.A. 305.

[5] Gray v. Sims, 3 Wash. (U. S. C. C.) 276, Fed. Cas. No. 5,729, per Washington, J.; 1 Duer on Marine Ins. (ed. 1845) 369–73, secs. 59–61.

[6] Walden v. Phœnix Ins. Co. 5 Johns. (N. Y.) 310, 4 Am. Dec. 359, see § 2506, subd. (d) herein.

On effect of passage before expiration of time for performance of contract of statute rendering performance impossible, see notes in 10 L.R.A.(N.S.) 415; 41 L.R.A.(N.S.) 559, and L.R.A.1916F, 66.

the port on the day he received intelligence of the embargo, and the insurers were held not released.[7] There are two views which may be taken of this decision. The rule above stated, although seemingly in conflict with the general rule excluding a showing of an ignorance of a law which one has violated, and although an intentional violation of the prohibited law would in the case here relied on have been a criminal act, yet the insurer's right to the premium had become fixed by the attachment of the risk, and there was no intentional violation of the law, unless such intent could be presumed under the circumstances of the case, and the rule seems a fair and equitable one under the circumstances of the case. Taking another view of the case, however, a question might fairly exist whether the voyage was not commenced with a knowledge of the existence of the prohibitory law and therefore avoided the contract of insurance. Again, the query is pertinent if an equitable exception be admitted to exist in such a case whether the courts would not be justified by such a precedent in extending an equitable exception to other cases, and the difficulty would arise as to where the line of demarcation should be drawn. Certainly, if the court was justified in its decision in this case, why could it not be urged as justifying the exercise of some like rule in other cases where a like departure from the rules of law would under the circumstances seem equally reasonable. It is true that any decision other than the one given in this case would have operated as a hardship against the assured, but that of itself is no sufficient excuse justifying such departure. We can see no difference between a case of this character and one where the risk commenced after the law becomes of force, but the assured has no actual knowledge of its existence. In the case in question the act of sailing violated the embargo. There is no difference between such a violation and the violation where the policy attaches after the law becomes of force and effect, and the assured has no actual knowledge of the law's existence because of its recent passage.[8]

[7] Walden v. Phœnix Ins. Co. 5 Johns. (N. Y.) 310, 4 Am. Dec. 359. But see Tucker v. Jubel & De Longuamare, 1 Johns. (N. Y.) 19, 20.

[8] Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (C. C.) 320, Fed. Cas. No. 10,433; per Washington, J.; American Ins. Co. v. Dunham & Wadsworth, 12 Wend. (N.Y.) 463, aff'd 15 Wend. 9; Dunham v. American Ins. Co. 2 Hall (N. Y.) 422; Tucker v. Jubel & De Longuamare, 1 Johns. (N. Y.) 20; Morck v. Abel, 3 Bos. & P. 35; Lubbock v. Potts, 7 East, 449. *Examine* The Merrimack, 8 Cranch (12 U. S.) 317, 3 L. ed. 575; The Compte de Wahrenzoff, 1 C. Rob. 205, on the point of ignorance; 1 Duer on Ma-

§ 2529 (omitted).

§ 2530. **Effect of arbitration clauses.**—The question whether arbitration clauses in policies of insurance are valid has been, and still is, the source of constant discussion by the courts, and will be fully considered hereafter. It may be stated here, however, that in so far as such clauses are so worded as to be against public policy, or the language is such that they would if enforced have the effect of ousting courts of jurisdiction, they are invalid and unenforceable.[9] There are numerous cases, however, where arbitration clauses are so worded that they have been held valid and enforceable,[10] especially where the charters of mutual companies or benefit societies provide for a resort to arbitration.[11]

§ 2531. **Insurances contrary to policy of the law: public policy.**—An insurance is illegal if it be contrary to public policy, equally if it contravenes a positive law.[12] So it is held that a provision in a certificate of insurance issued by a mutual society, organized

rine Ins. (ed. 1845) 354, 355, 402; 1 Phillips on Ins. (3d ed.) 134, sec. 218, n. 3, pp. 492, 493, sec. 907.

What constitutes embargo. See §§ 2762 et seq. herein.

Apprehension of embargo, see §§ 2776 et seq. herein.

Effect of embargo upon valid contract, see § 2523 herein.

[9] *United States.*—Home Ins. Co. of N. Y. v. Morse, 20 Wall. (87 U. S.) 445, 22 L. ed. 365; Trott v. City Ins. Co. 1 Cliff. (U. S. C. C.) 439, Fed. Cas. No. 14,189; Crossley v. Connecticut Fire Ins. Co. 27 Fed. 30.

*Maine.*—Stephenson v. Piscataqua Fire & Marine Ins. Co. 54 Me. 55; Robinson v. Georges Ins. Co. 17 Me. 171, 35 Am. Dec. 239.

*Massachusetts.*—Reed v. Washington Fire & Marine Ins. Co. 138 Mass. 572; Rowe v. Williams, 97 Mass. 163.

*Nebraska.*—German-American Ins. Co. v. Etherton, 25 Neb. 505, 41 N. W. 406.

*North Carolina.*—Pioneer Manufacturing Co. v. Phœnix Ins. Co. 110 N. C. 176, 28 Am. St. Rep. 673, 14 S. E. 731.

*England.*—Gilmour v. Caledonian Ins. Co. (Scot. Ct. Sess. 1891) 28 Scot. L. Rep. 899. See chapter on arbitration, herein.

[10] Hamilton v. Liverpool & London & Globe Ins. Co. 136 U. S. 242, 34 L. ed. 419, 10 Sup. Ct. 945; Western Assurance Co. v. Hall, 112 Ala. 318, 20 So. 447.

As to validity of arbitration and award clauses, see §§ 3232 et seq. herein.

[11] Reeves v. White, 10 Eng. L. & Eq. 332, 21 Law J. Rep. (N. S.) 169, pt. 2.

On submission to arbitration as condition precedent to action on policy, see notes in 15 L.R.A.(N.S.) 1055 and 28 L.R.A.(N.S.) 104.

[12] Mount v. Waite, 7 Johns. (N. Y.) 434; O'Hara v. Carpenter, 23 Mich. 410; Roebuck v. Hammerton, Cowp. 737; Carter v. Boehm, 3 Burr. 1909, 13 Eng. Rul. Cas. 501, 1 W. Bl. 593. See §§ 148–54 herein. A stipulation that assured shall not bring any action to enforce the provisions of the contract except against the attorney in fact representing all the underwriters is null and void as against public policy, but the underwriter is nevertheless obligated to pay in case of loss: Knorr v. Bates, 35 N. Y. Supp. 1060, 14 Misc. Rep. 501, 67 N. Y. St. Rep. 592, aff'd 70 N. Y. St. Rep. 686. Insurance of lottery or lottery prize unauthorized: Deering's Annot. Civ. Code Cal. sec. 2532.

As to wager policies: public policy, see §§ 894 et seq. 914 et seq. herein.

under a statute which provides that the directors shall be jointly and severally liable for its debts, to the effect that such directors shall assume no liabilities by reason of the issue of such certificate, is void, as in contravention of the statute and of public policy.[13] So an agreement by a member of a building and loan association to insure his life and permit the policy to be used as collateral security for a loan to the association is void as against public policy.[14] But an annuity contract of insurance is not contrary to public policy.[15] Nor is a contract forbidden by public policy, which requires the return of a life policy, duly receipted within six months after default in payment of premiums, to entitle the holder to a paid-up policy for a proportionate amount, and providing that if this is not done, the policy shall cease and all premiums paid thereon be forfeited.[16] And it is not at variance with law or against public policy for a society or association to stipulate that the benefits shall go as directed by the laws of the order, and

[13] Greene & Veeder v. Walton, 59 Hun (N. Y.) 102, 13 N. Y. Supp. 147, 35 N. Y. St. Rep. 881.

[14] Tate v. Commercial Building Assoc. 97 Va. 74, 45 L.R.A. 243, 45 Ins. L. J. 243, 33 S. E. 382. See chapters on insurable interest, §§ 887 et seq., 912 et seq. herein.

On insurance on life of officer of corporation for benefit of the corporation, see notes in 16 L.R.A.(N.S.) 1020, and L.R.A.1915F, 979.

*Accumulative endowment certificates*, or tontine debenture certificates, or contracts of investment security, are fraudulent, contrary to public policy, and unlawful, where the premiums thereof as to maturity contain such elements of chance as to constitute a lottery, or where it cannot reasonably be expected that a reserve fund will be accumulated equal to the stipulated endowment values within the stated period without aid from lapses or appropriations from premiums on new business, State (ex rel. Sheets) v. Interstate Savings Investment Co. 64 Ohio St. 283, 52 L.R.A. 530, 60 N. E. 226 (although these certificates contained certain provisions covering principally dues, premiums, apportionment of funds, liability, being nonforfeitable, tontine funds, reinstatement, surrender value, loans, maturity of certificates, transfer, death of owner, authority of agents, loss, etc., the court declared that it was not "now called upon to draw the line of demarcation between such insurance and investment methods as have been approved by law and the schemes under consideration. We are not considering life insurance methods, tontine or other, building and loan associations or investment companies in general. We are only concerned with the question whether the methods of this company are lawful or not"). This case is *cited* and *considered* in Equitable Loan & Security Co. v. Waring, 117 Ga. 599, 618, 62 L.R.A. 93, 120, 44 S. E. 320.

[15] Mutual Life Ins. Co. v. Smith, 184 Fed. 1, 106 C. C. A. 593, 33 L.R.A.(N.S.) 439, rev'g Smith v. Mutual Life Ins. Co. 178 Fed. 510.

[16] Collman v. Equitable Life Assur. Soc. 133 Iowa, 177, 8 L.R.A.(N.S.) 1019, 110 N. W. 444.

On effect of failure to apply for paid-up insurance within time stipulated, see notes in 8 L.R.A.(N.S.) 193, and 51 L.R.A.(N.S.) 1044.

shall not be controlled by will.[16a] Nor is a policy contrary to public policy which insures against violation of a city ordinance by employees of a taxicab company.[17]

As very pertinent, however, to what is above stated, it is held that public policy is not a safe or trustworthy ground for legal decision; accordingly it is declared that "a contract or other transaction which is against public policy i. e. the general interest of this country is illegal;[17a] but public policy is a very unstable and dangerous foundation on which to build until made safe by decision." And this is applied in a case which holds that a contract of insurance is valid and not against public policy whereby a subject of a foreign government insures treasure with British underwriters against capture during transit from the foreign state to England even though war is threatened or imminent, and the foreign government in contemplation of war and in order to use the treasure in support of the war seizes it in transit but before war was declared between it and Great Britain, that is, there was a seizure by said foreign government of the property of its own subject; and such a contract is enforceable in an action in England against the underwriters after the restoration of peace.[17b]

[16a] Thomas v. Supreme Lodge Knights of Honor, 126 Wis. 593, 105 N. W. 922, 3 L.R.A.(N.S.) 904.

As to designation, etc., of beneficiaries by will, or disposal of certificate, or policy by will, see §§ 733 et seq. herein.

[17] Taxicab Motor Co. v. Pacific Coast Casualty Co. 73 Wash. 631, 132 Pac. 393.

[17a] *Citing* Egerton v. Earl Brownlow [1853] 4 H. L. Cas. 1, 161, 195, 196, 23 L. J. Ch. (N. S.) 348, 18 Jur. 71, 24 Eng. Rul. Cas. 118.

[17b] Janson v. Driefonstein Consol. Mines [1902] A. C. 484, 71 L. J. K. B. (N. S.) 857, 87 L. T. (N. S.) 372, 18 T. L. R. 796, 7 Com. Cas. 268, 5 B. R. C. 810, 832,—Lord Lindley (who also refers, on this point, to "the weighty observations of Alderson, B., and Parke, B., in Egerton v. Brownlow, [1853] H. L. Cas. 106, 123"), aff'g (1901) 2 K. B. 419, 70 L. J. K. B. (N. S.) 881, 49 W. R. 660, 85 L. T. (N. S.) 104, 17 T. L. R. 604, 6 Com. Cas. 198, s. c. [1900] 2 Q. B. 339, 69 L. J. Q. B. (N. S.) 771, 48 W. R. 619, 83 L. T. (N. S.) 79, 16 T. L. R. 438, 5 Com. Cas. 296. See this case under § 299a herein. See also §§ 281 et seq. herein.

This point of validity of the contract and public policy was clearly in issue in the principal case as it was claimed by counsel for appellants that "the gold was seized for the purpose of waging war against this country, and a contract of indemnity against such a loss is invalid" and that the "contract is void whether or not it was made in contemplation of war." On the other hand counsel for respondents claimed that: "The loss of the gold was within the express words of the policy caused by arrests of princes and peoples. . . . The construction of the appellant would be an undue extension of the authorities by which the insurance of alien enemies is forbidden. The original foundation of the rule was not public policy, but the primitive conception of war which imputed mutual hostility to the individual subjects of belligerent powers. . . . Public policy is a very insecure justification of breach of contract. In Nordenfelt v.

**§ 2531a. Insurance against capital conviction or execution for crime is void.**—An attempted insurance against capital conviction in the established courts of competent jurisdiction, in the event

Maxim Nordenfelt Guns and Ammunition Co. [1894] A. C. 535, at p. 553, Lord Watson said: 'A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal.' See also Jessel, M. R., on the 'paramount public policy' of not lightly interfering with freedom of contract. Printing and Numerical Registering Co. v. Sampson (1875) L. R. 19 Eq. 462–465, 44 L. J. Ch. N. S. 705, 32 L. T. N. S. 354, 23 Week. Rep. 463, 21 Eng. Rul. Cas. 696."

In addition to what is above quoted from Lord Lindley, Halsbury, L. C., said (5 B. R. C. 817, 818, 822): "Now, as I have said, I understand the judgment of Vaughan Williams, L. J., is put upon the sole ground that this policy is against public policy. He puts it at various parts of his judgment in different ways. He calls it a contravention of public interests, injurious to the country, inconsistent with public duty, repugnant to the interests of the state, and no doubt there are equivalent phrases to be found in many judgments where their application is expounded; but the learned judge, beyond using these phrases, does not go on to explain in what sense they are used, and how and on what principles of law the policy in question was unlawful.

"I do not think that the phrase 'against public policy' is one which in a court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy. If such a principle were admitted, I should very much concur with what Serjeant Marshall said in the first edition of his work on marine insurance a century ago; 'To avow or insinuate that it might, in any case, be proper for a judge to prevent a party from availing himself of an indisputable principle of law, in a court of justice, upon the ground of some notion of fancied policy or expedience, is a new doctrine in Westminster Hall, and has a direct tendency to render all law vague and uncertain. A rule of law, once established, ought to remain the same till it be annulled by the legislature, which alone has the power to decide on the policy or expedience of repealing laws, or suffering them to remain in force.' . . . But I do not think the law of England does leave the matter so much at large as seems to be assumed. In treating of various branches of the law, learned persons have analyzed the sources of the law, and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy; but I deny that any court can invent a new head of public policy; so a contract for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or, what is relevant here, the assisting of the King's enemies, are all undoubtedly unlawful things; and you may say that it is because they are contrary to public policy they are unlawful; but it is because these things have been either enacted or assumed to be by the common law unlawful, and not because a judge or court have a right to declare that such and such things are in his or their view contrary to public policy. Of course in the application of the principles here insisted on, it is inevitable that the particular case must be decided by a judge; he must find the facts, and he must decide whether the facts so found do or do not come within the principles which I have endeavored to describe, —that is, a principle of public pol-

that such conviction is unwarranted by the evidence and unjust will not be upheld by the courts as it is void as contrary to public policy which forbids the insertion of conditions which tend to induce crime and which, therefore, are not the basis of a lawful contract.[18]

§ 2531b. **Fidelity guaranty: validity of.**—A contract guaranteeing the honesty of employees is not void as being against public policy.[19] But where a foreign insurer has not complied with the

icy, recognized by the law, which the suggested contract is infringing, or is supposed to infringe. . . .

"My Lords, I conclude by reading the words of Parke, B., on this subject, when advising your Lordship's House in Egerton v. Lord Brownlow and others [1853]4 H. L. Cas. at p. 123: 'To allow this to be a ground of judicial decision would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes; the unwritten or common law from the decisions of our predecessors and of our existing courts, from textwriters of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have, no doubt, been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognized law, and we are therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise.'

"It is not necessary to go through all the principles of law which may make a contract altogether illegal. As a wagering contract is illegal, so wills creating a perpetuity have no operation in that respect, but it is enough for the purpose I have in hand. They are defined legal principles, known to and absolutely fixed as part of our law, and a judge is called upon to bring the instrument he has to construe to the test—whether it is or is not within such principles; but I do not think he has any jurisdiction to bring into the discussion his own views of what he may consider an inexpedient thing in his own peculiar view of public policy. To permit such a discussion to arise it must be a question of some public policy recognized by the law."

Lord Macnaghten said (5 B. R. C. 823): "It is not, I think, for private individuals to pronounce upon the foreign relations of their Sovereign or their country, and to measure their own responsibilities arising out of civil contracts with foreigners by a standard of public policy which they set up for themselves."

Lord Davey said (5 B. R. C. 826): "Public policy is always an unsafe and treacherous ground for legal decision, and in the present case it would not be easy to say on which side the balance of convenience would incline."

See Nigel Gold Mining Co. v. Hoade, 70 L. J. K. B. 1006, [1901] 2 K. B. 849, 85 L. T. 482, 50 W. R. 108, 6 Com. Cas. 268.

[18] Burt v. Union Central Life Ins. Co. 105 Fed. 419, 44 C. C. A. 548, 59 L.R.A. 393, aff'd 187 U. S. 362, 47 L. ed. 216, 23 Sup. Ct. 139. See §§ 833 et seq. herein.

[19] Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170, 30 L.R.A. 586, 56

state law as to transacting business, a bond insuring it against the dishonesty of its manager in said state is void and recovery is precluded.[20]

§ 2531c. **Usury.**—If a borrower from an insured procures a loan upon a lawful rate of interest, giving a real estate mortgage as security and also a life insurance policy procured by him on a life in which he has no insurable interest, and for which he signs premium notes with the insured in order to give value to the policy as collateral security for the loan, the premiums paid and agreed to be paid upon such policy cannot be regarded as additional interest for the loan so as to render it usurious.[1]

§ 2532. **Condition upholding suicide is void.**—Mr. Bunyon is of opinion that a stipulation to uphold suicide would be contrary to sound policy, and would take away "one of the restraints operating in the minds of men against the commission of crimes by the interest which they have in the welfare and prosperity of their connections. . . . For a policy, moreover, to remain in force when death arose from any such cause would be a fraud upon the insurers, for a man's estate would thereby benefit by his own felonious act."[2] And it is declared by the Federal supreme court that a contract of life insurance expressly providing for payment if the assured, in sound mind, takes his own life, would, even if not prohibited by statute, be against public policy as tempting or encouraging suicide to make provision for those dependent upon the insured, or to whom he was indebted, and would be subversive

Am. St. Rep. 464, 65 N. W. 351. See § 2766 herein.

On character of and rules governing contracts by corporations engaged for profit in business of guaranteeing the fidelity or contracts of other persons, see note in 33 L.R.A. (N.S.) 513; on guaranty of fidelity of employees as insurance, see note in 47 L.R.A.(N.S.) 294.

[20] McCanna & Fraser Co. v. Citizens' Trust & Surety Co. 76 Fed. 420, 24 C. C. A. 11, 39 U. S. App. 333, 35 L.R.A. 236, 6 Pa. Dist. Rep. 25.

When notes given surety company to cover defalcation in consideration of promise not to prosecute for embezzlement are void as against public policy, see United States Fidelity & Guaranty Co. v. Charles, 131 Ala. 658, 31 So. 558.

[1] Union Central Life Ins. Co. v. Hilliard, 63 Ohio St. 478, 53 L.R.A. 462 (annotated on validity of life insurance to secure debt to insurer), 81 Am. St. Rep. 644, 59 N. E. 230.

[2] Bunyon on Life Ins. (2d ed.) 72; *relying* upon Amicable Society v. Bolland, 4 Bligh (N. S.) 194, 2 Dow & Clark, 1, per Lord Lyndhurst. But he adds (Bunyon on Life Ins. [2d ed.] 74) that when the insurance is on the life of a nominee, the insurance can be no inducement to the criminal act, and may be construed to cover this as well as every other risk. Provision to pay suicide or not is void: Amicable Ins. Co. v. Bolland, 2 Dow & Clark, 1, 4 Bligh (N. S.) 194; Moore v. Woolsey, 4 El. & B. 243, 3 C. L. R. 207, 24 L. J. Q. B. 40, 1 Jur. (N. S.) 468, 3 W. R. 66. See §§ 2641, 2643, 2644, 2650 herein.

of sound mentality, endanger public interests and ought never to be upheld.[3]

**§ 2533. Insurance by common carrier against losses from negligence, etc., not against public policy.**—While a common carrier will not be permitted by contract or otherwise to exempt himself from liability for losses caused by his own negligence or the negligence of his servants, there is no reason of public policy which prohibits him from contracting with a third person for insurance against the very same losses. Therefore, he may by insurance indemnify himself against loss or injury to property intrusted to his care, even where the loss or injury is caused by his own or his servant's negligence.[4]

**§ 2534. Policy executed on Sunday.**—If the policy and premium note are executed on Sunday, the contract is void, and no re-

[3] Rotter v. Mutual Life Ins. Co. 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. 300, *cited* in Hart v. Modern Woodmen of America, 60 Kan. 678, 681, 72 Am. St. Rep. 380, 57 Pac. 936; Campbell v. Supreme Conclave Independent Order of Heptasophs, 66 N. J. L. 274, 276, 54 L.R.A. 576, 577, 49 Atl. 550.

On conflict of laws as to suicide of insured, see notes in 63 L.R.A. 867; 23 L.R.A.(N.S.) 981; and 52 L.R.A. (N.S.) 284; on suicide while sane as defense to an action on a policy or certificate containing no provision as to effect of suicide, see note in 8 L.R.A.(N.S.) 1124.

[4] American Casualty Ins. Co's Case (Boston & A. R. Co. v. Mercantile Trust & Deposit Co.) 82 Md. 535, 576, 38 L.R.A. 97. See opinion of McSherry, J. That common carrier may insure goods in possession as "goods in trust as carriers to the full value, and in case of loss by fire may recover the full amount, even though by statute or by special contract the carrier is not responsible for losses by fire, see London & Northwestern Ry. Co. v. Glyn, 28 L. J. Q. B. 188, 5 Jur. (N. S.) 1004, *cited* in Macnamara on Carriers (ed. 1888) p. 94. See also Minneapolis, St. Paul & S. S. M. R. Co. v. Home Ins. Co. 64 Minn. 61, 66 N. W. 132; Trenton Passenger R. Co. v. Guarantor's Liability & Indemnity Co. 60 N. J. L. 246, 44 L.R.A. 213, 37 Atl. 609. Common carriers or telegraph companies upon which a public use is impressed are subject to legislative interference, and cannot by contract exempt themselves from liability for negligence of their employees: Merchants Dispatch Transportation Co. v. Block, 86 Tenn. 392; Marr v. Western Union Tel. Co. 85 Tenn. 529. The last case decides that a telegraph company cannot by contract absolutely exempt itself from all liability for damages arising from the negligence of its servants. See in this last connection Joyce on Electric Law (2d ed.) secs. 16, 722.

As to limitation of liability: carriers: right to proceeds of insurance on cargo for account of whom it may concern, see Symmers v. Carroll, 207 N. Y. 632, 47 L.R.A.(N.S.) 196, and note, 101 N. E. 698.

As to limitation of liability act of Congress, June 26, 1884, sec. 18 and act March 3, 1851, c. 43, and that owner's liability cannot be limited merely to value of vessel and freight, etc., see Great Lakes Towing Co. v. Mills Transportation Co. 155 Fed. 11, 83 C. C. A. 607, 22 L.R.A.(N.S.) 769, and note, s. c. 207 U. S. 596, 52 L. ed. 357, 28 Sup. Ct. 262.

covery can be had on the note even though both note and policy be postdated, there being no subsequent ratification of the act.[5]

§ 2535. **Newspaper company cannot carry on accident insurance business.**—A company organized with power to publish a newspaper and conduct a general printing business cannot, it is held, insure against accidents, and as a coupon printed in a daily newspaper by which the publishers agree that, in case any person meeting death by accident, and having a copy of the newspaper on his person with his name signed in the blank space in the coupon, they will pay to the heir of such person a certain sum, constitutes an accident policy, it is beyond the powers of the company to issue it.[6]

§ 2536. **Where traffic insured unlawful, or unlawful business carried on upon insured property: fire risk.**—If one is engaged in a business which the law legalizes only upon the performance of certain conditions, an insurance upon such traffic while it continues unlawful, by reason of noncompliance with the statutory requirements legalizing it, would undoubtedly be void,[7] and if at the time of effecting a policy on his stock in trade, and until after the contract of insurance is completed, a part or the whole of such stock consists of goods in which it is unlawful to traffic except the act be legalized, by conformity with certain statutory requirements, and it has not been so legalized, the policy will not attach, such use being also prohibited therein or the traffic increasing the risk.[8] Cases of the above character rest upon the principle that the property insured, or a part thereof, is used in connection with the carrying on of an unlawful traffic, unlawful until legalized, or

[5] Heller v. Crawford, 37 Ind. 279. But see note to Myers v. Meinrath, 101 Mass. 366, 3 Am. Rep. 368; note to Allen v. Duffie, 43 Mich. 1. 38 Am. Rep. 159; Robeson v. French, 12 Mete. (53 Mass.) 24, 45 Am. Dec. 237; 2 Parsons on Contracts (7th ed.) bottom page 898 et seq. and note.

But *compare* upon the general point of validity of a contract made on Sunday or a holiday, article by Edward H. Decker vol. 22, Case & Comment, pp. 545–552.

[6] So held in Commonwealth v. Philadelphia Inquirer (Pa. C. P.) 3 Pa. Dist. R. 742.

But *compare* Hunter v. Hunter (Ct. Sess.) 7 F. 136 (substantially same proposition and money was paid to sister as "next-of-kin:" suit was brought by brothers against her, but it was held they had no right to share in the fund).

[7] Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124, per Campbell, J.; Armstrong v. Toler, 11 Wheat. (24 U. S.) 258, 6 L. ed. 468, and cases cited, and cases under this section.

On validity of fire insurance on property illegally used, see note in 40 L.R.A. 845; on validity of insurance on intoxicating liquors as affected by liquor laws, see note in 31 L.R.A.(N.S.) 873.

[8] Lawrence v. National Ins. Co. 127 Mass. 557; Johnston v. Union Ins. Co. 127 Mass. 555. Chapter LXIII. herein.

used to aid or further the same, and where the intent of the contract substantially effects a violation of or encourages or advances acts in violation of law.[9] But if the insurance be merely upon the property in which such illegal traffic is carried on, or in which such unlawful goods are kept, a question may exist whether the insurance is not within that class of cases where the contract may be valid, even though it is connected with an independent illegal transaction which it is in no way designed to aid or to promote, and it has been so held.[10] But even in a case of this character, where the premises are insured and they are kept solely or partly for carrying on an unlawful business, the question is pertinent whether the insurance is not so closely connected with the illegal or unlawful use that it does in fact operate as a cover for the unlawful purpose, and so taint the contract itself with illegality. If it does tend to assist or abet the wrongdoer in transgressing the laws, and if it does in reality aid or promote the illegal transaction, and encourages an abatement of the laws, there are strong reasons for holding that the insurance is illegal, and not a mere collateral valid contract in which no illegal design enters.[11] Again, the main

[9] Boardman v. Merrimack Ins. Co. 8 Cush. (62 Mass.) 583. See also Clark v. Protection Ins. Co. 1 Story (U. S. C. C.) 109, Fed. Cas. No. 2,-832; Russell v. DeGrand, 15 Mass. 35; Swanger v. Mayberry, 59 Cal. 91 ("well established that contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein is void. This applies to every contract which is founded on a transaction malum in se, or which is prohibited by statute on the ground of public policy"); United States v. Sherman, 98 U. S. 565, 25 L. ed. 235.

[10] Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124.

[11] See as to principle, Ocean Ins. Co. v. Polleys, 13 Pet. (38 U. S.) 157, 10 L. ed. 105, per Story, J.; Bartle v. Coleman, 4 Pet. (29 U. S.) 184, 7 L. ed. 825 (fraud will not be aided by the courts); Patton v. Nicholson, 3 Wheat. (16 U. S.) 204, 4 L. ed. 3711. Johnson v. Union Ins. Co. 127 Mass. 555; Ward v. Wood, 13 Mass. 539; Warren v. Manufacturers' Ins. Co. 13 Pick. (30 Mass.) 518, 25 Am. Dec. 341, per Wilde, J.; Campbell v. Charter Oak Ins. Co. 10 Allen (92 Mass.) 213; Boardman v. Merrimack Mutual Fire Ins. Co. 8 Cush. (62 Mass.) 583. Mutual Benefit Ins. Co. v. Davis, 12 N. Y. 569; Lycoming Fire Ins. Co. v. Wright & Son, 55 Vt. 526, s. c. 60 Vt. 515 (presumed that foreign insurer had duly complied with the laws and that the secretary of state had performed his duty and issued license). Carruthers v. Gray, 15 East, 35, 3 Camp. 142; Bird v. Appleton, 8 Term Rep. 562, 5 R. R. 468, 13 Eng. Rul. Cas. 547, per Lord Kenyon, C. J.; Johnson v. Hudson, 11 East, 180 (a question of breach of mere revenue regulation, there being no fraud thereon). *Examine* chapter LXIII. herein.

The words of Mr. Duer in relation to contracts of marine insurance are of force in this connection. He says: "The statutory provision, the breach of which discharges the insurers, must bear a direct and immediate relation to the voyage insured. It must operate either by its terms or by a necessary inference as a pro-

question is not solely one whether the contract is susceptible of legal performance, or that the premises insured are susceptible of lawful use, but whether there has actually been an unlawful use which the policy is intended to actually cover, or would in fact cover if it were admitted to be a lawful use. It is true that if the contract is susceptible of a double construction covering both a lawful and unlawful use or performance, that the law presumes a lawful intent, or at least admits proof of a lawful performance, but if an unlawful use or illegal performance is proven, then the contract will be void.[12]

hibition of the voyage, where no such connection subsists between the actual voyage and the provisions of the statute, where consequently the relation between the illegal act and the policy is not direct, but remote and incidental, so that neither the design nor tendency of the latter is to aid and promote the commission of the former, and the validity of the contract is not impaired or affected:" 1 Duer on Marine Ins. (ed. 1845) 360, secs. 50 et seq.

[12] Waugh v. Morris, L. R. 8 Q. B. 202, 208, 42 L. J. Q. B. 57, 28 L. T. 265, 21 W. R. 438, 1 Asp. M. C. 573; Russell v. De Grand, 15 Mass. 35; Haines v. Busk, 5 Taunt. 521, 1 Marsh. 191; Holland v. Hall, 1 Barn. & Ald. 53, 18 R. R. 428; Gill v. Dunlop, 7 Taunt. 193; Thornton v. Lance, 4 Camp. 231. See Brown on Parol Evidence (ed. 1893) p. 61, sec. 34. And as bearing somewhat upon the question involved herein, it may be stated as a general rule that, in other than insurance contracts, if the property concerning which the contract is made is ordinarily susceptible of a lawful use, the contract is not validated by the mere fact that the person contracting to do some matter or thing in or about the property knew that the premises were intended to be applied to an unlawful use, unless the services rendered under the contract were furnished directly for this purpose of aiding or abetting and furthering the illegal act. Maddox v. Thornton, 2 Cranch (U. S. C. C.) 260, Fed. Cas. No. 1363. See also:

*United States.*—Ocean Ins. Co. v. Polleys, 13 Pet. (38 U. S.) 157, 10 L. ed. 105, per Story, J.

*Arkansas.*—Tatum v. Kelly, 25 Ark. 209, contract void when in aid of rebellion.

*Missouri.*—Michael v. Bacon, 49 Mo. 474, 8 Am. Rep. 138.

*New York.*—Tracy v. Talmadge, 14 N. Y. (4 Kern.) 162, illegal use of property.

*Ohio.*—Spurgeon v. McElwain, 6 Ohio, 442, keeping a ninepin alley unlawfully.

*England.*—Lewis v. Davison, 4 Mees. & W. 654.

The mere fact that a foreign vendor knew that the goods were intended to be smuggled by the purchaser will not of itself avoid a recovery of the contract price; he must have aided or abetted the act, as in case where he aids in packing the goods for smuggling: Holman v. Johnson, Cowp. 341; Gibson v. Service, 5 Taunt. 433, 1 Marsh. 119, 15 R. R. 541. But if the services rendered are of a character which clearly evidence that they were intended to be rendered in aid and furtherance of the unlawful or prohibited act, or if the statute provides for the doing of certain acts to render the service lawful, and the law is not complied with, the contract cannot be enforced. The Pioneer, Deady (U. S. D. C.) 72, Fed. Cas. No. 11,177; Chadwick v. Collins, 26 Pa. St. 138; Badgely v. Beale, 3 Watts (Pa.) 263; De Begnis v. Armistead, 10 Bing. 107, 3 M. & Scott, 511, 2 L. J. C. P. 214; Duke of Brunswick v.

It is held that noncompliance by foreign insurance companies with certain statutes in respect to doing business in a state, or concerning the appointment of agents vitiates contracts made by them in such state,[13] although there are numerous decisions otherwise.[14]

The keeping and sale of liquor without license is using the premises for an unlawful purpose when the law requires such license.[15] But a contract of insurance of whisky stored in Iowa is not void because it tends to assist the insured to violate the public policy and laws of Iowa against the possession and sale of intoxicating liquors therein, where the statute does not expressly forbid or avoid such contracts.[16] And insurance upon merchandise kept for an illegal business, such as a stock of drugs and liquors, kept by a dealer who does not have the required permit under the law to sell them is not void as against public policy.[17] Under the Mississippi code requiring a privilege tax license of a merchant, authorizing the carrying of a stock of goods not exceeding a certain amount, if the stock exceeds such limit the business becomes eo instanti illegal, and if thereafter an insurance is effected on the

Crowl, 4 Exch. 492, 19 L. J. Ex. 112, 13 Jur. 1058 ("an attorney cannot recover for business done, unless he has obtained a certificate, which was in force for the period when the work was done").

[13] *United States.*—Lamb v. Lamb, 6 Biss. (U. S. C. C.) 420, Fed. Cas. No. 8,018, 7 Chic. Leg. News, 411.

*Illinois.*—Cincinnati Mutual Assurance Co. v. Rosenthall, 55 Ill. 85.

*Indiana.*—Farmers' & Merchants' Ins. Co. v. Harrah, 47 Ind. 236; Union Central Life Ins. Co. v. Thomas, 46 Ind. 44; Hoffman v. Banks, 41 Ind. 1; Rising Sun Ins. Co. v. Slaughter, 20 Ind. 520.

*Kentucky.*—Franklin Ins. Co. v. Louisville & Arkansas Packet Co. 9 Bush (Ky.) 590.

*Massachusetts.*—Williams v. Cheney, 8 Gray (74 Mass.) 206; Roche v. Ladd, 1 Allen (83 Mass.) 436.

*New Hampshire.*—Haverhill Ins. Co. v. Prescott, 42 N. H. 547.

*Wisconsin.*—Ætna Ins. Co. v. Harvey, 11 Wis. 394. See § 333 herein.

[14] *United States.*—The Manistee, 5 Biss. (U. S. C. C.) 381, Fed. Cas. No. 9027.

*Massachusetts.*—Provincial Ins. Co. v. Lapsley, 15 Gray (81 Mass.) 262.

*Michigan.*—Clay Fire & Marine Ins. Co. v. Huron Salt Manufacturing Co. 31 Mich. 346.

*Missouri.*—Columbus Ins. Co. v. Walsh, 18 Mo. 229.

*New York.*—Huntly v. Merrill, 32 Barb. (N. Y.) 626.

*Ohio.*—Union Mutual Life Ins. Co. v. McMillen, 24 Ohio St. 67.

*Pennsylvania.*—Thornton v. Western Reserve Farmers' Ins. Co. 31 Pa. St. 529. See §§ 332 et seq. herein.

[15] Kelly v. Worcester Mutual Fire Ins. Co. 97 Mass. 284.

[16] Mechanics' Ins. Co. v. C. A. Hoover Distilling Co. 182 Fed. 590, 105 C. C. A. 128, 31 L.R.A.(N.S.) 873 (annotated on validity of insurance on intoxicating liquors as affected by liquor laws). See Kellogg v. German American Ins. Co. 133 Mo. App. 391, 113 S. W. 663.

[17] Erb v. German-American Ins. Co. 98 Iowa, 606, 40 L.R.A. 845, 67 N. W. 583. *Examine* Kellogg v. German-American Ins. Co. 133 Mo. App. 391, 113 S. W. 663.

stock, it is a contract "made in reference to the business" thus illegally "carried on," and is void.[18]

The placing by a dealer of a musical instrument in a house of ill fame, with a hope of selling it to the proprietor, is not so far against public policy as to avoid a policy upon the instrument.[19] So a policy may cover furniture in a bawdyhouse since the unlawful business is not thereby increased.[20] Again, a policy on a house leased by the owner to a lewd woman, with knowledge on his part that it is to be used by her for purposes of prostitution, is held not void so as to preclude recovery in case of loss, in the absence of any policy stipulation under which the immoral use of the house vacates the contract. In such case the insurance contract does not grow out of, nor is it connected with, the immoral and illegal use of the house and it is clearly disconnected from the contract of rental for such use.[21]

**§ 2537. Illegal use of property when susceptible of legitimate use: public policy.**—The fact that insured property susceptible of a legitimate use is used for an illegal or unlawful purpose does not avoid the risk as contrary to public policy.[1]

**§ 2538. Illegal occupation of insured: life risk.**—The fact that the party whose life was insured was engaged in an illegal trade will not of itself deprive the one for whose benefit the policy was effected of the right to recover on the policy, he not having known of such illegal employment, nor having participated therein.[2]

**§ 2539. Goods the importation or exportation of which are prohibited.**—Goods the importation or exportation of which are forbidden by the laws of this country cannot form the lawful subject of a contract of insurance here. The contract is vitiated by the illegality to the extent that the court at once when the fact is disclosed will refuse its enforcement, even though the insurer had full information of the character of the risk assured. No tribunal can by its decree impart life to a contract which tends so directly to a subversion of its laws, or which if permitted to stand would only encourage the direct violation of the laws of revenue and trade, but would

[18] Sun Mutual Ins. Co. v. Searles 73 Miss. 62, 18 So. 544, Miss. Ann. Code, 1892, c. 108.

[19] Electrova Co. v. Spring Garden Ins. Co. 156 N. Car. 232, 35 L.R.A.(N.S.) 1216, 72 S. E. 306.

[20] Conithan v. Royal Ins. Co. 91 Miss. 386, 45 So. 361, 18 L.R.A. (N.S.) 214.

[21] Phenix Ins. Co. v. Clay, 101 Ga. 331, 65 Am. St. Rep. 307, 28 S. E. 853.

On insurance on bawdyhouse or furniture therein, see notes in 18 L.R.A.(N.S.) 214, and L.R.A.1917B, 257.

[1] Erb v. German-American Ins. Co. 98 Iowa, 606, 40 L.R.A. 845, 67 N. W. 583 (case on policy on stock of drugs and liquors).

[2] Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38.

secure an indemnity to the transgressor. These principles are well settled.[3] And if the traffic in which the ship is to be engaged is forbidden by the law of this country, a policy on the ship for the voyage is void, as well also as an insurance covering freight.[4]

As a war measure but, as declared by the President of the United States, for the purposes merely of export control and of public safety, rather than of export prohibition, and in the interests of facility and expediency, the President, acting under authority of a law enacted by Congress on June 15, 1917, issued a Proclamation of date August 27, 1917, whereby the export of practically all articles of commerce from this country is prohibited. Two lists are made; the first, applicable to the enemy and his allies, the second covering all the other countries of the world. This Proclamation also adds a few articles to the list of commodities controlled by an earlier Proclamation of July 9, 1917. License is required for shipment from the United States to the allies and to all other countries. The effect of these prohibitions or control of exports is evidently intended to stop leakages into Germany through neutrals, which is the same purpose that is endeavored to be accomplished by Orders in Council in England, or by proclamations in that country relating to contraband or to contraband of war and ulterior or ultimate destination. Insurances therefore which contravene said prohibitions come within the rule first above stated; that is, that goods the importation or exportation of which are forbidden by the laws of this country, cannot form the lawful subject of a contract of insurance here, etc., and this would apply to all the articles enumerated in said Proclamation except so far as those goods are shipped under license

[3] Gray v. Sims, 3 Wash. (U. S. C. C.) 276, Fed. Cas. No. 5,729; Russell v. De Grand, 15 Mass. 35; Richardson v. Maine Ins. Co. 6 Mass. 102, 4 Am. Dec. 92. See generally Armstrong v. Toler, 11 Wheat. (24 U. S.) 258, 6 L. ed. 468; Hannay v. Eve, 3 Cranch (7 U. S.) 242, 2 L. ed. 427; Johnson v. Hudson, 11 East, 180, 10 R. R. 465; Ritchie v. Smith, 6 Com. B. 462, 18 L. J. C. P. 9, 13 Jur. 63; Holman v. Johnston, Cowp. 341; Cope v. Rowlands, 2 Mees. & W. 149, 2 Gale, 231, 6 L. J. Ex. 63; Catlin v. Bell, 4 Camp. 183; Emerigon on Ins. (Meredith's ed. 1850) c. viii. sec. 5, p. 169; 1 Marshall on Ins. (ed. 1810) 55 et seq.; 3 Kent's Commentaries (5th ed.) 262; 1 Arnould on Marine Ins. (Perkins' ed.) 1850) *704 et seq.; 2 Id. (Maclachlan's ed. 1887) 693 (*citing* Cushing's Laws; consolidation act 1876; 39 & 40 Vict. c. 36); 1 Id. (9th ed. Hart & Simey) secs. 741 et seq., pp. 931 et seq.; Duer on Marine Ins. (ed. 1845) 315 et seq. See U. S. Rev. Stats. sec. 3082; Acts Cong. June 22, 1874, c. 391.

When adventure not illegal: edict of Persian government of 1881, forbidding importation of arms into Persia, but never enforced: *insured believed prohibition dead letter:* goods seized and confiscated: also held no concealment. Fracis v. Sea Ins. Co. 79 L. T. N. S. 28, 47 Wkly. R. 119, 8 Asp. 418.

[4] Gray v. Sims, 3 Wash. (U. S. C. C.) 276, Fed. Cas. No. 5,729.

or, as stated in the statute, and said Proclamation, where they are shipped "under such regulations and orders, and subject to such limitations and exceptions as the President shall prescribe until otherwise ordered by the President or by Congress." [5]

**§ 2540. Trade prohibited by foreign laws: effect of treaties.**—In determining the legality of a contract the courts will not, subject to the exceptions herein noted, consider the prohibitory laws of revenue or trade of a foreign country under the common form of policy, and insurances here in contravention thereof are valid, provided the policy is written with the full knowledge of the intended trade, and also conditioned that such risk is not expressly excepted. But if the contract be against the usual risks, and there is no knowledge of the contemplated breach of the foreign laws of trade or revenue, the underwriters cannot be presumed to have taken the risk of condemnation from breach of the trade laws of such country, unless the voyage be to a place where no legal trade can be carried on, or there are other facts which show that such illegal trading was evidently within the contemplation of the parties.[6] In the application of this rule a distinction should be observed between

[5] For text of Proclamation and list of articles which is important not only because insurances on prohibited articles are illegal as stated in the text, but also because of the like nature or character of certain of the prohibited goods and those of contraband of war in that arms and ammunitions and the ingredients of their manufacture, and other articles which might contribute to the aid and support of the enemy and their continuance of the war are covered. See Appendix G, herein.

As to contraband of war, see §§ 2568–2569a herein.

As to ulterior or ultimate destination of goods, see §§ 2567, 2569a herein.

The subject of embargo is fully considered elsewhere herein under the several headings to which it properly belongs.

[6] *United States.*—Andrews v. Essex Fire & Marine Ins. Co. 3 Mason (U. S. C. C.) 6, 17, Fed. Cas. No. 374, per Story, J.; Seton v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 175, Fed. Cas. No. 12,675.

*Maryland.*—Maryland & Phœnix Ins. Co. v. Battlehurst, 5 Gill & J. (Md.) 159.

*Massachusetts.*—Archibald v. Mercantile Ins. Co. 3 Pick. (20 Mass.) 70, 73; Parker v. Jones, 13 Mass. 173; Richardson v. Fire & Marine Ins. Co. 6 Mass. 102, 4 Am. Dec. 92; Pollock v. Babcock, 6 Mass. 234; Cook v. Essex Ins. Co. 6 Mass. 122.

*New York.*—Gardner v. Smith, 1 Johns. Cas. (N. Y.) 141; Blagge v. New York Ins. Co. 1 Caines (N. Y.) 549.

*South Carolina.*—McFee v. South Carolina Ins. Co. 2 McCord (S. C.) 503, 13 Am. Dec. 757.

*England.*—Planche v. Fletcher, 1 Doug. 251, reported also in 1 Park on Ins. (8th ed.) 360; Lever v. Fletcher, reported in 1 Park on Ins. (8th ed.) 506; 1 Marshall on Ins. (ed. 1810) 61.

See also Emerigon on Ins. (Meredith's ed. 1850) c. viii. secs. 5 et seq.; 1 Marshall on Ins. (ed. 1810) 60 et seq.; 1 Phillips on Ins. (3d ed.) 657, sec. 1117; 1 Arnould on Marine Ins. (Perkins' ed. 1850) **706 et seq.; 2 Id. (Maclachlan's ed. 1887) 693; Id.

insurances which contravene merely the laws of revenue and trade of a foreign country and those which are opposed to subsisting treaties between this and foreign countries, since if by such treaty a certain trade or trade in particular commodities is prohibited, the subjects of each country thereto are bound the same as if by municipal law, and insurances upon voyages in contravention of the treaty are illegal and void.[7]

**§ 2541. Exportation otherwise legal may become illegal by subsequent execution of agreement in evasion of revenue laws.**—Although the goods may be exported in conformity with the requirements of the laws of the country, yet if in pursuance of an agreement made here prior to the exportation and consummated while the voyage exists as an entire voyage there is a fraudulent evasion and breach of the revenue laws, the contract of insurance is vitiated. If the agreement to evade the revenue laws is made here, it is immaterial at what point of an entire voyage insured it is to be executed. It nevertheless makes the exportation of the goods unlawful.[8] This

(9th ed. Hart & Simey) secs. 742 et seq., pp. 932 et seq.

See as to principal involved, Kohn v. Schooner Renaissance, 5 La. Ann. 25, 52 Am. Dec. 577; Ludlow v. Van Rensselaer, 1 Johns. (N. Y.) 94; Holman v. Johnson, Cowp. 341; Lightfoot v. Tenant, 1 Bos. & P. 551, 4 R. R. 735. But see 3 Kent's Commentaries (13th ed.) *263, *265; Story's Conflict of Laws (7th ed.) secs. 255–57.

As to prohibition by twenty-one countries but not from the United States of export of wheat: partial prohibition: distinction between a total prevention of shipment: sellers right to cancel, under agreement, see Ford & Sons Ltd. v. Leethan & Sons Ltd. 84 L. J. K. B. 2101, 21 Com. Cas. 55, 31 T. L. R. 552.

[7] The Eenrom, 2 Rob. Adm. 6; The Neutralitet, 3 Rob. Adm. 296; 1 Duer on Marine Ins. (ed. 1845) 349, sec. 38. Mr. Marshall says: "Even where the trade insured is to be carried on by British subjects not only contrary to the laws of a foreign state, but contrary also to the express provisions of a treaty to which Great Britain was a party, yet if the insurers subscribe the policy with full knowledge of the nature of the trade, the contract will bind him:" 1 Marshall on Ins. (ed. 1810) 60, reporting Lever v. Fletcher, Park on Ins. (8th ed.) 506, per Lord Mansfield. Mr. Maclachlan (2 Arnould on Marine Ins. (Maclachlan's ed. 1887) 693, note) says this statement of Mr. Marshall's "is an error of long standing:" see also Id. 697. "The Constitution and laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under authority of the United States are declared to be the supreme law of the land, and the judges in every state are to be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding:" Const. U. S. art. vi. See also Cooley's Constitutional Limitations (6th ed.) 18. "Validity of an insurance in contravention of the laws of a foreign country:" Article 21, Amer. Jur. 138 (1839), translated from article by Dr. Lewis Duncker, University-Syndic at Marburg, published in the Archiv für die Civilistiche Praxis, vol. 21.

[8] Gibson v. Service, 5 Taunt. 433, 1 Marsh. 119, 15 R. R. 541. See Sturges v. Bush, 5 Day (Conn.) 452; Pond v. Smith, 4 Conn. 297.

conforms with the general rule of law that courts will not uphold a mere device for carrying into effect that which the legislature has said shall not be done, nor can one by an indirect and circuitous evasion of the law effect legally that which cannot directly be accomplished in the face of a prohibitory law, whether the prohibition be express or implied.[9]

**§ 2542. Effect of prohibitory statute imposing penalty: collateral acts.**—If a statute prohibits under a penalty the carrying of certain materials on vessels, the noncompliance with such statute by the owners of the vessel does not affect the insurance on the vessel or cargo.[10] So if a statute provides that a certain quantity of water shall be carried on board vessels, and in case of noncompliance that the crew shall have a remedy against the owners and masters, the voyage is not rendered illegal by noncompliance.[11] It will be observed from an examination of the cases that there is a distinction between a statute which, although it contains no prohibitory words, yet by imposing a penalty implies a prohibition, and makes, therefore, a contract concerning the act so impliedly prohibited unlawful and unenforceable,[12] and those cases where it is clearly evident from the enactment that it was not intended to render unlawful the prohibited act, and the statute may reasonably be held to be directory. The whole purpose of the statute is subserved by imposing the penalty, especially so where the statute is intended for the benefit of particular persons having no influence upon the public welfare, nor being founded upon reasons of public policy. In this class of cases the court will construe the contract so as to effect the

[9] Brown's Legal Maxims (7th Am. ed.) sec. *489, *citing* Morris v. Blackman, 2 Hurl. & C. 912, 918, 10 Jur. (N. S.) 520; Booth v. Bank of England, 7 Clark & F. 509, West. 298, 6 Bing. (O. S.) 415; Kendall v. United States, 12 Pet. (37 U. S.) 524, 9 L. ed. 1181, per Mr. Justice Thompson; Hughes v. Statham, 4 Barn. & C. 187, 193, 6 D. & R. 219, 3 L. J. (N. S.) K. B. 179; Mouys v. Leake, 8 Term Rep. 411, 415, per Lord Kenyon, C. J.

[10] Sherlock v. Globe Ins. Co. 1 Cinc. (Ohio) 193, 13 Ohio Dec. 495, rev'd 25 Ohio St. 50.

[11] Warren v. Manufacturers' Ins. Co. 13 Pick. (30 Mass.) 518.

[12] Clark v. Protection Ins. Co. 1 Story (U. S. C. C.) 109, Fed. Cas. No. 2,832, per Story, J.; The Pioneer, Deady (U. S. C. C.) 72, Fed. Cas. No. 11,177; Swords v. Owen, 43 How. Pr. (N. Y.) 176, 2 Jones & S. (N. Y.) 277; Fowler v. Scully, 72 Pa. St. 456, 13 Am. Rep. 699; Suart v. Powell, 1 Barn. & Adol. 266, 8 S. J. (O. S.) K. B. 371, per Lord Tenterden; Bartlett v. Vinor, Carth. 252, per Lord Holt; Drury v. De Fontaine, 1 Taunt. 131, 136, per Tindal, C. J.; Bensley v. Bignold, 5 Barn. & Ald. 335; De Begnis v. Armistead, 10 Bing. 107, 3 M. & Scott, 511, 2 L. J. C. P. 214, 6 Eng. Rul. Cas. 338; Law v. Hodson, 11 East, 300, 2 Camp. 147, 10 R. R. 513; Blachford v. Preston, 8 Term Rep. 89; Farmer v. Legg, 7 Term Rep. 186; Johnston v. Sutton, 1 Doug. 254; Gallini v. Laborie, 5 Term Rep. 242; Ribbans v. Crickett, 1 Bos. & P. 264.

purpose contemplated, and will not extend it so as to invalidate the contract itself, and, applying the rule to insurances, the voyage or trade will not be held illegal by reason of noncompliance with the statute.[13]

We have elsewhere given consideration to the question whether by the violation of some statute expressly or impliedly prohibiting an act the insurable interest is devested at that moment the illegal act is done, or not until seizure or perhaps until forfeiture declared;[14] and where a statute expressly or impliedly prohibits an act, the question arises whether the noncompliance therewith at the inception of the voyage makes the subsequent voyage or trade illegal. In Ocean Insurance Company v. Polleys[15] the register was obtained without conforming to the requirements of the laws of the United States relating thereto, and it was held that the insurance was not avoided thereby. In Clark v. Protection Insurance Company,[16] a chain cable was smuggled aboard subsequently to the insurance, and it was held that the infraction of the law was covered by a penalty, and the vessel was not liable to forfeiture for receiving smuggled goods, and that the insurance was not avoided, and also that an insurance on the chain cable was good. In Carruthers v. Gray,[17] the insurers were held not released because of the fact that the goods insured were not mentioned in the ship's manifest contrary to the provisions of the statute. In Redmond v. Smith[18] the statute was passed for a collateral purpose, and there was a penalty for noncompliance therewith, and it was held that the voyage was not illegal because of a failure to have shipping articles.[19]

**§ 2543. Trade which would otherwise be invalid because interdicted may be valid through necessity.**—If a trade with a foreign

[13] Clark v. Protection Ins. Co. 1 Story (U. S. C. C.) 109, Fed. Cas. No. 2,832; Warren v. Manufacturers' Ins. Co. 13 Pick. (30 Mass.) 518, and cases cited; Ward v. Wood, 13 Mass. 538, 539; Brown v. Duncan, 10 Barn. & C. 93, 5 Man. & Ry. 114, 8 L. J. (O. S.) K. B. 60, per Lord Tenterden.

See as to general rule: Fackler v. Ford, 24 How. (65 U. S.) 322, 16 L. ed. 690; Harris v. Runnels, 12 How. (53 U. S.) 79, 13 L. ed. 901; Pangborn v. Westlake, 36 Iowa, 546; Oneida Bank v. Ontario Bank, 21 N. Y. (7 Smith) 490. See § 2168 herein, as to statutes requiring pilot to be employed under penalty for noncompliance. "The same consequence," viz., avoiding the policy, "does not follow from the violation of acts of parliament which, though connected with the trade and navigation of this country, are yet passed for a collateral purpose:" 1 Arnould on Marine Ins. (Perkins' ed. 1850) *765, sec. 266; 2 Arnould on Marine Ins. (Maclachlan's ed. 1887) 697.

[14] *Examine* § 904 herein.

[15] 13 Pet. (38 U. S.) 157, 10 L. ed. 105.

[16] 1 Story (U. S. C. C.) 109, Fed. Cas. No. 2,832.

[17] 3 Camp. 142, 15 East, 35.

[18] 7 Man. & G. 457; 13 L. J. C. P. 159, 2 D. & G. 280, 8 Scott (N. R.) 250, 8 Jur. 711.

[19] See Farmer v. Legg, 7 Term Rep.

power be interdicted by an act of Congress, and a vessel is forced by stress of weather into a port of such power, and is obliged to land her cargo and is prevented by that government from reloading, she is not obligated to abandon and seek redress from her own government, but may take a new cargo in exchange therefor, or a cargo purchased with the proceeds of the sale thereof, and the policy is not vitiated by such act: in such case the offense is not intentional. This was so held under the nonintercourse law of 1798.[20]

**§ 2544. Contract of indemnity against embargo: when valid.**—A contract to indemnify against an embargo which the government of the parties may impose at a future time is not against the policy of the law and is valid.[1]

**§ 2545. Effect of violation of embargo.**—A trade carried on in contravention of an embargo is illegal, and an insurance of such trade is void.[2] If the voyage is begun with a knowledge of its being prohibited or illegal, the policy is void, and the policy having at-

186. Certain qualifications were required of the master engaged in voyages for slave trading under a penalty upon both master and owners for noncompliance, and the certificate not being in exact conformity with the requirements of the statute, it was held that the voyage was illegal and the policy void. Mr. Duer, who exhaustively considers this question, concludes that "where the prohibited act, whatever may be the nature of the penalty imposed, renders the subsequent voyage or trade illegal, as a necessary consequence it vacates the policy," but he makes the distinction that if no forfeiture is created by the law, it being limited to the punishment of the offender, "the participation or privity of assured is necessary to be proved in order to avoid the policy:" 1 Duer on Ins. (ed. 1845) 318, 319 et seq., 377–87. As to what acts regulating trade and navigation were in force in 1887, see 2 Arnould on Marine Ins. (Maclachlan's ed. 1887) 695.

[20] Hallett v. Jenks, 3 Cranch (7 U. S.) 210, 2 L. ed. 414. See, as to distinctions between a case of this character and excuse for traffic with an enemy, opinion of Marshall, C. J., in above case: Hallett v. Jenks, 3 Cranch (U. S.) 210, 2 L. ed. 414; The Seyerstadt, 1 Dod. 241; The Catharina Maria, 1 Ed. Adm. 337. See The James Wells, 7 Cranch (11 U. S.) 22, 3 L. ed. 256, *considered* in note to § 2545 herein), aff'g s. c. 3 Day (Conn.) 296.

[1] Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (U. S. C. C.) 312, Fed. Cas. No. 10,433; Francis v. Ocean Ins. Co. 6 Cow. (N. Y.) 404; McBride v. Marine Ins. Co. 5 Johns. (N. Y.) 299; Lorent v. South Carolina Ins. Co. 1 Nott & McC. (S. C.) 505; Simeon v. Blazett, 2 Maule & S. 94, per Lord Ellenborough.

[2] Delmada v. Motteux, 1 Term Rep. 85 N. reported in 1 Marshall on Ins. (ed. 1810) 82. See Edward Grey & Co. v. Tolme & Runge, 59 S. J. 218, 31 T. L. R. 137, 551 (contract incapable of performance by reason of embargo by Germany on the goods, which could not be shipped: also further performance illegal as trading with enemy).

As to goods, the importation or exportation of which is prohibited, see § 2539 herein.

The evidence of that necessity which will excuse the violation of an embargo must be very clear and positive, The James Wells, 7 Cranch (11 U. S.) 22, 3 L. ed. 256, aff'g s. c. 3 Day (Conn.) 296.

tached "at and from," a breach of the embargo is such a violation as to render the subsequent voyage illegal, and release the insurers; certainly so if the violation is followed by seizure.[3]

**§ 2546. Cargo procured with proceeds of former illegal cargo: prior separate voyage illegal.**—The fact that the cargo insured is purchased with the proceeds of an illegal cargo exported in contravention of law on an illegal voyage to the port "at and from" which the insurance is effected, the antecedent voyage being separate and distinct from that insured, does not render the insurance illegal and void, even though the ship by her previous illegal commerce was subject to seizure and confiscation; in such case the subsequent voyage cannot be affected by the illegality of the prior separate one.[4]

In case of contraband of war, if the return voyage is separate, distinct, and independent, the illegality of the preceding voyage will not generally attach upon the cargo of the return voyage, although such cargo be the proceeds of the prior illegal one, nor will such illegality attach upon the ship upon a distinct return voyage.[5] It

[3] Delmada v. Motteux, reported in 1 Marshall on Ins. (ed. 1810) 82; 1 Duer on Marine Ins. (ed. 1845) 351, 352, *citing* Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (U. S. C. C.) 312, Fed. Cas. No. 10,433; McBride v. Marine Ins. Co. 5 Johns. (N. Y.) 299; Walden v. Phœnix Ins. Co. 5 Johns. (N. Y.) 299, 310; Delano v. Bedford Mutual Ins. Co. 10 Mass. 347, 349, 6 Am. Dec. 132 and other cases.

[4] Kemble v. Rhinelander, 3 Johns. Cas. (N. Y.) 130; Bird v. Appleton, 8 Term Rep. 562, 566, 5 R. R. 468, 13 Eng. Rul. Cas. 547, reported in 1 Marshall on Ins. (ed. 1810) 74; Bell v. Gilson, 1 Bos. & P. 345, 4 R. R. 823, 353, per Butler, J.

[5] Carrington v. Merchants' Ins. Co. 8 Pet. (33 U. S.) 495, 521, 8 L. ed. 1021, per Story, J. In the case so holding the ship insured, when seized, had not unloaded all her outward cargo, but was still in the progress of the outward voyage, originally designated by the owners; she sailed on that voyage from Providence, Rhode Island, with contraband articles on board, belonging, with other parts of the cargo, to the owners of the ship, with a false destination and false papers, which yet accompanied the vessel; the contraband articles had been landed, before the policy, which was a policy on time, designating no particular voyage, had attached; the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage; and the alleged cause of the seizure and detention was the trade in articles contraband of war by the landing of powder and muskets, which formed a part of the outward cargo. It was held that: by the principles of the law of nations, there existed, under these circumstances, a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture, notwithstanding the prior deposit of the contraband goods; there was a legal and justifiable cause of seizure. It was further declared that according to the modern law of nations, for there has been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy, subjects them, if captured in delicto, to the penalty of confiscation; but the vessel and remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty; the penalty is ap-

is further decided that an augmentation of force, or illegal outfit, does not affect any capture made after the original cruise, for which such augmentation or outfit was made, is terminated although as to captures made during the same cruise they are infected with the character of torts and the original owner is entitled to restitution when the property is brought into our jurisdiction.[6] But it is held that the ship is liable to seizure in port after the determination of the entire voyage.[7] None of the cases, however, extend the doctrine beyond the completion of the entire voyage, so as to taint subsequent separate and distinct voyages with the illegality, and undoubtedly an insurance on such new and distinct voyage would be legal. So where the trade is with an enemy, the ship must be taken during the voyage, or during some part of a continuous and entire voyage during which the offense is committed: it is not enough, however, that the voyage may be separated into parts. The court will consider its true character, and if the trade is circuitous and the voyage entire, or if the continuity of the voyage is broken by the master's making an intermediate trade, the vessel is nevertheless subject to confiscation.[8]

plied to the latter, only when there has been some actual co-operation on their part, in a meditated fraud upon the belligerents, by covering up the voyage under false papers and with a false destination. This is the general doctrine, when the capture is made in transitu, while the contraband goods are yet on board; but when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship or cargo upon the return voyage, although the latter may be the proceeds of the contraband; and the same rule would seem, by analogy, to apply to cases where the contraband articles have been deposited at an intermediate port, on the outward voyage, and before it had terminated; although there is not any authority directly in point. But in the highest prize courts of England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established, that it exists only in favor of neutrals who conduct themselves with fairness and good faith in the arrangement of the voyage; if, with a view to practice a fraud upon the belligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers and with a false destination, the mere deposit of the contraband, in the course of the voyage, is not allowed to purge away the guilt of the fraudulent conduct of the neutral.

See also The Imina, 3 C. Rob. 167, 168, per Sir W. Scott; The Nancy, 3 C. Rob. 122, 127; The Christiansberg, 6 C. Rob. 376, 381, per Sir Wm. Scott; The Rosalie & Betty, 2 C. Rob. 343, 348; The Jonge Pieter, 4 C. Rob. 79, per Sir Wm. Scott; Kent's Commentaries (12th ed.) *151n. See Wheaton's International Law (6th ed.) 568.

[6] The Santissima Trinidad and The St. Ander, 7 Wheat. (20 U. S.) 283, 5 L. ed. 454.

[7] The Caledonian, 4 Wheat. (17 U. S.) 100, 4 L. ed. 523.

[8] The Joseph, 8 Cranch (12 U. S.) 457, 454, 3 L. ed. 621; The Jonge

The rule is deduced from these cases that a prior illegal voyage will not invalidate an insurance on a subsequent legal voyage which is separate and distinct from the prior, and in no way constituting with it an entire continuous voyage.[9]

But it is declared, that the general rule acted upon in England is that if a neutral vessel carries contraband goods they are subject to confiscation if captured in delicto, and that the vessel also is subject to the same penalty if it belongs to the same owner, or if the owner has been implicated where it is covered by false papers or other deceitful devises. If however the goods have been deposited at the port or place of destination the ship and cargo on the return voyage are exempt from the penalty. But exceptions are made where the outward voyage was made under false papers, or with a false destination, or under circumstances of deceit and fraud as to the belligerent. And it is held that if a vessel which had been used by its owner by means of false papers, with false destination and any such doubtful practices intended to elude the right of capture by belligerents, to carry contraband goods to the enemy, and which had delivered such goods on the outward voyage, remains confiscable upon the return voyage also; and what would constitute the return voyage would be a question of fact.[10]

**§ 2547. Trade with enemy: prior valid character of cargo.**—(a) If the importation of goods is illegal, because of trade with an enemy, the prior valid character of the goods constituting the illegal cargo, or of the funds with which they are purchased, does not validate the offense of trading with the enemy or make the goods the less subject to the illegality.[11] This rule does not, however, preclude proof that the property seized is innocent, and is owned by a neutral who has no share nor interest in the illegal transaction.[12]

(b) *Trading with enemy: valid contract: effect of imminent war upon legality of.* A point of considerable importance as relevant to the subject under consideration is presented by an English case

Pieter, 4 C. Rob. 79, 84, per Sir Wm. Scott.

[9] See also Sewell v. Royal Exchange Assur. Co. 4 Taunt. 856; Muller v. Thompson, 2 Camp. 610, 12 R. R. 753; Clark v. Protection Ins. Co. 1 Story (U. S. C. C.) 109, 126, Fed. Cas. No. 2,832, per Story, J.

[10] The Alwina (1916) L. R. Prob. Div. 131, 85 L. J. P. 199, 2 P. Cas. 186, 114 L. T. 707, 60 Sol. J. 540, 32 T. L. R. 444; Art. 38, Declaration of London, Orders in Council, Aug. 20, 1914, and Oct. 29, 1914.

[11] The Lady Jane, *cited* in 1 C. Rob. 202; The Juffrow Louisa Margaretta, *cited* in 1 C. Rob. 203; The Alexander, 8 Cranch (12 U. S.) 169, 3 L. ed. 524; The Rapid, 1 Gall. (U. S. C. C.) 295, Fed. Cas. No. 11,576, 8 Cranch (12 U. S.) 155, 3 L. ed. 520; Potts v. Bell, 8 Term Rep. 548, 2 Esp. 612, 5 R. R. 452, 2 Eng. Rul. Cas. 654.

[12] See The Franklin, 6 C. Rob. 127.

which holds that an expected or imminent war does not render illegal an otherwise valid contract of insurance between citizens of the two nations between whom war is anticipated.[13]

(c) *Valid contract: where outbreak of war makes performance illegal and impossible: partial performance: transfer to neutral during transit.* In case of a charter party where cargo is shipped on board two ships, German and English, the outbreak of the war makes the former vessel that of an alien enemy and her seizure makes the further performance of the contract impossible as to her although the contract as to the English ship and cargo is legally capable of performance, and a tender of bills of lading and insurance policy will be good as to her, while the tender of documents will be bad so far as the cargo on the German vessel is concerned.[14]

[13] Janson v. Driefonstein Consolidated Mines, Ltd. (1902) A. C. 484, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 T. L. R. 796, 7 Com. Cas. 268, 5 B. R. C. 810 aff'g [1901] 2 K. B. 419, 70 L. J. K. B. N. S. 881, 49 W. R. 660, 85 L. T. N. S. 104, 17 T. L. R. 604, 6 Com. Cas. 198 (see Driefonstein Consolidated Gold Mines, Ltd. v. Janson, West Rand Consolidated Gold Mines Co. Ltd. v. De Rougemont (1900) 2 Q. B. D. L. R. 339). The proposition is not justified that "expected wars render a contract illegal between citizens of the two nations between whom war is anticipated, and to lay down such a rule would be to establish an entirely new code, for which there is no authority in the law."—Earl of Halsbury, L. C. (Id. 5 B. R. C. 822). "The law recognizes a state of peace and a state of war, but . . . it knows nothing of an intermediate state which is neither one thing nor the other,—neither peace nor war."—Lord Macnaughten (Id. 5 B. R. C. 823). "There are as it seems to me, but two categories,—war or not war; and the difference between the two things is essential. . . . To extend the law's prohibition of trading with the King's enemies to future or contingent enemies, would be subversive of the broad and palpable distinction between peace and war, would be unworkable in practice, and productive of endless uncertainty and loss . . . the question whether it is workable or salutary is one of the tests of any legal doctrine, and I am satisfied that the law against trade with enemies is inapplicable to the events now in question."—Lord Robertson (Id. 5 B. R. C. 830). "But threatened war or anticipated war or imminent war is peace which may not after all result in war; and to apply the rules of war to insurance against loss before war breaks out would paralyze commerce and often without real necessity."—Lord Lindley (Id. 5 B. R. C. 835).

On liability of insurer under policy of marine insurance for losses arising out of state of war, see note in 5 B. R. C. 4.

[14] Weis & Co. Ltd. v. Credit Colonial & Commercial Co. 13 Mar. L. C. N. S. 242. See also Duncan Fox & Co. v. Schrempft & Bonke, 84 L. J. K. B. 2206, [1915] 3 K. B. 355, 113 L. T. 600, 20 Com. Cas. 337, 13 Asp. M. C. 131, 59 S. J. 578, 31 L. T. R. 491 (in such cases of goods carried on enemy ship, tender of documents after outbreak of war may be refused as being trading with enemy in violation of Proclamation of Aug. 5, 1914 as to trading with enemy).

As to effect of war on pre-existing valid contract, etc., see §§ 289 et seq. herein.

It is somewhat pertinent here, in

It is also held that if the outbreak of war renders illegal and impossible the performance of a contract which is partly performed before the event, and there is no agreement as to part performance, the loss lies where it falls and the parties are relegated to their relative positions, and this applies as to freight pro rata itineris, discharge of cargo at an intermediate port, and the clause as to restraint of princes, etc.[15] But if goods in transit are sold bona fide by enemy subjects to neutrals while war is imminent, but before its actual outbreak, the cargo although seized as prize will be released.[16]

**§ 2548. Where prior part of same voyage is illegal.**—It is declared by eminent authority that it is exceedingly difficult to distinguish

connection with this point of prior valid cargo, and the right to discharge the same, after the outbreak of war, that after the termination of diplomatic relations between this country and Spain, on April 20, 1898, and after the proclamation on April 23, 1898, by Spain of an existing state of war, the President of the United States, on the 26th of the same month, by Proclamation declared that "5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded." Although the said above part of said Proclamation was directly involved, the points decided, however, were that Havana was an enemy port and not "a port or place within the United States," so as to prevent capture of a Spanish vessel after discharging her cargo there, although she had arrived there from Antwerp, April 17th, discharged and left for Santiago, April 22d; that it must be assumed that she was advised of the impending war, or strained relations existing between the United States and Spain; also that the nationality of the underwriters was immaterial. The Pedro, 175 U. S. 354, 44 L. ed. 195, 20 Sup. Ct. 138. See The Carlos P. Roses, 177 U. S. 655, 44 L. ed. 929, 20 Sup. Ct. 803, a Spanish vessel which sailed from Barcelona, Spain, to Montevideo, Uruguay, discharged her cargo, took on one of jerked beef and garlic, sailed from there on March 16, 1898, for Havana and, on May 17, was captured, condemned as enemy's property, and her cargo being perishable was sold and proceeds ordered paid to claimants a British company doing business in London and it was held that the presumption that the cargo was enemy's property could only be overcome by clear and positive evidence contra.

[15] St. Enoch Shipping Co. v. Phosphate Mining Co. 86 L. J. K. B. 74, [1916] 9 K. B. 624, 21 Com. Cas. 192.

[16] Southfield, The, 85 L. J. P. 78, 1 P. Cas. 332, 113 L. T. 656, 13 Asp. M. C. 150, 59 S. J. 681, 31 T. L. R. 577. *Examine* Parchim, The, 1 P. Cas. 579 (vessel chartered prior to war by German firm: goods sold during transit, but property in cargo held not passed: also the continuing performance with enemy charterers after war commenced was held illegal: vessel seized: rights of allies: prize case).

As to vendee of vessel: sale by belligerent to neutral, see § 2135 herein.

between an illegality in a former voyage and that in a prior part of the same voyage where the policy covers only the part which is legal.[17] The rule seems to be, however, that if there is such a legal infirmity at the inception of a voyage as to make it illegal, and the voyage, although it consists of separate or successive parts, is nevertheless an entire and continuous one, the original illegality extends to and taints every part of the subsequent voyage, and makes the entire voyage illegal.[18]

**§ 2549. Illegality after risk attaches "at and from."**—If the risk on the ship has actually attached under a policy "at and from," and is so far tainted with the illegality that the insurer could have then avoided the policy on this ground, the subsequent voyage is affected with such illegality to the extent of avoiding the insurance thereon.[19]

**§ 2550. Where subsequent part of same voyage is illegal.**—We believe that we may fairly deduce from the authorities the rule that if a subsequent illegality arising in the course of the same voyage be in furtherance or a necessary consequence or a consummation of a proven illegal intention existing at the inception of the voyage, this is such an infirmity in a part of an integral voyage that the whole voyage is rendered illegal. But if there is no illegal intention at the inception of the voyage, and the voyage exists as a valid one until the illegality arises, the rule does not apply.[20] It is declared

[17] Clark v. Protection Ins. Co. 1 Story (U. S. C. C.) 109, 126. Fed. Cas. No. 2,832, per Story, J. See last section.

[18] Bird v. Pigon, 2 Selw. N. P. 991, 1009 (Phil. ed. 191) (9th ed.) (11th ed.) 966n, per Lord Kenyon; Camden v. Anderson, 6 Term Rep. 725, 1 Bos. & P. 272; 1 Duer on Ins. (ed. 1845) 336, sec. 27.

[19] Bird v. Appleton, 8 Term Rep. 562, 5 R. R. 468, 13 Eng. Rul. Cas. 547. We have cited this case in support of the rule in the text, and think it does support it to the extent specified. The risk had certainly attached on the ship and she had on board, one illegal cargo from the voyage to the place "at." She however disposed of this cargo before the ship sailed, and the new cargo was entirely distinct and separate. In the argument the policy on the ship was abandoned by plaintiff's counsel because the illegal goods were on board "at." The immediate voyage insured could not be severed, and the whole was an illegal adventure. Lord Kenyon said: "It is now very properly admitted that the policy on the ship must be abandoned, because during part of the time that the parties intended that the policy should attach . . . there was something illegal in the transaction," but the policy on the goods was upheld under the rule stated under §§ 2544, 2546 herein. This case is reported in 1 Marshall on Ins. (ed. 1810) 74.

[20] Wilson v. Marryat, 8 Term Rep. 31, 1 Bos. & P. 430, as reported in 1 Marshall on Ins. (ed. 1810) *68; Sewell v. Royal Exchange Assur. Co. 4 Taunt. 856; Gill v. Dunlop, 7 Taunt. 193; 1 Duer on Ins. (ed. 1845) 343, sec. 31. It is said by Mr. Justice Lawrence that "in order to render the insurance illegal the illegality should exist during the course of the voyage insured:" Bird v. Ap-

by eminent authority in this country that the voyage should be at the commencement wholly or in part illegal as to trade and objects in order to avoid an insurance, and in the same case the same judge further declares that a subsequent illegality will not affect an insurance upon an originally valid voyage, so far as concerns losses on property not tainted with such illegality, though connected with the independent illegal transaction, and that a mere liability to forfeiture will not avoid the insurance or prevent a recovery for a loss by an independent peril.[1] Mr. Duer, however, doubts the soundness of this decision, in that it implies that a subsequent illegality does not avoid the contract from the time it arises, and is of opinion that a subsequent illegality not connected with an original illegal intent avoids the insurance from the time it occurs.[2] We incline, however, to the belief that the better opinion favors the rule stated by Mr. Justice Story in all cases.[3]

pleton, 8 Term Rep. 562, 5 R. R. 468. And it seems to be the rule in England that any illegality at the commencement or in the course of the voyage makes it illegal: 1 Arnould on Marine Ins. (Perkins' ed. 1850) 702, *699; 2 Id. (Maclachlan's ed. 1886) 688, 689, *citing* Wilson v. Marryat, 8 Term Rep. 31, 46, per Lord Kenyon; Bird v. Pigou, 2 Selw. N. P. 1000 (Phil. ed. 191); Id. 2 Selw. N. P. (11th ed.) 966n. Lord Kenyon says: "I admit that if there had been any infirmity in any part of the integral voyage it would have made the whole illegal, so that the assured could not recover upon a policy or any part of it." But he also declares in the same case, referring to the intention existing at the commencement of the voyage: "Everything, therefore, relating to these different plans, though a fair subject of investigation and discussion, may now be laid out of our consideration, as it does not appear what precise voyage the parties had in contemplation at the inception of the voyage from America. Then if the voyage insured be not infected by what was done in America, it was a legal voyage;" and Mr. Marshall, who reports the case in which this language occurs, digests this portion of it so as to refer the illegality which would afford a basis for avoiding the contract to the commencement of the risk: Wilson v. Marryat, 8 Term Rep. 31, 1 Bos. & P. 430, as reported in 1 Marshall on Ins. (ed. 1810) 68. Mr. Justice Story refers to the first above quoted part of Lord Kenyon's remarks as a "mere obiter dictum" substantially overturned by a subsequent decision: Clark v. Protection Ins. Co. 1 Story (U. S. C. C.) 109, 126, Fed. Cas. No. 2,832, per Story, J., the subsequent case referred to being Bird v. Appleton, 8 Term Rep. 562, 5 R. R. 468, 13 Eng. Rul. Cas. 547.

[1] Clark v. Protection Ins. Co. 1 Story (U. S. C. C.) 109, Fed. Cas. No. 2,832, per Story, J.; Ocean Ins. Co. v. Polleys, 13 Pet. (38 U. S.) 157, 10 L. ed. 105. See §§ 904, 2507, 2538 herein.

[2] 1 Duer on Ins. (ed. 1845) 344, 345, secs. 31, 32. See Chalmers v. Bell, 3 Bos. & P. 604.

[3] "If the contract is on its face legal, and the passage or adventure contracted about is legal, the weightier authority seems to be in favor of the validity of the contract, though the subject contracted about may be on one side or the other precedent or consequent to something not sanctioned by the law:" 1 Phillips on Ins. (3d ed.) 142, sec. 231. See Vir-

**§ 2551. Effect of partial illegality upon contract.**—The question as to the effect of a partial illegality upon the contract is one of much difficulty, and concerning which no certain rule can be stated. If it be assumed that the contract is entire, the way to a solution is comparatively clear, but there arises at once the question, When is the contract entire so that the rule "void in part void in toto" will apply? In fire risks, where real and personal property is covered by one contract, or there are several distinct and separate buildings insured, or several distinct and separate articles of personal property, or there is a separate valuation, the authorities are conflicting whether the risk is entire or severable. In fire risks, however, the point arises chiefly under conditions requiring disclosure as to title or encumbrances, or of circumstances relating to the condition, situation, or value of the property, or under warranties or stipulations in the policy, or concerning alienation, other insurance, and the like, so that we have in these risks an element which affects the construction, and that is whether the intention of the parties was to extend the condition in all its force to the entire contract and the entire property covered, and in some cases the condition itself is so worded as to extend specifically to all or any of the property. We have, however, considered elsewhere this question in its relation to fire risks.[4] The question whether the contract is entire or divisible would undoubtedly be eliminated if the illegality is such as to pervade the whole contract, and the same would be true in case of the illegal act of assured in shipping prohibited goods. Beyond this point it is equally as difficult to formulate a rule in marine as in fire risks concerning what is an entire and what a divisible contract, although it would seem that the courts will not, on general principles of construction, extend the rule so as to forfeit the rights of the assured, unless the circumstances are such as clearly warrant it, and if in marine policies there are different articles, or specific and different kinds of property separately valued, a reasonable construction would justify a finding that the contract is so far divisible that an illegality as to part may exist, and the property nevertheless be valid as to part, provided the ownership does not make the insurance illegal; that the illegality does not pervade the whole contract. The following rule may, however, be safely stated as to marine risks: If a party insured goods together generally under one policy, the risk being entire, as where they are included in one valuation, and some of the goods are illegal and the voyage is void as to them, the whole contract is illegal and void.[5]

ginia Fire & Marine Ins. Co. v. Feagin, 62 Ga. 515, 575.

As to partial illegality: life risk, see § 2509, subdiv. (b) herein.

[4] See §§ 1931, 2253, 2256 herein.

[5] Parkin v. Dick, 11 East, 502, 2

**§ 2552. Last rule qualified where illegality removed as to part of cargo by permission of government.**—The illegality which would otherwise exist as to the entire cargo may be removed as to part of the cargo where such part is lawfully carried under express permission of the government; as in case of goods the lawful carrying of which requires a government license, here the license will protect so much of the cargo as it covers, and that part which is in excess will be separated, and the policy will be valid as to the lawful part, even though all the goods are those of the same shipper covered by the same policy.[6] This rule rests upon the grounds that the goods protected by the license are lawfully shipped and cannot be forfeited, and that the excess can be easily repaired.

**§ 2553. Partial illegality: shipowners under same policy.**—If an insurance be effected under one policy on account of all the owners of the ship, it may be stated as a general rule that the contract is so far entire that an illegality at the inception of the voyage as to one of the owners affects all the owners with the consequent invalidity.[7]

**§ 2554. Partial illegality: insurance by common agent covering goods of hostile and neutral owner.**—Where the goods of hostile and neutral owners, between whom there is no common or joint interest, are insured by a common agent in one policy, there being no fraud or consent thereto, or other act of participation separate and distinct, the mere act of the agent in effecting such a policy does not extend the illegality attaching to the hostile goods to those which are neutral so as to avoid the insurance thereon.[8]

**§ 2555. Effect of illegal employment of ship where neutral goods transported therein.**—The illegal employment of the ship in trans-

Camp. 221, 11 R. R. 258, per Lord Ellenborough. See Camelo v. Britten, 4 Barn. & Ald. 184; Shiffner v. Gordon, 12 East, 296, per Lord Ellenborough; The Staadt Embden, 1 C. Rob. *27, 31; Gordon v. Vaughan, 12 East, 302n; The Jonge Tobias, 1 C. Rob. 329.

[6] Keir v. Andrade, 2 Marsh. 196, 6 Taunt. 498, 16 R. R. 660; Shiffner v. Gordon, 12 East, 296. See The Jonge Clara, 1 Edw. Adm. 371. See § 1818 herein. The decision itself in Keir v. Andrade, 6 Taunt. 498, 2 Marsh. 196, 16 R. R. 660, has, however, been subjected to both adverse and favorable criticism; 1 Duer on Marine Ins. (ed. 1845) 390–93, adversely criticized, although he says, "It were indeed to be wished . . . that the decision in Keir v. Andrade could be sustained;" 1 Phillips on Ins. (3d ed.) 144, sec. 233, who says, "The rule adopted by that court is certainly recommended by very strong equitable considerations." See Clark v. Protection Ins. Co. 1 Story (U. S. C. C.) 109, Fed. Cas. No. 2,832, per Story, J.; Pieschell v. Allnutt, 4 Taunt. 792, per Gibbs, C. J.

[7] Clark v. Protection Ins. Co. 1 Story (U. S. C. C.) 109, Fed. Cas. No. 2,832.

[8] Hagedorn v. Bazett, 2 Maule & S. 100, per Lord Ellenborough.

porting enemy's goods will not invalidate an insurance upon goods of a neutral transported thereon.[9]

§ 2556. **Goods of several owners under same policy effected by common agent.**—The mere accidental circumstance of several owners having employed one common agent, and that he effects a policy covering their interests, does not communicate to the others the vice belonging to the property of one of the assured where there is no common or joint interest or partnership in the whole subsisting in the different owners, and no fraud; that is, the unlawfulness which would avoid one separate interest will not extend to and invalidate the interests of those others who have in no way a common interest, and who have not consented to or participated in the unlawful act through the common agent or otherwise. But it is said that if consent had been given to the employment of a common agent, the rule might be otherwise, and if the interests of the owners be joint and connected, or if they have a common interest in the loss or gain which may arise, the illegality which affects one affects all.[10]

§ 2557. **Transportation by same vessel: lawful and unlawful goods.**—If unlawful goods belonging to one owner are transported by the same vessel on which are lawful goods belonging to another owner, and the lawful goods are covered by a separate and distinct policy, the illegality of the voyage will not of itself extend to and avoid the policy on the lawful goods of the innocent owner.[11] It is held, however, as to contraband goods, that the contamination of such articles extends to noncontraband of a cargo belonging to the same owner, and the noncontraband must share the fate of the contraband.[12]

§ 2558. **Effect of intention to do illegal act.**—It may be stated as a general rule that the mere intention to do an illegal act which would if done avoid the policy is not of itself alone sufficient to invalidate the contract, the intent never having been consummated by any act; especially so where the actual subject matter described in

[9] Barker v. Blakes, 9 East, 283, 9 R. R. 558; Visger v. Prescott, 5 Esp. 184, 8 R. R. 846.

[10] Hagedorn v. Bazett, 2 Maule & S. 100, per Lord Ellenborough. In this case the policy was on goods thereafter to be valued, the hostile owner was interested one-sixteenth and the neutral one-fourteenth, but they were separately interested in the goods and the contract could be disturbed: Story v. Protection Ins. Co. 1 Story (U. S. C. C.) 190, Fed. Cas. No. 2,832.

[11] The Jonge Clara, 2 Edw. Adm. 371, per Sir Wm. Scott; Pieschell v. Allnutt, 4 Taunt. 792.

Whether, in cases where the assured knows or ought to know that his goods are to be transported by the same vessel with unlawful goods, he ought to disclose such facts. See §§ 1807, 1818 herein. See The Bermuda, 3 Wall. (70 U. S.) 180, 18 L. ed. 200.

[12] The Peterhoff, 5 Wall. (72 U. S.) 28, 18 L. ed. 564.

the policy is not per se illegal, and the contract itself contains no stipulation which evidences an intent to perform an illegal act, and such absence of illegal intent may be shown where the facts are such as to warrant an explanation.[13] So in case of an implied exclusion arising from the acts of government, such implied exclusion may, it is held, be rebutted by the facts and circumstances of the case.[14] But if the ultimate purpose of the voyage is evidenced at the outset by some act done in furtherance thereof and in preparation therefor, the voyage is then illegal, even though the act done is not the act prohibited.[15]

**§ 2559. Trade with enemy, absence of intent to violate law no excuse.**—Where either ship or goods are engaged in illegal traffic with the enemy, it is no excuse that there was no intent to transgress the law, or even that the illegal acts were done in good faith.[16]

**§ 2560. When possibility of executing illegal intention is removed.**—Where the possibility of executing the intention to trade with the enemy is removed by the intervention of peace or some cause which makes the country no longer enemy's country, the crime of trading with the enemy not being consummated at the time, the intent of itself is not punishable as a crime.[17] This rule applies to a case of an intent to proceed to a blockaded port where the blockade has ceased.[18] The rule, however, would undoubtedly not extend to and validate an insurance which had been effected prior to the happening of such an event, where the voyage was commenced with the intent to do the illegal act: for, as we have seen, a voyage which is illegal in its origin and inception is void where some

[13] Clark v. Protection Ins. Co. 1 Story (U. S. C. C.) 109, 124, Fed. Cas. No. 2,832, per Story, J.; Waters v. Allen, 5 Hill (N. Y.) 421; Fontaine v. Phœnix Ins. Co. 11 Johns. (N. Y.) 293; Holland v. Hall, 1 Barn. & Ald. 53, 18 R. R. 428; The Abby, 5 C. Rob. 251, per Sir Wm. Scott; Sewell v. Royal Exchange Assur. Co. 4 Taunt. 856; Gill v. Dunlop, 7 Taunt. 193, 204.

[14] Simeon v. Bazett, 2 Maule & S. 94.

[15] Lubbock v. Potts, 7 East, 449. Even in the slave trading cases there must be some evidence of a criminal intent to employ the vessel in the illegal trade, shown by the preparation or fitting out, and the vessel could be seized so soon as the intention to sail was apparent, such unlawful intent existing; The Slavers, 2 Wall. (69 U. S.) 350, 358, 17 L. ed. 878; The Emily and Caroline, 9 Wheat. (22 U. S.) 381, 6 L. ed. 116; Strolum v. United States, Taney (U. S. C. C.) 413. Fed. Cas. No. 13,539; United States v. Gooding, 12 Wheat. (25 U. S.) 460, 6 L. ed. 693; The Plattsburg, 10 Wheat. (23 U. S.) 133, 6 L. ed. 284.

[16] The Hoop, 1 C. Rob. 196, per Sir Wm. Scott; The Joseph, 8 Cranch (12 U. S.) 451, 3 L. ed. 621, 1 Gall. (U. S. C. C.) 545, Fed. Cas. No. 7,533; The Vriendschaft, 4 C. Rob. 96, 99.

[17] The Abby, 5 C. Rob. 251. See The Trende Sostre, 6 C. Rob. 390n; The Imina, 3 C. Rob. 167.

[18] The Leisette, 6 C. Rob. 387, 390.

act is done, such as commencing in furtherance of the intent, even though the act be not the one prohibited.[19]

**§ 2561. Insurance upon a cartel ship while employed as such.**—As the employment of a vessel as a cartel ship entitles her to protection under the law of nations, an insurance thereon would undoubtedly be valid, but inasmuch as such vessels may not engage in trade with a belligerent, the doing of such act would logically, because of the consequent forfeiture of her privileges and liability to confiscation, render the insurance void.[20]

**§ 2562. Insurance to ports some hostile some not.**—If an insurance be to port or ports, some of which are hostile and at war and others not, the law implies an exception in favor of the nonhostile ports, and the policy is prima facie valid;[1] although it may be proven in such case as a defense to the policy that the voyage was intended and made to such interdicted port.[2]

**§ 2563. Contract excepting interdicted port unlawful.**—If a port is interdicted by the laws of this country, it is not competent to stipulate an exception of such interdicted ports; such a contract is unlawful.[3]

**§ 2564. Subject of one of two or more allied powers may not trade with common enemy.**—The rule which prohibits trading with an enemy makes illegal the trade of a subject of one of two or more allied powers with the common enemy.[4]

**§ 2565. Trade with port occupied by enemy's forces: power of government to determine what are hostile relations.**—Acquisitions of territory made during the war, and of which the conqueror retains possession and control, are, as a general rule, a part of his domain for every commercial and belligerent purpose, although they are not permanent possessions until confirmed by treaty.[5]

[19] See § 2558 herein.

[20] See The Daifjie, 3 C. Rob. 139; The Venus, 4 C. Rob. 355; The Mary, 5 C. Rob. 200; La Glorie, 5 C. Rob. 192.

[1] Wright v. Welbie, 1 Chitty, 49, 22 R. R. 792. See § 2506 herein. See Blackburn v. Thompson, 3 Camp. 61, 13 R. R. 382; Johnson v. Greaves, 2 Taunt. 344.

[2] Russell v. De Grand, 15 Mass. 35.

[3] Russell v. De Grand, 15 Mass. 35.

[4] The Nayade, 4 C. Rob. 251; The Eenhigheid, 1 C. Rob. 210. See § 2506, subdiv. (e) herein.

[5] Thirty Hogsheads of Sugar v. Boyle, 9 Cranch (13 U. S.) 191, 3 L. ed. 701, per Marshall, C. J.

As to territories acquired by war: when civil government takes effect; that territory so acquired belongs to the government of the United States, consisting of the President, the Senate, and the House of Representatives; and as to right to establish temporary or permanent or military or civil government, see Downes v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. 770.

As to "contributions, requisitions, and compulsory service in occupied territory." See article by James W. Garner, 11 Amer. Jour. of Internat. Law (Jan. 1917) pp. 74 et seq.

During the time of the Berlin and Milan decrees, however, the English court asserted the principle that it is within the power of a state to determine the relations sustained by it to other countries, and that courts will be bound thereby and will recognize the national character thus established, and declared that the fact that a trade is carried on with a port occupied by enemy's forces does not make it illegal where the government where the insurance is made does not deem it expedient to pronounce such as hostile, and to enforce against the coerced government the rigors of war, preferring to consider such port friendly or neutral rather than hostile; especially where its commerce is attempted to be excluded by decrees not in conformity with the law of nations, and insurances covering a vessel to such ports have been declared legal.[6]

So the acts of the executive branch of the government in declaring a fact concerning the sovereignty of any island or country concludes the judicial department, and excludes the question whether such act of the executive is right or wrong, otherwise there would be constantly recurring and irreconcilable differences between these two departments upon questions of foreign jurisdiction; and, therefore, where this government had refused to recognize the sovereignty of Buenos Ayres and extending to and including the Falkland Islands, and a vessel which had proceeded to those islands on a sealing voyage, for which she was insured, was seized for an alleged violation of the law of Buenos Ayres in fishing there, it was held that the insured was not bound to regard unlawful threats of any individual assuming such unrecognized authority, and that the insurers were liable, and that the master had the right in behalf of his owners, and in the exercise of a proper and reasonable discretion, to persist in asserting and maintaining a national right common to citizens of this country.[7]

**§ 2566. Illegality to which insurer is in privity may affect his rights.**—It is not competent for the owner to stipulate contrary to express or implied prohibitory laws affecting the legality of the trade or voyage, and if he does so he may not recover his premium. This rule also applies to those cases where proof of the knowledge or privity of the insurer in the illegality depends upon extrinsic evidence.[8]

[6] Hagedorn v. Bell, 1 Maule & S. 450, 459, 14 R. R. 497; Miller v. Thompson, 2 Camp. 610, 12 R. R. 753; Donaldson v. Thompson, 1 Camp. 429, 10 R. R. 717; Johnson v. Greaves, 2 Taunt. 344. See The Manilla, Edw. Adm. 1; Gelston v. Hoyt, 13 Johns. (N. Y.) 587; Blackburn v. Thompson, 15 East, 81, 3 Camp. 61, 13 R. R. 382; 1 Arnould on Marine Ins. (Perkins' ed. 1850) 730, *728 et seq.; 2 Id. (Maclachlan's ed. 1887) 144, 704–06; Id. (9th ed. Hart & Simey) sec. 757, p. 943.

[7] Williams v. Suffolk Ins. Co. 13 Pet. (38 U. S.) 415, 10 L. ed. 226, aff'g 3 Sum. (U. S. C. C.) 270, Fed. Cas. No. 17,738. See Rose v. Hime-

**§ 2567. Goods shipped to neutral port.**—(a) *Ulterior or ultimate destination.* The fact that goods intended for the enemy are first shipped to a neutral port does not of itself legalize the trade where it is proposed to forward them thence to the enemy, even though the goods are unladen, and the mode of conveyance thence to the ulterior destination makes no difference, and inasmuch as the legality of the voyage is referred to the commencement thereof where such ulterior unlawful destination was then intended,[9] any insurance covering such voyage would necessarily be invalid.

(b) *Distinction where consignee is resident of country occupied by enemy.* A case of the above character differs from one where a neutral is resident at the time of a country in the occupation of the enemy, for in such case goods are insurable although consigned to such neutral to be delivered to him at a neutral or friendly port.[10]

(c) *Distinction between "continuous voyage" or "continuous transportation" and ultimate hostile destination of contraband.* A distinction is also made between the doctrine of "continuous voyage" or "continuous transportation;" and the doctrine of ultimate hostile destination of conditional and absolute contraband respectively and it is declared as to the former, or "continuous voyage" that it was first applied by the English prize courts to unlawful trading and that there is no reported case in the courts of that country where the doctrine is applicable to the carriage of contraband, but that it was so applied and extended by the United States courts against England at the time of the American Civil War, and its application was acceded to by the British Government of the day, and was, moreover, acted upon by the International Commission which sat under the treaty between these two countries in 1891, and has been a clearly recognized doctrine under United States decisions and also in England. This matter is, however, more fully presented in the exhaustive discussion of the subject in the noteworthy case of The Kim, which is hereinafter considered under the subject of contraband with excerpts from the opinion in said case.[11]

ly, 4 Cranch (8 U. S.) 241, 272, 2 L. ed. 608.

[8] Russel v. De Grand, 15 Mass. 35; Gray v. Sims, 3 Wash. (U. S. C. C.) 276, Fed. Cas. No. 5,729; Craig v. United States Ins. Co. Pet. (U. S. C. C.) 417, Fed. Cas. No. 3,340.

[9] The Jonge Pieter, 4 C. Rob. 79, per Sir Wm. Scott. *Examine* Wilson v. Marryat, 8 Term Rep. 36, 1 Bos. & P. 430.

As to Proclamation of President of the United States prohibiting exports for purpose of stopping leakages into Germany through neutrals, see § 2539 herein.

[10] Bromley v. Hesseltine, 1 Camp. 75, 10 R. R. 635. See § 2569a herein.

[11] The Kim; The Alfred Nobel; The Bjornsterjne Bjornson; The Fridland, 85 L. J. P. 38, [1915] L. Prob. D. 215, 1 P. Cas. 405, 113 L. T. 1064, 60 Sol. J. 9, 13 Asp. M. Cas. 178, 32 T. L. R. 10, *considered* under § 2569a herein.

Inasmuch as certain important Federal Supreme Court decisions are cited in the opinion in the Kim case,[12] it is proper to state here what was decided respectively in those cases; In the Peterhoff case,[13] which was one of those cited, it was held that the blockade of ports by the national government during the civil war did not include the mouth of the Rio Grande, occupied on one bank by neutrals with complete rights of navigation; and that neutral commerce with Matamoras a neutral town on the Mexican side of the river, was entirely free except as to contraband destined to the enemy; also that no blockade was violated by a vessel destined for a neutral port with no ulterior destination for the ship or none by sea for the cargo to any blockaded place; accordingly trade between London and Matamoras, both neutral places, the last an inland one of Mexico close to the Mexican boundary with intent to supply from the latter place goods to Texas, then an enemy to the national government, was not unlawful as a violation of blockade; furthermore that the trade of neutrals with belligerents is absolutely free as to articles not contraband, except so far as interrupted by blockade, but the conveyance of contraband articles by neutrals to belligerents is always unlawful, and such articles may always be seized during transit by sea. It was said in this case, per Mr. Chief Justice Chase that "it is an undoubted general principle," recognized in several cases, "that an ulterior destination to a blockaded port will infect the primary voyage to a neutral port with liability for intended violation of blockade." In the Bermuda case,[14] also cited in the Kim decision, it is held that no trade can be lawfully interrupted by belligerents where said trade is honestly carried on between neutral ports, whether of the same or different nations, but that good faith must govern such commerce, for enemy commerce under neutral disguises has no claim to neutral immunity; also, that goods of every description may be conveyed from neutral ports to neutral ports, provided it is actually intended to discharge them at a neutral port to be brought into the common stock there of merchandise, but an intention, real or pretended, to touch at intermediate neutral ports will not protect ship or cargo from seizure where the voyage from neutral ports is intended for belligerent ports; that although goods of any description, may be conveyed by a neutral to belligerent ports not under blockade, still contraband of war is always subject to seizure when its destination, whether by direct or indirect voyage, is a belligerent

As to continuity of voyage; vessel and cargoes protected under President's Proclamation or instructions (Act Aug. 28, 1812). See The Mary, 9 Cranch (13 U. S.) 126, 3 L. ed. 678.

[12] See § 2569a note herein.

[13] 5 Wall. (72 U. S.) 28, 18 L. ed. 564.

[14] 3 Wall. (70 U. S.) 514, 18 L. ed. 200.

one. The seizure is, however, confined to actual contraband, and except in cases of fraud or bad faith on the owner's part or of the master with the owner's sanction, does not extend to the ship or other cargo: but the liability to seizure and condemnation does extend, from the commencement to the end of the voyage to cases of vessels conveying contraband cargo to ports not under blockade when the circumstances show fraud or bad faith, also where cargo of any description is being conveyed to belligerent ports under blockade. It was also decided that, whether the destination be ulterior or direct, and whether with or without the interposition of one or more intermediate ports, and whether to be performed by one vessel or several employed in the same transaction and in accomplishment of the same purpose, the voyage from a neutral to a belligerent constitutes one and the same voyage; and, finally, seizure and condemnation of ship and cargo in voyage to ports of blockade are justified by destination alone; and seizure of contraband in voyage to ports not under blockade is equally justified by destination alone, except that in such case ship and cargo which are not contraband are free from seizure, unless in cases of fraud or bad faith. It was said, per Mr. Chief Justice Chase, that "It makes no difference whether the destination to the rebel port was ulterior or direct: nor could the question of destination be affected by transhipment at Nassau, if transhipment was intended, for that could not break the continuity of transportation of the cargo. The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous so long as intent remains unchanged, no matter what stoppages or transhipments intervene." [15] In the case of The Springbok [16] also cited in The Kim as above stated there was no sufficient proof that the owners, who were neutrals, had any knowledge of the unlawful destination of the cargo, and they had no interest therein, nor had they in any way previously violated neutral obligations, and the stipulations of the charter party in favor of said owners were apparently in good faith; the vessel was also neutral and was on a voyage to a neutral port under a charter party, sailing under genuine and regular papers as to which there was no concealment or spoliation; and it was decided that in such case the

[15] The Bermuda, 3 Wall. (70 U. S.) 551, 553, 18 L. ed. 200, *quoted* in The Pedro, 175 U. S. 354, 374, 44 L. ed. 195, 20 Sup. Ct. 138, per Mr. Justice White.

[16] 5 Wall. (72 U. S.) 1, 18 L. ed. 480.

vessel would not be condemned because the neutral port to which it was bound had been constantly and notoriously used as a port of call and transhipment by persons engaged in systematic violation of blockade and in the conveyance of contraband of war, and the owners of the cargo intended that it be so used in regard to it; but, inasmuch as the vessel was sailing to such a port, the cargo was condemned for intent to run a blockade. It appeared, however, that the bills of lading and the manifest made the cargo deliverable to order and the letter of instructions to the master directed him to report himself on arrival at the neutral port to a certain person "who would give him orders as to the delivery of his cargo." The bills of lading disclosed the contents of only about one third the number of packages which made the cargo, the greater proportion being undisclosed, and a certain fraction of the cargo whose contents were undisclosed was especially fitted for the enemy's military use, and a larger part was capable of being adapted thereto. There were also other relevant facts which tended to show the intent, such as blockade running, etc.

It will be seen therefore that the first two decisions covered more especially the case of an actual enforceable blockade, a belligerent destination and the interposition of a neutral port to break the continuity of the voyage, but the decision clearly refers to cases where the ulterior destination intended was that of a belligerent, while the last decision covered an attempt of the owners of the cargo under a consignment thereof deliverable to order to run a blockade with contraband goods, although the vessel owner had no knowledge of the intended illegal destination for enemy's use.[17]

**§ 2568. Insurances on contraband of war.**—(a) If in time of war between this country and another goods which are contraband of war are sent by a neutral to aid the enemy, they are not capable of a valid insurance here.[18]

(b) But so far as a neutral is concerned an insurance on contraband goods may validly be made and enforced in the neutral coun-

[17] As to goods shipped by neutral on enemy vessel to enemy port, on voyage commenced before war declared, "to order, for account and risk," etc., see The Carlos F. Roses, 177 U. S. 655, 44 L. ed. 929, 20 Sup. Ct. 803, *considered* under § 2748 herein.

[18] 1 Marshall on Ins. (ed. 1810) 81a; 1 Duer on Marine Ins. (ed. 1845) 623, 642 et seq. See Gibson v. Service, 5 Taunt. 433, 1 Marsh. 119, 15 R. R. 668.

As to contraband of war, see 2 Halleck's Internat. Law (ed. 1908) pp. 243 et seq. As to history of contraband trade, see Taylor's Internat. Law (ed. 1904) pp. 725 et seq., secs. 653 et seq. See also discussion as to development of the law of contraband, in article by William C. Morey, in Vol. 10 Amer. Jour. Internat. L. (1916) pp. 467, 491.

On effect of carriage of contraband upon marine insurance, see note in 5 B. R. C. 58.

try, for it is not, with respect to the neutral, an illegal commerce, although the goods may be subject to seizure and confiscation by a belligerent.[19]

(c) In connection with the above assertion and upon the assumption that goods or articles which are lawfully the subject of commerce or trade may be insured, we will state that it does not constitute a violation of any law of the United States or of international law for a corporation carrier to contract for the exportation of contraband, as in case of lead, to be delivered in the port of a belligerent, since it is not illegal to export contraband articles even though said articles and ship are subject to the risk of capture and forfeiture.[20] In the case of The Bermuda,[1] the court, per Mr. Chief Justice Chase, said: "Neutrals in their own country may sell to belligerents whatever belligerents choose to buy. The principal exceptions to this rule are, that neutrals must not sell to one belligerent what they refuse to sell to the other, and must not furnish soldiers or sailors either; nor prepare, nor suffer to be prepared within their territory armed ships or military, or naval expeditions against either. So, too, except goods contraband of war, or conveyed with intent to violate a blockade neutrals may transport to belligerents whatever belligerents may agree to take. And so, again, neutrals may convey on neutral ships, from one neutral port to another, any goods whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port. . . . Very eminent writers on international maritime law have denied the right of neutrals to sell to belligerents, even within neutral territory, articles made for use in war, or to transport such articles to belligerent ports without liability to seizure and confiscation of goods and ship. And this is not an illogical inference from the general maxim that neutrals must not mix in the war. International law, however, in its practical administration, leans to the side of commercial freedom, and allows both free sale and free conveyance by neutrals to belligerents, if no blockade be violated, of all sorts of goods except contraband; and the conveyance even of contraband goods, will not, in

[19] The Santissima Trinidad, 7 Wheat. (20 U. S.) 283, 5 L. ed. 454, per Story, J.; Richardson v. Marine Ins. Co. 6 Mass. 102, 4 Am. Dec. 92; Bowne v. Shaw, 1 Caines (N. Y.) 489; Harratt v. Wise, 9 Barn. & C. 712, 4 M. & Ry. 521, 7 L. J. (O. S.) K. B. 309; Rhodes v. Hunter, 2 Hud. & B. 581; Emerigon on Ins. (Meredith's ed. 1850) c. viii. sec. 5, p. 170. See discussion of this subject in 1 Duer on Marine Ins. (ed. 1845) 750 et seq. *Examine* Acts Congress 1794, re-enacted 1818.

[20] Northern Pacific Ry. Co. v. American Trading Co. 195 U. S. 439, 49 L. ed. 269, 25 Sup. Ct. 84.

[1] 3 Wall. (70 U. S.) 514, 551, 552, 18 L. ed. 200.

general, subject the ship, but only the goods to forfeiture." [2] Again, it was decided in1822 that the sending of armed vessels, or of munitions of war, from a neutral country to a belligerent port, for sale, as articles of commerce, is unlawful, only as it subjects the property to confiscation on capture by the other belligerent; also, that no neutral state is bound to prohibit the exportation of contraband articles and it is not prohibited by the United States. Furthermore,

[2] Art. 3 of Declaration of Paris of 1856 provides that "neutral goods, except contraband of war, are not liable to capture under an enemy's flag." See § 2128 herein. And in the Carlos F. Roses, 177 U. S. 655, 44 L. ed. 929, 20 Sup. Ct. 803, it is said that the President's proclamation of April 26, 1898, declared that the policy of the Government in the conduct of the war would be to adhere to the rules of the Declaration of Paris, one of which was Art. 3, above set forth.

See further as to augmentation of armament of belligerent ships as breach of neutrality, the following cases: United States v. Quincy (1832) 6 Pet. (31 U. S.) 445, 8 L. ed. 458 (indictment charging being knowingly concerned in fitting out in this country a vessel with intent to employ her in service of foreign "people" the United Province of Buenos Ayres, against subjects of Emperor of Brazil with whom the United States were at peace); The Gran Para (1822) 7 Wheat. (20 U. S.) 471, 486, 5 L. ed. 501 ("The principle is now firmly settled that prizes made by vessels which have violated the Acts of Congress, that have been enacted for the preservation of the neutrality of the United States, if brought within their territory, shall be restored," per Mr. Chief Justice Marshall. The point was also covered as to the intention with which a vessel was equipped); United States v. Grassin (1811) 3 Wash. (U. S. C. C.) 65, Fed. Cas. No. 15,248 (illegal augmentation of force of French privateer; what constitutes); The Betty Cartheart (1795) Bee Admr. 292, Fed. Cas. No. 9,742 (augmenting armament; what equipment of guns and men is breach of neutrality); Moodie v. The Brothers (1795) Bee Admr. 76, Fed. Cas. No. 9,473 (when equipment for war in neutral port does not take place by alterations and repairs); Neutrality Law, 13 Opinion of Attorney General 541; violation of neutrality 4 Opinion of Attorney General 336; De Wütz v. Hendric (1824) 9 Moore 586, 2 Bing. 314, 3 L. J. (O. S.) C. P. 3, 27 R. R. 660 (action of trover for certain papers; illegal for residence of Great Britain to raise money by way of loan to assist in prosecuting war against government in amity). As to goods for enemy's use in neutral port, see 2 Halleck's Internat. Law (ed. 1908) p. 249.

See article "Sale of munitions of war" by William C. Morey, in Vol. 10 Amer. Jour. Inter'l. L. (1916) pp. 467–491. See also article by Charles Noble Gregory, Id. pp. 543–555 on "Neutrality and Sale of Arms;" also article as to sales and exportation of arms and munitions of war to belligerents, 10 Amer. Jour. Int. L. (1916) pp. 749–797, article by James W. Garner.

That citizens of neutral country may sell contraband to belligerent government or its agent, subject to enemy's right to prevent articles sold reaching destination but neutral government itself cannot sell; but that right of said citizens does not extend to outfitting or furnishing vessels in American ports, etc. See circular of Department of State of United States, Oct. 15, 1915, published in 9 Amer. Jour. Internat. L. (1915) suppl. p. 124.

in connection with the same principle, in the case of an illegal augmentation of the force of a belligerent cruiser, in the ports of this country, by enlisting men, the onus probandi is on him to show, that the persons enlisted, were subject of the belligerent state or belonging to its service, and then transiently within the United States. It is also declared in said case that "There is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the person engaged in it to the penalty of confiscation."[3] If the seizure and detention of a vessel for trade in contraband of war are bona fide, a sentence of condemnation or acquittal, or other regular proceeding, is unnecessary to discharge the underwriters, for, when discharged from the primary hostile act, they are discharged from the consequences of it. So the clause in a policy that the judgment of a foreign consular or colonial court shall not be conclusive as to the fact of there being articles contraband of war on board, or as to the fact of an attempt at illicit trade, will be interpreted as introduced to enable the assured to disprove the existence of justifiable cause for seizure or detention by showing that the facts did not warrant it.[4]

(d) It is also held that "contraband goods of war" do not vitiate a policy warranted to be on goods that are "lawful." The insured are not bound to disclose that the goods insured are "contraband of war."[5] And when it is understood by the parties that the voyage is illicit by the laws of the country to which the vessel is destined, the warranty against contraband goods is to be extended to such goods only as are contraband of war, not such as are contraband by the laws of that country,[6] or to contraband as distinguished from contraband of war.[7]

§ 2569. **What articles contraband of war.**—The term "contraband of war" has reference to the existence of war.[8] Outside of those international treaties which settle what articles are contraband of

[3] The Santissima Trinidad; The St. Andre (1822) 7 Wheat. (20 U. S.) 283, 5 L. ed. 454.

[4] Carrington v. Merchants' Ins. Co. 8 Pet. (33 U. S.) 495, 8 L. ed. 1021.

[5] Seton v. Low, 1 Johns. Cas. (N. Y.) 1. See Rhinelander v. Juhel, 2 Johns. Cas. (N. Y.) 120, 487 and note. Comments on these two cases; 3 Kent's Commentaries (5th ed.) 268.

As to disclosure that goods are contraband; belligerent risks, see § 1818 herein.

[6] Vandervoort v. Smith, 2 Caines (N. Y.) 155.

As to warranty against illicit, prohibited or contraband trade; against seizure therefor, see § 2682 herein.

[7] *Compare* Cucullu v. Louisiana State Ins. Co. 5 La. N. S. 464, 16 Am. Dec. 199, 8 La. O. S. 613.

[8] Wilbraham v. Wartnaby, Lloyd & W. 144, 8 L. J. K. B. 255.

war,[9] it is difficult, if not impossible, to precisely specify them. It is not merely the fact that the goods may aid the enemy. It is always undoubtedly a pertinent inquiry whether there is a breach of that strict impartiality which a neutral nation is bound to observe, and whether the neutral has rendered aid to one belligerent to the detriment of the other by furnishing him goods or articles which are intended clearly to subserve the purposes of war, and to this end the character of the goods themselves in certain cases are peculiarly indicative of the intent. Of this class are arms, ammunition, and other implements and munitions of war of every description, or articles which may immediately be used for the purposes of war by land or naval forces. So ships for war, materials for shipbuilding, and naval stores have been declared contraband of war, and sometimes, though not generally, provisions have been held such, and contributions not designed to aid hostilities, but in good faith, and to relieve distress of a belligerent, are held not a breach of neutrality; and augmenting the armament of belligerent ships of war is an offense against neutrality, although making repairs is not necessarily so. Commodities which are supplied one neutral may be supplied another, even though useful in war. In cases of doubt where the articles are susceptible of a civil use as well as a warlike one, the character of the port of destination has been deemed important, although not a certain test, and where the goods are not adapted to warlike uses, the test does not apply. So goods which might otherwise partake of the character of contraband of war are not such when excepted by particular treaties.[10] It is de-

[9] In the first commercial treaty between this country and France contraband goods were defined as solely munitions of war: Schuyler's American Diplomacy, 368. So also does the Ordonnance of Louis XIV. of 1681. In the treaty of 1794 between this country and Great Britain materials for shipbuilding were declared contraband except unwrought iron and fir planks. See United States Statutes at Large for treaties.

[10] The Carlos F. Roses (1899) 177 U. S. 655, 675, 44 L. ed. 929, 20 Sup. Ct. 303 ("It is true that by the modern law of nations, provisions, while not generally deemed contraband, may become so, although belonging to a neutral, on account of the particular situation of the war, or on account of their destination, as if destined for military use, for the enemy, or navy of the enemy, or ports of naval or military equipment," per Mr. Chief Justice Fuller, *citing* The Benito Estenger, 176 U. S. 568, 44 L. ed. 592, 20 Sup. Ct. 489; The Panama, 176 U. S. 535, 44 L. ed. 577, 20 Sup. Ct. 480; The Peterhoff, 5 Wall. (72 U. S.) 28, 18 L. ed. 564; Grotius De Jure Belli et Pacis, lib. III. c. I. sec. 5; Hull sec. 236); The Benito Estenger (1899) 176 U. S. 568, 44 L. ed. 592, 20 Sup. Ct. 489 (provisions not generally contraband, but may become so if destined for the enemy's army or navy, his ports of naval or military equipment); United States v. Diekelman (1875) 92 U. S. 520, 23 L. ed. 742 (money, silver plate, and bullion when destined for hostile use, or for the purchase of

clared, however, that the classification of goods as contraband or not contraband which is best supported by American and English

hostile supplies, are contraband); United States v. Sheldon (1817) 2 Wheat. (15 U. S.) 119, 4 L. ed. 199 (living fat oxen, etc., are articles of provision and munitions of war within Act of Congress of July 6, 1812, but driving said oxen, etc., on foot is not a transportation thereof within said enactment prohibiting American vessels from proceeding to or trading with enemies, etc.); The Commercen (1816) 1 Wheat. (14 U. S.) 382, 4 L. ed. 116 (provisions neutral property, but the growth of the enemy's country and destined for the supply of the enemy's military or naval forces are contraband; but such provisions if destined for the general supply of human life in the enemy's country are not contraband; and it makes no difference that the enemy is carrying on a distinct war in conjunction with his allies, who are friends of the captor's country, and that the provisions are intended for the supply of his troops engaged in that war, and that the ship on which they are transported belongs to a subject of one of the allies); United States v. Barber (1815) 9 Cranch (13 U. S.) 243, 3 L. ed. 719 (fat cattle are provisions or munitions of war within Act of Congress, July 6, 1812, to prohibit American vessels from proceeding to or trading with enemies, etc.); Thirty Hogsheads of Sugar v. Boyle (1815) 9 Cranch (13 U. S.) 191, 3 L. ed. 701 (the produce of an enemy colony is hostile property so long as it belongs to the owner of the soil, regardless of his national character in other respects, or his place of residence); The Steamship Frosida (1871) 4 Ben. Admr. 452, Fed. Cas. No. 4,887 (violation of neutrality enactments; vessel and cargo consisting of arms and munitions of war; landing of cargo contraband of war on shore of country of one belligerent at a point not blockaded, is not an act of hostility against other government); Maisonnaire v. Keating (1815) 2 Gall. (U. S. C. C.) 325, Fed. Cas. No. 8,978 (provisions when destined to port of naval equipment of the enemy, and a fortiori, if destined for supply of his army, become contraband and subject vessel and cargo to confiscation by the other belligerent, more especially if the country of the captured vessel be at war with the country to which she is destined). In the English cases cited below it will be observed that certain of the decisions determine whether particular articles used in shipbuilding at the time of wooden ships of war were contraband. The chief value of these decisions depends, however, at the present day, upon such of the principles underlying them as are in force here upon the point that articles are contraband of war when intended to aid one belligerent to the detriment of another, etc., as stated in the text: The Zelden Rust (1805) 6 C. Rob. 93 (Dutch cheese condemned); The Richmond (1804) 5 C. Rob. 325 (pitch and tar concealed: condemned); The Charlotte Kaltzenburg (1804) 5 C. Rob. 305 (masts, particularly those of large dimensions, are: nature of port immaterial; unless protected by treaty); The Nostra Signora (1804) 5 C. Rob. 97 (rosin not contraband when to a port not of military equipment); The Evert (1803) 4 C. Rob. 354 (hemp, contraband: incumbent on claimant to show that it was of growth of districts the produce of which was usually employed in ordinary course of their trade); The Twee Juffrowen (1802) 4 C. Rob. 242 (tar and pitch, not produce of exporting country, is contraband: onus probandi on claimant); The Apollo (1802) 4 C. Rob. 158 (hemp generally contraband but being neutral property and on board neutral ship destined to Amsterdam: excepted); The Gute Gesselschaff Michael

decisions, divides all merchandise into three classes: (1) Articles manufactured and primarily or ordinarily used for military purposes in time of war. (2) Articles which may be and are used for purposes of war or peace according to circumstances. (3) Articles exclusively used for peaceful purposes. Merchandise of the first class destined to a belligerent country or places occupied by the army or navy of a belligerent is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege. Parts of cargo described in a ship's invoice as cases of "artillery harness," as "men's army Bluchers," as "artillery boots" and as "government regulation gray blankets" come within the first class.[11]

(1801) 4 C. Rob. 94 (hemp of inferior quality and not fit for naval purposes: not contraband); The Edward (1801) 4 C. Rob. 68 (wines with false destination condemned); The Neptunus (1800) 3 C. Rob. 108 (tallow not contraband on destination to great mercantile port as well as port of naval equipment; sail cloth contraband even to ports of mere mercantile equipment); The Haabet (1799) 2 C. Rob. 175, 182 (cargo of corn decreed to be restored after being seized and brought into England); The Sarah Christina (1799) 1 C. Rob. 241 (pitch and tar generally contraband, with relaxation of rule where produce is of claimant's own country and real destination is not concealed; ship was also condemned as property of same owner); Jonge Margarita (1799) 1 C. Rob. 196 (except under certain circumstances provisions are not contraband, as where they are the product of the country which exports them, but if the product of another country and that a hostile one, and the claimant has not only gone out of his way to supply the enemy but has assisted the enemy's ally in the war by taking off his surplus commodities they are contraband: cheeses held contraband); The Staadt Emden (1798) 1 C. Rob. *22, 26 (masts also innocent parts of the cargo, how affected); The Endraught (1798) 1 C. Rob. 25 (cargo of ship timber going to an enemy port of naval equipment: treaty with Denmark).

*Examine*, generally, Taylor's Internat. Law (ed. 1904) secs. 655 et seq., pp. 727 et seq.; Abbott on Shipping (6th Am. ed.) 347 et seq.; Wheaton's International Law (6th ed.) 535, 546, 551 et seq.; Hall's International Law (ed. 1880) 564, 565, 578–83 et seq.; Davis' International Law (ed. 1887) 336–365; Walker's International Law (ed. 1893) 433, 446, 506–08, 510–12; 2 Halleck's International Law (ed. 1861) c. 24; Id. (ed. 1908) secs. 14 et seq., pp. 250 et seq.; 3 Geneva Award. Rep. St. Dep., pt. 1, 11, 49, 74; 1 Arnould on Marine Ins. (Perkins' ed. 1850) *736, *741; 2 Id. (Maclachlan's ed. 1887) 708–12; Id. (9th ed. Hart & Simey) secs. 761–764, pp. 947 et seq.; 1 Duer on Marine Ins. (ed. 1845) 623–43; 3 Vattel on the Law of Nations, sec. 104.

As to augmentation of armament of belligerent ships as breach of neutrality, etc., see notes to § 2568, subdiv. (c) herein.

[11] The Peterhoff, 5 Wall. (72 U. S.) 28, 58, 18 L. ed. 564.

Contraband goods sent by mail or post, not protected: also not protected by Art. I. of Eleventh Hague Convention. The Turantia, 32 L. T. 529.

So goods destined to supply the fleet of one belligerent are contraband of war.[12] But the above rule does not preclude shipping goods to supply the forces of the shipper's own country, although destined for an enemy's port, where there is reasonable ground for belief that they are in possession, or there is actual knowledge of such fact, and an insurance effected in the shipper's country on such goods is valid.[13]

The term "contraband" is also applicable to goods only and not to persons, in the absence of something in the context pointing to another meaning, or unless the words are used in connection with some place or trade usage in which they have acquired a secondary meaning.[14]

**§ 2569a. Same subject: British Orders in Council, etc.**—Shortly after war was declared between Great Britain and Germany, the former issued a Proclamation or Order in Council, specifying the articles which should constitute contraband and contraband of war. These Orders have been added to, amended and revised from time to time by numerous other Orders or Proclamations. The list of articles covered, is, however, given in the Appendix herein, in juxtaposition to the Declaration of London where it can be readily compared with the list of contraband, contraband of war, absolute and conditional contraband, and noncontraband given in said Declaration,[15] although, on October 29, 1914, the provisions of that Convention, which had been adopted with certain additions and modifications on August 20, 1914, were, as to the lists of contraband and non-contraband, excluded by Order in Council on account of the changed conditions of commerce etc.; other rules were also subsequently promulgated, abrogating other provisions of said Declaration.

The following Orders in Council show the position taken by Great Britain, on the several dates specified, with relation to the present very important questions which concern contraband, the

As to correspondence concerning "noncontraband character of Hydroaeroplanes;" United States and Germany, see 9 American Jour. of Inter'l. Law (special No.) pp. 366–368.

[12] The Commercen, 1 Wheat. (14 U. S.) 382, 388, 4 L. ed. 116, 2 Gall. (C. C.) 261, Fed. Cas. No. 3,055; Maisonarie v. Keating, 2 Gall. (U. S. C. C.) 325, Fed. Cas. No. 8,978.

[13] See Calhoun v. Insurance Co. of Pennsylvania, 1 Binn. (Pa.) 293; Sperry v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 243, Fed. Cas. No. 13,236. See § 2558 herein. See §§ 2136 et seq. herein, as to breach of blockade.

[14] Yangtsze Ins. Assoc. v. Indemnity Mutual Marine Assur. Co. [1908] 2 K. B. 504, 77 L. J. K. B. N. S. 995, 24 T. L. R. 687, 13 Comm. Cas. 283, 99 L. T. N. S. 498, 32 Sol. J. 550, 5 B. R. C. 53, aff'g Bigham, J., [1908] 1 K. B. 910, 24 T. L. R. 381, 77 L. J. K. B. N. S. 392, 32 Sol. J. 315 (*considered* under § 2682 herein).

[15] See Appendix F herein.

Declaration of London, ultimate destination, etc. By Proclamation in England dated August 5, 1914, British vessels were prohibited from carrying from one foreign port to any other foreign port any article comprised in the list of contraband of war, "unless the ship-owner shall have first satisfied himself that the articles are not intended ultimately for use in the enemy's country." Any such vessels acting in contravention of said Proclamation were declared to be liable to capture and to be taken before the Prize Courts of that country for adjudication and British subjects acting in contravention of the Proclamation were made liable to penalties.[16] On August 20, 1914, by Orders in Council, Great Britain acting in co-operation with Russia and France, declared that "during the present hostilities the Convention known as the Declaration of London shall subject to" certain "additions and modifications be adopted and put in force" by the British Government "as if the same had been ratified by" it. These additions and modifications related generally to lists of absolute and conditional contraband; capture of neutral vessels on return voyages after carrying contraband to the enemy; evidence and proof as to destination of conditional contraband to the enemy with false papers; presumptions where consignee agent of enemy State, etc.; blockades; and interpretation of the Declaration.[17] On October 29, 1914, "The Declaration of London Order in Council No. 2, 1914, was promulgated whereby the prior Order of August 20, 1914, was re-enacted "with amendments to minimize, so far as possible the interference with innocent neutral trade occasioned by the war" and accordingly "during the present hostilities the provisions" of said Declaration of London "shall, subject to the exclusion of the lists of contraband, and noncontraband, and to the modifications" set out in said Order, "be adopted and put in force." The modifications were; that a neutral vessel with papers indicating a neutral destination, which, notwithstanding, proceeded to an enemy port, was liable to capture and condemnation if encountered before the end of her next voyage; that destination of conditional contraband for use of enemy's forces was presumed to exist where consigned to or for an agent of the enemy State; that conditional contraband was liable to capture when on vessels bound to a neutral port and "consigned to 'order,' or if the ship's papers do not show who is the consignee of the goods, or if they show a consignee of the goods in territory belonging to or occupied by the

[16] Statutory Rules & Orders, 1914, Vol. I. ("Published by authority") p. 248, Appendix F herein. See §§ 2139a, 2567 herein.

[17] The Articles of the Declaration of London to which the additions and modifications related were Arts. 22, 24, 32, 33, 34, 35. See Appendix E herein.

enemy;" and in these cases "it shall lie upon the owners of the goods to prove that their destination was innocent." [18] The Order of Council of March 11, 1915, called the "Reprisals" Order in view of the military area or war zone declaration of Germany,[19] also provides that "6. A merchant vessel which has cleared for a neutral port from a British or allied port, or which has been allowed to pass, having an ostensible destination to a neutral port, and proceeds to an enemy port, shall, if captured on any subsequent voyage, be liable to condemnation." [20] By the "Declaration of London Order in Council, 1915," of date October 20, 1915, in lieu of Article 57 of the Declaration of London, which was abolished, British Prize Courts were directed to apply the rules and principles formerly observed in such courts.[1] By "The Declaration of London Order in Council, 1916" of date March 30, 1916, The Declaration of London Order in Council, No. 2, 1914," of date October 29, 1914, was modified as to the capture of conditional contraband on board a vessel bound for a neutral port and ulterior destination, but affirming the right of capture whether the carriage of the goods to their destination be direct or entail transhipment or a subsequent transport by land; certain provisions of the former Order were also declared to be applicable to absolute as well as conditional contraband, but as to Article 33 of the Declaration of London, as to conditional contraband being liable to capture if destined for the use of armed enemy forces, etc., subject to certain exceptions, said destination "shall in addition to any presumptions" in said Order be presumed to exist "if the goods are consigned to or for a person who, during the present hostilities, has forwarded imported contraband goods to territory belonging to or occupied by the enemy;" also declaring that the burden of proof of innocent destination is upon the owner of goods. There were also other provisions as to capture and blockade.[2]

On July 7, 1916, by the "Maritime Rights Order in Council, 1916" the "Declaration of London Order in Council, No. 2, 1914" and all orders subsequent thereto amending said Order were withdrawn, although the validity of anything done thereunder was not to be affected. The belligerent rights at sea in accordance with the law of nations of Great Britain and its allies was reasserted and

[18] Statutory Rules & Orders 1914, Vol. I. ("Published by authority"), p. 248. Order in Council article of Aug. 20, 1914, adopting Declaration of London, etc., repealed. See Appendix F herein.

[19] See § 2139a herein.

[20] See Order of March 11, 1915, Appendix F herein.

[1] See "Declaration of London, Order in Council, 1915," Appendix F herein.

[2] See "Declaration of London, Order in Council, 1916," Appendix F herein.

further provisions were directed to be observed: "(a) The hostile destination required for the condemnation of contraband articles shall be presumed to exist, until the contrary is shown, if the goods are consigned to or for an enemy authority, or agent of the enemy State, or to or for a person in a territory belonging to or occupied by the enemy, or to or for a person who, during the present hostilities, has forwarded contraband goods to an enemy authority, or an agent of the enemy State, or to or for a person in territory belonging to or occupied by the enemy, or if the goods are consigned 'to order' or if the ship's papers do not show who is the real consignee of the goods. (b) The principle of continuous voyage or ultimate destination shall be applicable both in cases of contraband and of blockade. (c) A neutral vessel carrying contraband with papers indicating a neutral destination, which, notwithstanding the destination shown on the papers, proceeds to an enemy port, shall be liable to capture and condemnation if she is encountered before the end of her next voyage. (d) A vessel carrying contraband shall be liable to capture and condemnation if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo." [3]

[3] See "Maritime Rights Order in Council, 1916." Appendix F herein.

As to ultimate enemy destination; shipowner's knowledge; full cargo of contraband: subject to condemnation, see The Maricairo; The Hakan [1916] L. R. Prob. D. 266, 86 L. J. P. C. (1916) P. 266, 115 L. T. 639, 61 Sol. J. 87, 33 T. L. R. 48. As to "The continuous voyage doctrine during the civil war and now" see Article by Simeon E. Baldwin, 9 Am. Jour. of Internat. Law (1915) pp. 793–801. See also Article "The Doctrine of Continuous Voyage in the Eighteenth Century" by Harmodia Arias, 9 Am. Jour. of Internat. Law (1915) pp. 583–593.

As to "British Orders in Council & International Law," see Article by James Brown Scott (Editor in Chief) 10 Am. Jour. of Internat. Law (1916, "Editorial comment") pp. 560–569.

As to "International Law as applied by England in the war" covering Maritime Capture; neutral character of ship and cargo: lists of contraband; by Norman Bentwich, 9 Am. Jour. of Internat. Law (1915) pp. 17–44.

As to contraband, right of search and continuous voyage, see Article by James W. Garner, 9 Am. Jour. of Internat. Law, pp. 372–401. "By way of conciliating neutrals and mitigating their hardships, which result from maritime capture, the British Government have adopted the practice of pre-emption, or forcible purchase, as a substitute for absolute confiscation, and have also recently introduced an innovation in regard to condemned prizes." Phillipson's International Law and The Great War (1915) p. 338. It is declared by a recent writer in discussing the British Order in Council of March 11, 1915, that: "The right of a belligerent thus to intercept trade between neutrals, merely because the goods may subsequently find their way to the enemy is, however, a serious encroachment upon the rights of neutrals, and no publicists have condemned the assertion of such a claim more strongly than Hall, Westlake,

In an English case chrome ore was declared absolute contraband by Order in Council after the vessel sailed. Such chrome ore had,

Bentwich, Baty, Atherly-Jones and other English writers. To allow a belligerent such a right is to make him the judge of the destination of neutral ships and their cargoes; it is to allow him to determine in a particular case whether a cargo destined in good faith to a neutral port is intended for local consumption or, whether it is intended to be transhipped to the enemy. Manifestly, no belligerent is able to determine, for example, what proportion of American goods going to Holland today is intended for local use and how much is intended for transhipment to Germany and Austria. To attempt such a line must of necessity be arbitrary and dangerous to the rights of neutrals and to provoke serious controversy. The only rule by which the rights of neutrals may be insured is the full recognition by belligerents of the freedom of trade between neutrals. . . . The right of blockade liberally interpreted, is a right to cut off all the sea-borne commerce of the enemy; so far as it applies to commerce direct between the oversea neutral and the enemy, has never been contested. The same reason upon which this right is founded must apply with equal force to indirect commerce, that is to say, oversea trade which reaches the enemy through neutral ports situated near his frontier. The resulting benefit of such trade to the enemy is the same in both cases and so is the corresponding injury to the blockading belligerents. . . . International law allows a belligerent two means of preventing wholly or in part sea-borne commerce between his enemy and neutral states. These are: first, the right to seize and confiscate absolute contraband goods destined to enemy territory and conditioned contraband intended for the use of the armed forces or government of the enemy state; and second, the right to blockade the ports and coasts of the enemy and thereby to prevent commercial intercourse with him in all articles whether contraband or not." Article by James W. Garner in 9 Amer. Jour. Internat. L. (1915) pp. 818, 850, 854.

*Validity of Orders in Council.* The Order in Council August 20, 1914, October 29, 1914, as to Declaration of London, is valid. See The Zamara, 86 L. J. P. 89 (1916) 2 A. C. 77, 2 P. Cas. 1 (noted below). The British Order in Council of March 11, 1915, generally called the "Reprisals" Order, which provides in addition (see Appendix F and § 2139a herein) to what is above stated, that every merchant vessel which sailed from her port of departure after March 1, 1915, on her way to a port other than a German port, carrying goods with an enemy destination or which are enemy property may be required to discharge such goods in a British or allied port. Any goods so discharged in a British port "to be placed in custody of the Marshall of the Prize Court," and, unless they are contraband of war, shall, if not requisitioned "be restored by order of the Court, upon such terms as the Court may in the circumstances deem to be just, to the person entitled thereto." It is decided that said Order does not entail upon neutrals a degree of inconvenience, unreasonable considering all the circumstances of the case; that it is lawful as an Order enjoining reprisals in accordance with the principles of international law and whatever inconvenience may inevitably or necessarily be caused, neutrals must suffer that delay and that inconvenience as the consequence of the exercise of legitimate belligerent rights. The Stigstad, 85 L. J. P. 196, [1916] P. 123, 2 P. Cas. 179, 114 L. T. 705, 60 Sol. J. 496, 32 T. L. R. 472.—Evans, P.

*Extent of binding force upon Eng-*

under a contract of sale to a German company entered into in the preceding year, been shipped by a Norwegian vessel which sailed from New Caledonia to Rotterdam some four months prior to such declaration of contraband, and about one month prior thereto she had put into Pernambuco, under alleged average and proceeded under instructions to Gothenburg via the North of Scotland and in the month following said Order declaring such ore contraband she was seized and taken into Glasgow. It appeared, however, that she had no knowledge at the time of capture that chrome ore was contraband, although she knew that war existed. It was held that the goods had passed to the German company and the cargo was condemned, but freight was allowed and the shipowners were also held entitled to contribution from the cargo, although the claim for delay was disallowed. It was further decided that Article 43, of the

*lish Prize Courts of "Orders in Council." In England this distinction is made that the law which its Prize Court is to administer, is not the national, or as it is sometimes called, the municipal law, but the law of nations or international law. And as to Orders in Council* the Prize Court will take judicial notice of every such Order material to the consideration of matters with which it has to deal and will give the utmost weight and importance to every such Order short of treating it as an authoritative and binding declaration of law. "Thus an Order declaring a blockade, will prima facie justify the capture and condemnation of vessels attempting to enter the blockaded ports but will not preclude evidence to show that the blockade is ineffective and therefore unlawful. An order authorizing reprisals will be conclusive as to the facts which are recited as showing that a cause for reprisals exists, and will have due weight as showing what, . . . are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the court to hold that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable considering all the circumstances of the case. Further, it cannot be assumed, until there be a decision of the Prize Court to that effect, that any executive order is contrary to law and all such orders, if acquiesced in and not declared to be illegal, will in the course of time, be themselves evidence by which international law and usage may be established." The Zamora [1916] 2 App. Cas. 77, 85 L. J. P. 89, 2 P. Cas. 1, 114 L. T. 626, 60 Sol. J. 416, 32 T. L. R. 436, rev'g 13 Asp. M. C. 144.—Lord Parker of Waddington. (A case of neutral cargo: contraband: seizure as prize and validity of requisition before adjudication: damages, etc., considering also the American authorities as to right of requisition of vessels or goods seized). As to jurisdiction of Prize Court, see the St. Helena, 1 P. Cas. 618. See also Article by Quincy Wright on "Conflicts of International Law with National Law and Ordinances" under headings: "Sources of law:" "International Law and Constitutions:" "International Law and Statutes:" "International Law and Executive Orders:" Including also British Orders in Council, 11 Am. Jour. of Internat. Law (Jan. 1917) pp. 1–21. Same point of conflicts of such laws is also involved in discussion in Article by same author on "Destruction of Neutral Property in Enemy Vessels," 11 Id. (April, 1917) pp. 358–379.

Declaration of London providing that contraband cannot be condemned except on payment of compensation, where the vessel is encountered at sea while unaware of the declaration of contraband, etc., was not applicable in that said Article was not intended to protect contraband belonging to the enemy.[4] Under another decision where iron ore was declared as conditional contraband after a cargo thereof intended for Krupps works was shipped on board a neutral vessel for Rotterdam, and, after being so listed as such contraband, was diverted by a British warship to Portsmouth, said cargo was condemned as prize; the shipowner was, however, held entitled to freight, but no demurrage or detention was allowed.[5]

Although submarine sound-signaling apparatus is declared to be absolute contraband of war under the British and French contraband lists,[6] it is held that a submarine signalling apparatus leased by neutral American owners with a reserved right of sole and exclusive ownership, and to retake possession upon breach of certain conditions, and which apparatus is affixed to an enemy's ship, is not "neutral goods" but a part of the ship and subject to condemnation with the ship.[7]

[4] Sorfareren, 85 L. J. P. 121, 1 P. Cas. 589, 114 L. T. 46, 13 Asp. M. C. 223, 32 T. L. R. 108. See Appendix E herein.

[5] The Katwijk (1916) P. 177, 1 P. Cas. 282, 114 L. T. 1214, 31 T. L. R. 448. *Compare* The Stigsdad, 85 L. J. P. 196, [1916] P. 123, 2 P. Cas. 179, 114 L. T. 705, 60 Sol. J. 496, 32 T. L. R. 472 (Iron ore for Krupp's works: diverted: cargo sold: neutral ship: proceeds of sale ordered paid to representative of cargo less reasonable freight). See The Iolo, 85 L. J. P. 82 [1916] P. 206, 1 P. Cas. 291, 113 L. T. 604, 13 Asp. M. C. 141, 59 L. J. 545, 31 T. L. R. R. 474 (Russian cargo loaded before war in British vessel: vessel diverted: cargo discharged and sold by order of court: proceeds released to cargo owners, on indemnity against claims; shipowners entitled to freight or charges). *Examine* The St. Helena: St. Enoch Shipping Co. Ltd. v. Phosphate Mining Co. 86 L. J. K. B. 74, [1916] 2 K. B. 624, 21 Comm. Cas. 192, [1916] 2 A. C. 625, 115 L. T. 465, 61 S. J. 8, 32 T. L. R. 726 (cargo of cotton, copper and phosphates: South America to Hamburg: diverted to Manchester, where released to defendants: freight not due until contract completed); The Roumanian, 84 L. J. P. 65, P. 26, 1 P. Cas. 75, s. c. 85 L. J. P. C. 33, [1916] 1 A. C. 124, 1 P. C. 536 (question as to meaning of "port" where there was a seizure of part of a cargo of oil on land, where oil had in part been discharged into tanks; also point of jurisdiction of prize court, *compare* in this connection The Terek, 1 P. Cas.).

[6] See Appendix F herein.

[7] The Schlesien, 1 Treherne's British Colonial Prize Cas. (1914–1915) 13,—Sir Samuel Evans, President. In this case, decided in 1914, it appeared that a German steamship registered at the port of Bremen and belonging to the North German Lloyd Co. was fitted with a submarine signalling apparatus by means of which sounds passing through the water were received and indicated in the chart room. The vessel was captured in the Bay of Biscay and taken into Plymouth, condemned as prize and ordered sold. The apparatus was claimed as the property of an Amer-

The Kim Case. In this noteworthy and much discussed case decided in 1915, the questions of absolute and conditional contraband, continuous voyage, ultimate destination, certain of the English Orders in Council, and of the articles of the Declaration of London, were involved. The facts were as follows: four vessels, three of them Norwegian and the other Swedish, started, all within a period of three weeks, in October and November 1914, on voyages from New York to Copenhagen, with very large cargoes of lard, hog and meat products, oil stocks, wheat and other foodstuffs. Two of the vessels had cargoes of rubber and one of hides. They were captured on the high seas in November 1914, and their cargoes seized on the ground that they were conditional contraband all claimed to be confiscate under the circumstances except that the cargo of rubber was seized as absolute contraband. The court was asked to deal only with the cargoes which were the property of neutral owners but were under time charters to an American corporation, the Gans steamship line of which a German was the president. There were about six hundred and twenty-five separate bills of lading for the four cargoes. Four American firms were consignors on each of the four vessels and a fifth on two of them. Those portions of the cargoes which had been released and those which were not claimed were dealt with in separate judgments. There was some overlapping as some parts of the cargoes were claimed by the consignors and also by some alleged venders.

There were certain ports, to which, apart from mines sown by the Germans in open sea routes of maritime trade, neutral vessels could

ican company (The Submarine Signal Co. incorporated in Maine, U. S. A.) but the instrument was supplied through the company's agency at Bremen. There was not enough evidence, however, to say that the apparatus belonged to the American company and not to the Bremen agency. But the terms as to the ownership of the property were comprised in a document in the form of a lease whereby the apparatus should at all times remain the sole and exclusive property of the American company, with the right on its part upon breach to terminate the same and take possession, etc. Counsel for complainants urged that by the express terms of the Declaration of Paris, 1856, Art 3, the apparatus was "neutral goods" but this claim was not sustained, it being declared by the court that: "It is true that the words 'neutral goods' and 'enemy's goods' are used in the Declaration, but until now those terms have always been read as applying to cargo carried in the ship. In the French text of the Declaration the words in each instance are 'la merchandise,' and it is quite clear that they are intended to cover merchandise, and this apparatus is not merchandise." Nor was the contention sustained that the claim was "within the spirit of the Declaration of Paris" and as the apparatus was affixed to the ship it was condemned as a part of the ship which was condemned.

As to wireless installation on hospital ship, see § 2748 herein.

have, in the exercise of their international rights, voyaged with their goods. There was no blockade involving risk of confiscation of vessels running or attempting to run it. Neutral vessels might have carried conditional and absolute contraband into those ports, acting within their rights under international law, subject only to the risk of capture by warships of the British and their allies. The neutral trade with German ports in the North sea having therefore become impossible to all intents, a great part of it was deflected to Scandinavian ports from which access to the German ports in the Baltic and to inland Germany by overland routes was available.

The neutral trade involved in the above cases was that of our country and the transactions arose from a trading, either real and bona fide, or pretended and ostensible only, with Denmark, in the course of which these vessels sea voyages were made between New York and Copenhagen. Denmark is a small country exporting rather than importing foodstuffs, but conveniently situated for the transportation of goods to German ports.

Statistics were before the court showing a great disproportion between the amount of these cargoes of lard and the amount of the same goods imported annually in previous years immediately before the war, there being about thirteen times more in said cargoes. Other statistics were offered showing similar disproportionate results as to importations from which the conclusion was deduced that an overwhelming proportion of the consignments of lard was intended for Germany although these considerations were not held to be conclusive as to continuous voyages, hostile destination and hostile quantity.

The several dates of the Orders in Council and those of the commencement of the voyages were considered as to the absolute and conditional contraband character of the cargoes of rubber and hides. although it was admitted that said goods partook of said character of contraband under the Orders or Proclamations. There was also a very extended and detailed consideration of the various claims by the court.

As to the general character of the cargoes there was evidence that all the foodstuffs were suitable for use of troops in the field and that some of them were similar in kind, packing and wrapping to that supplied to British troops and were not ordinarily supposed for civilian use, that others were of the same brand and cases offered by the consignors for use of British forces in the field and could only have been made up for such like use although there was evidence to the contrary, and although the lard might have been used for the manufacture of glycerine for high explosives there was no evidence that any of it had been so used in Germany, and it was treated as foodstuffs used largely by the German army. As to that part

of the cargoes, there was evidence that it was not in a condition suitable for eating and there was no market therefor in Denmark, and it was needed in Germany for glycerine and this class was treated as materials suitable for food or the production of glycerine. Other factors in the same general line and tending to like results were considered and on the evidence when condemnation of the cargoes was asked for it was found that a major portion of the goods were not intended to be incorporated in the common stock of Denmark, but that the ultimate destination intended was Germany, and it was declared by the court that it had no hesitation in pronouncing that the doctrine of continuous voyage or transportation, both in relation to carriage of contraband, absolute and conditional, by sea and over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognized legal decisions, and with the great body of modern jurists, and also with the practice of nations in modern warfare, and it was accordingly so decided and the doctrine was applied in this case to all goods of said contraband character intended for the use of the German Government although nominally the port of destination was Copenhagen and therefore they must be condemned.

Another important point was that prize courts were not governed or limited by the strict rules of evidence binding upon the municipal courts as strict evidence is very difficult to obtain in prize cases and the said court must rely upon well-known facts which have come to light in other cases, or as matters of public reputation, otherwise the rights of belligerents would be defeated.[8] If goods are

[8] The Kim: The Alfred Nobel: The Bjornsterjne Bjornson: The Fridland, 85 L. J. P. 38, [1915] L. R. Prob. D. 215, 1 P. Cas. 405, 113 L. T. 1064, 60 Sol. J. 9, 13 Asp. Mar. C. 178, 32 T. L. R. 10. Reference was made to articles 30, 31, 34–42 of the Declaration of London, also the Order of Council of Aug. 4th and 20th of Aug. 1914, and of Oct. 29th 1914. The court, per Sir Samuel T. Evans, president, said: "Before stating the inferences and conclusions of fact, it will be convenient to investigate and to ascertain the legal principles, which are to be applied according to international law, in view of the state of things as they were in the year 1914. While the guiding principles of the law must be followed, it is a truism to say that international law, in order to be adequate, as well as just, must have regard to the circumstances of the times, including the circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it: (see The Jonge Margaretha, Roscoe's English Prize Cases vol. 1, 100; 1 Ch. Rob. 189, and Chancellor Kent's Commentaries, p. 139).

"Two important doctrines familiar to international law come prominently forward for consideration; the one is embodied in the rule as to 'continuous voyage' or 'continuous transportation;' the other relates to the ultimate hostile destination of conditional and absolute contraband respectively.

"The doctrine of 'continuous voyage' was first applied by the English Prize Courts to unlawful trading.

shipped by a neutral after the outbreak of war with the intent that they should become enemies' property ultimately, the fact of capture

There is no reported case in our courts where the doctrine is applied in terms to the carriage of contraband. But it was so applied and extended by the United States Courts against this country in the time of the American Civil War, and its application was acceded to by the British Government of the day, and was, moreover, acted upon by the International Commission which sat under the treaty between this country and made at Washington on the 8th May 1871, when the commission, composed of an Italian, an American, and a British delegate, unanimously disallowed the claims in The Peterhoff (5 Wall. [72 U. S.] 28) which was the leading case upon the subject of continuous transportation in relation to contraband goods. The Stephen Hart (Blatch. Prize Cases, 387), The Bermuda (3 Wall. [70 U. S.] 514), and The Springbok (5 Wall. [72 U. S.] 1), considered and applied the doctrine in relation to attempted breaches of blockade.

"The doctrine was asserted by Lord Salisbury at the time of the South African War with reference to German vessels carrying goods to Delagoa Bay, and, as he was dealing with Germany, he fortified himself by referring to the view of Bluntschli as the true view, as follows: 'If the ships or goods are sent to a destination of a neutral port only the better to come to the aid of the enemy, there will be contraband of war, and confiscation will be justified:' (Droit International Codifié, par. 813).

"It is essential to appreciate that the foundation of the law of contraband, and the reason for the doctrine of continuous voyage which has been grafted into it, is the right of a belligerent to prevent certain goods from reaching the country of the enemy for his military use. Neutral traders, in their own interest, set limits to the exercise of this right as far as they can. These conflicting interests of neutrals and belligerents are the causes of the contests which have taken place upon the subject of contraband and continuous voyages.

"A compromise was attempted by the London Conference in the unratified Declaration of London. The doctrine of continuous voyage or continuous transportation was conceded to the full by the conference in the case of absolute contraband, and it was expressly declared that 'it is immaterial whether the carriage of the goods is direct or entails transhipment, or a subsequent transport by land:' (art. 30). As to conditional contraband, the attempted compromise was that the doctrine was excluded in the case of conditional contraband, except where the enemy country had no seaboard: (Art. 36). As is usual in compromises, there seems to be an absence of logical reason for the exclusion. If it is right that a belligerent should be permitted to capture absolute contraband proceeding by various voyages, or transport with an ultimate destination for the enemy territory, why should he not be allowed to capture goods which, though not absolutely contraband, become contraband by reason of a further destination to the enemy government or its armed forces? And with the facilities of transportation by sea and by land which now exist, the right of a belligerent to capture conditional contraband would be of a very shadowy value if a mere consignment to a neutral port was sufficient to protect the goods. It appears also to be obvious that in these days of easy transit, if the doctrine of continuous voyage or continuous transportation is to hold at all, it must cover not only voyages from port to port at sea, but also transport by land until the real, as distinguished from the merely osten-

sible, destination of the goods is reached.

"In connection with this subject, note may be taken of the communication of the 20th Jan., 1915, from Mr. Bryan, as Secretary of State for the United States Government, to Mr. Stone, of the Foreign Relations Committee of the Senate. It is, indeed, a State document. In it the Secretary of State, dealing with absolute and conditional contraband, puts on record the following as the views of the United States Government:—

" 'The rights and interests of belligerents and neutrals are opposed in respect of contraband articles and trade. . . . The record of the United States in the past is not free from criticism. When neutral, this government has stood for a restricted list of absolute and conditional contraband. As a belligerent we have contended for a liberal list, according to our conception of the necessities of the case. The United States has made earnest representations to Great Britain in regard to the seizure and detention of all American ships or cargoes bona fide destined to neutral ports. . . . It will be recalled, however, that American courts have established various rules bearing on these matters. The rule of "continuous voyage" has been not only asserted by American tribunals, but extended by them. They have exercised the right to determine from the circumstances whether the ostensible was the real destination. They have held that the shipment of articles of contraband to a neutral port "to order," from which, as a matter of fact, cargoes had been transhipped to the enemy, is corroborative evidence that the cargo is really destined to the enemy instead of to the neutral port of delivery. It is thus seen that some of the doctrines which appear to bear harshly upon neutrals at the present time are analogous to or outgrowths from policies adopted by the United States when it was a belligerent. The Government therefore cannot consistently protest against the application of rules which it has followed in the past, unless they have not been practised as heretofore. . . . The fact that the commerce of the United States is interrupted by Great Britain is consequent upon the superiority of her navy on the high seas. History shows that whenever a country has possessed the superiority our trade has been interrupted, and that few articles essential to the prosecution of war have been allowed to reach its enemy from this country.'

"It is not necessary to dilate further upon the history of the doctrine in question. I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage or transportation, both in relation to carriage of contraband, absolute and conditional, by sea and over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognized legal decisions, and with the view of the great body of modern jurists, and also with the practice of nations in recent maritime warfare.

"The result is that the court is not restricted in its vision to the primary consignment of the goods in these cases to the neutral port of Copenhagen, but is entitled and is bound to take a more extended outlook, in order to ascertain whether this neutral destination was merely ostensible, and, if so, what the real ultimate destination was. As to the real destination of a cargo, one of the chief tests is whether it is consigned to the neutral port to be there delivered for the purpose of being incorporated into the common stock of the country. This test was applied over a century ago by Sir William Grant in the Court of Appeal in Prize Cases, in the case of The William (Roscoe, vol. 1,505; 5 Ch. Rob. 385). It was adopted by the United States Supreme Court in their unanimous judgment in The Bermuda (ubi supra), where Chase, C. J., in delivering judgment, at p. 551, said: 'Neu-

trals may convey in neutral ships from one neutral port to another any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country, or of the port.'

"Another circumstance which has been regarded as important in determining the question of real or ostensible destination at the neutral port is the consignment 'to order or assigns' without naming any consignee. In the celebrated case of The Springbok (ubi supra) the Supreme Court of the United States acted upon information as to destination (in the case of blockade) on this very ground. The part of the judgment dealing with the matter is as follows: 'That some other destination than Nassau was intended may be inferred from the fact that the consignment, shown by the bills of lading and the manifest, was to order or assign. Under the circumstances of this trade, such a consignment must be taken as a negation that any such sale was intended to be made there; for, had such sale been intended, it is most likely that the goods would have been consigned for that purpose to some established house named in the bills of lading.' The same circumstance was also similarly dealt with in The Bermuda (ubi supra) and in The Peterhoff (ubi supra).

"I am not unmindful of the argument that consignment 'to order' is common in these days. But a similar argument was used in the Springbok case (ubi supra), supported by the testimony of some of the principal brokers in London to the effect that a consignment 'to order or assigns' was the usual and regular form of consignment to an agent for sale at such a port as Nassau. The British Government was petitioned to intervene on behalf of the shippers; but upon this point the British Foreign Office said that 'no doubt the form was usual in time of peace, but that a practice which might be perfectly regular in time of peace under the municipal regulations of a particular state would not always satisfy the law of nations in time of war, more particularly when the voyage might expose the ship to the visit of belligerent cruisers,' and added that 'having regard to the very doubtful character of all trade ostensibly carried on at Nassau during the war in the United States, and to many other circumstances of suspicion before the court, Her Majesty's Government are not disposed to consider the argument of the court upon this point as otherwise than tenable.'

"The argument still remains good that if shippers, after the outbreak of war, consign goods of the nature of contraband to their own order, without naming a consignee, it may be a circumstance of suspicion in considering the question whether the goods were really intended for the neutral destination, and to become part of the common stock of the neutral country, or whether they had another ultimate destination. Of course, it is not conclusive. The suspicion arising from this form of consignment during war might be dispelled by evidence produced by the shippers. It may be here observed that some point was made that in many of the consignments the bills of lading were not made out 'to order' *simpliciter*, but to branches or agents of the shippers. That circumstance does not in my opinion, make any material difference. Other matters relating to destination will be discussed under the second branch of the case—namely, whether the goods were destined for Government or military use.

"Wherever destination comes in question, certainty as to it is seldom possible, in such cases as these; 'highly probable destination' is enough in the absence of satisfactory evidence for the shippers: (see per Lord Stowell in The Jonge Maegaretha, ubi supra). Upon this branch of the case, for reasons which have been given when dealing with the consignments generally, and when stat-

ing the circumstances with respect to each claim, I have no hesitation in stating my conclusion that the cargoes (other than the small portions acquired by persons in Scandinavia whose claims are allowed) were not destined for consumption or use in Denmark, nor intended to be incorporated into the general stock of that country by sale or otherwise; that Copenhagen was not the real bona fide destination, but that the cargoes were on their way, at the time of capture, to German territory as their actual and real ultimate destination."

The court then considers that branch of the case which relates to the goods being on their way to German territory and ultimate destination, and as preliminary thereto, the effect of the Orders in Council of Aug. 20, and Oct. 29, 1914, with the result that three of the cases must be decided in accordance with the rules of international law and as to all the cargoes on one of the ships which sailed and was captured after Oct. 29, 1914, the Order of that date applied as to the contention that said last Order was not binding, the Court adhered to its decision in The Zamora, 13 Asp. Mar. L. Cas. 144, 113 L. T. R. 649. It was also declared that what the said Order in Council did was to prevent the innovation in international law incorporated in Art. 35 of the Declaration of London whereby if the Declaration had been ratified the doctrine of continuous voyage would have been excluded for conditional contraband as recognized by the United States and by Great Britain. The court further considers articles 33 of said Declaration as to presumption of destination and with regard to consignments "to order" or if the ship's papers do not show who the consignee is. The confiscability of the cargoes with relation to the state of things in Germany; also the proof of intention on the part of the shippers of the cargoes and ultimate destination and it is said:

"In the first place, it may be observed that it is not necessary that an intention at the commencement of the voyage should be established by the captors either absolutely or by inference. In The Bermuda (ubi supra) the Chief Justice of the Supreme Court of the United States, in referring to the decision of Sir William Grant in The William (ubi supra), said: 'If there be an intention, either formed at the time of the original shipment or afterwards, to send the goods forward to an unlawful destination, the continuity of the voyage will not be broken, as to the cargo, by any transactions at the intermediate port.' It is, no doubt, incumbent upon the captors, in the first instance, to prove facts from which a reasonable inference of hostile destination can be drawn, subject to rebuttal by the claimants. Lord Granville, as Foreign Secretary, in 1885, in a note to M. Waddington (the French Ambassador), which had reference to the question of rice being declared contraband by the French Government in relation to China, said: 'There must be circumstances relative to any particular cargo, or its destination, to displace the presumption that articles of food are intended for the ordinary use of life, and to show prima facie, at all events, that they are destined for military use, before they could be treated as contraband.' And Lord Lansdowne, as Foreign Secretary, in 1904, in a note to the British Ambassador at St. Petersburg, stated the British view thus: 'The true test appears to be whether there are circumstances relating to any particular cargo to show that it is destined for military or naval use.' These statements, so qualified, it will be noted, were made when this country was making representations against the action of Foreign Governments concerning conditional contraband. So far as it is necessary to establish intention on the part of the shippers, it appears to me to be beyond question that it can be shown by inferences from surrounding circumstances relating to

the shipment of and dealings with the goods. . . .

"Before I conclude I will make reference to an opinion expressed towards the end of last year by a body of men eminent as students and expositors of international law in America, in the Editorial Comment in the American Journal of International Law, to which my attention was called by the law officers. Amongst them I need only name Mr. Chandler Anderson, Mr. Robert Lansing, Mr. John Bassett Moore, Mr. Theodore Woolsey, and Mr. James Brown Scott. It is as follows: 'In a war in which the nation is in arms, where every able-bodied man is under arms and is performing military duty and where the noncombatant population is organized so as to support the soldiers in the field, it seems likely that belligerents will be inclined to consider destination to the enemy country as sufficient, even if the Government of the enemy possesses and exercises the right of confiscating or appropriating to naval or military uses the property of its citizens or subjects of service to the armies in the field.' I cite this, not, of course, as having any authority, but as showing how these eminent American jurists acknowledge that international law must have regard to the actual circumstances of the times. I have not in this judgment followed the course thus indicated by them as a likely and reasonable one in the present state of affairs. I have preferred to proceed on the lines of the old recognized authorities.

"I wish also to note the opinion recently expressed by the Hamburg Prize Court in the case of the Maria, decided in April 1915, where goods consigned from the United States to Irish ports were laden upon a neutral (Dutch) vessel. I refer to it, not because I look upon it as profitable or helpful (on the contrary, I agree with Sir Robert Finlay that it should rather be regarded as 'a shocking example'), but because it is not uninteresting as an example of the ease with which a Prize Court in Germany 'hacks its way through' bona fide commercial transactions when dealing with foodstuffs carried by neutral vessels. It is to be remembered, too, that the Hamburg Prize Court was dealing with wheat which was shipped from America before the outbreak of war, and which had also before the war been sold in the ordinary course of business to well-known British merchants, Messrs. R. and H. Hall, Limited. This is what the Hamburg court said:

"'There is no means of ascertaining with the least certainty what use the wheat would have been put to on the arrival of the vessel in Belfast, and whether the British Government would not have come upon the scene as purchaser even at a very high price, and in this connection it must be borne in mind that the bills of lading were made out "to order," which greatly facilitated the free disposal of the cargo. That at the time of the conclusion of the contract concerning the acquisition of the wheat on the part of R. and H. Hall Limited the possibility of using the same for war purposes had, perhaps, not been contemplated does not affect the question what actual use would have been made of the cargo of wheat after the outbreak of war in August 1914.'

"For the many reasons which I have given in the course of this judgment, and which do not require recapitulation, or even summary, I have come to the clear conclusion from the facts proved, and the reasonable and, indeed, irresistable inferences from them, that the cargoes claimed by the shippers as belonging to them at the time of seizure were not on their way to Denmark to be incorporated into the common stock of that country by consumption or bona fide sale, or otherwise; but, on the contrary, that they were on their way not only to German territory, but also to the German Government and their forces for naval and military use as their real ultimate destination. To hold the contrary would be

before transfer from the consignor of the legal property does not make the capture unlawful as the capture will be deemed a delivery.[9]

**§ 2570. Definition of license and authority conferred thereby.**—(a) "License" means permission or authority, and where a license is granted by government to do any particular thing, it is a privilege or authority to do that thing, and if a license is granted by the proper authority having power to grant it, it transfers to the grantee the right to do whatever it purports to authorize, and transfers to him all the rights which the grantor can transfer to do what is within the terms of the license.[10] So that a trade which is otherwise unlawful may be so far legalized by act of government in granting a license for its conduct and prosecution that an insurance thereon is valid where the traffic is protected by the license. This last principle runs through all the cases.[11] (b) It is pertinent to refer in connection with this point of license to the consideration of the status of alien enemies, the power of the government over them and the President's Proclamation during the present Great War which has been elsewhere considered.[12] And what is stated below in an English case as to the "Aliens Restrictions Order" would apply to the President's Proclamation in that it amounts to at least a license conferred thereby upon alien enemies to remain in this country so long as they conform to the prescribed course of conduct, that is "so long as they shall conduct themselves in accordance with the law they shall be undisturbed in the peaceful pursuit of their lives and

to allow one's eyes to be filled by the dust of theories and technicalities and to be blinded to the realities of the case. Even if this conclusion were only accurate as to a substantial proportion of the goods, the whole would be affected because 'contraband articles are said to be of an infectious nature, and they contaminate the whole cargo belonging to the same owners. The innocence of any particular article is not usually admitted to exempt it from the general confiscation:' (Kent's Commentaries, 12 ed. p. 142). The cases of The Springbok (ubi supra) and The Peterhoff (ubi supra) are to the same effect, as is also art. 42 of the Declaration of London, upon which M. Renault's Report is as follows: 'The owner of the contraband is punished in the first place by the condemnation of his contraband property, and in the second by that of the goods, even if innocent, which he may possess on board the same vessel.' "

See discussion, effect, and criticism of the above Kim Case in article by Chandler P. Anderson, on "British Prize Court Decision in Chicago Packing House Cases" 11 Amer. Jour. of Internat. Law (April 1917) pp. 251–269.

[9] The Louisiana, 32 T. L. R. 619, *distinguishing* The Miramichi, 84 L. J. P. 105, (1915) P. 71, 1 P. Cas. 137.

That burden of proof is upon claimant to show that goods are neutral when in enemy ship for enemy port: Art. 59, Declaration of London, see The Roland, 84 S. J. P. 127, 1 P. Cas. 188, 31 T. L. R. 357.

[10] Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23. The text is substantially the language of Marshall, C. J.

[11] See § 293 herein.

[12] See § 299b herein.

occupations," except, etc. There are also requirements as to removal etc., and if necessary the obligation to register. These provisions go directly to the point of the civil rights and liabilities of alien enemies, as is clearly evidenced by recent English decisions wherein analogous points have been most exhaustively discussed. The question then arises: To what extent are insured or insurer aliens, who are subjects of an enemy country but located here sub protectione domini regis? Are they not here by permission of or under an implied license from our government and allowed to remain here under conditions stated, and therefore, is not their status, while under such protection, that of alien friends entitled to enforce or protect their rights in our courts? In presenting this point we are not ignoring the President's Proclamation prohibiting the transaction of business, etc., by German insurance companies, elsewhere considered.[13] A question very similar in principle to the above was answered in the affirmative in a case where an American woman had by marriage become an alien enemy and resided in the United Kingdom and had duly registered herself under the Aliens Restrictions Order of 1914, and it was held that she might sue in the English courts for the maintenance of her individual rights. Sargent, J., said: "Under that Act and Order the alien enemy suffers restrictions upon his ordinary rights of movement; the Secretary of State may order his deportation, and so on, and there can be no doubt that the effect of such registration is to amount at least to a license to the person to remain in this country; indeed I gather from the provisions of the Order the permission really amounts to a command to the alien enemy not to depart from this country without some special leave for the purpose. The law applicable to the circumstances is in my opinion correctly stated in Hall's International Law,[14] as follows: 'When persons are allowed to remain either for a specified time after the commencement of war, or during good behavior, they are exonerated from the disabilities of enemies for such time as they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemy's vessels with the enemy country.' "[15] In another English case a policy of marine insurance was effected and the pleadings were closed before the war between Great Britain and Germany. The action was brought by British subjects against a German insurance company and defendants took out a summons

[13] See § 2506, subdiv. (e) herein, as to President's Proclamation of July 13, 1917, also English "Trading with the Enemy Proclamation" of Sept. 9, 1914, of like tenor.

[14] 6th ed. p. 388.

[15] Princess Thurn & Taxis v. Moffitt (1915) 1 Ch. D. 58, 61, [1914] 31 T. L. R. 24, [1914] W. N. 379, 59 Sol. J. 26.

asking that all proceedings be stayed during the war, but the application was dismissed. It was stated, however, by the court that there was no rule of common law which suspends an action in which an alien enemy is defendant and no rule of common law which prevents his appearing and conducting his defense; and it was suggested that it might be "that the war has so hampered the defendants in the preparation of their case, in their witnesses or in other ways, that it would be right to give them a postponement on these grounds. If any application is made to postpone the trial on grounds of that character it will be dealt with on its merits." The court also said: "To allow an action against an alien enemy to proceed and to refuse to allow him to appear and defend himself would be opposed to the fundamental principles of justice. No state of war could, in any view, demand or justify the condemnation by a Civil Court of a man unheard." [16] This decision is declared in another English case to be "clearly right" as such an alien is a resident "by tacit permission of the Crown" and has "by registration informed the Executive of his presence in this country" and is, therefore, under its protection.[17]

§ 2571. **By what authority license granted.**—It is undoubtedly within the power of government, where it has by declaration of war or by statute impliedly or expressly prohibited traffic of a certain character, or has otherwise limited it, to qualify such prohibition and exempt persons or property from the operation thereof, by granting a license to such persons or privileges as to trade. These principles are not disputed.[18] The power to grant licenses is vested in Congress and in the President. So certain officers in command

[16] Robinson & Co. v. Continental Ins. Co. of Mannheim, [1915] 1 K. B. 155, 158, 159, 161, 31 T. L. R. 20, 84 L. J. K. B. (N. S.) 238, 20 Com. Cas. 125, 112 L. T. (N. S.) 125, [1914] W. N. 393, 59 Sol. J. 7.—Bailhache, J.

[17] Porter v. Freudenberg (Kreglinger v. S. Samuel & Rosenfeld), [1915] 1 K. B. 857, 112 L. T. (N. S.) 313, 84 L. J. K. B. (N. S.) 1001, 20 Com. Cas. 189, 32 R. P. C. 109, [1915] W. N. 43, 31 T. L. R. 162, 59 Sol. J. 216, 5 B. R. C. 548, 565.—Lord Reading, Ch. J. The opinion also discusses the questions of confiscation, etc., in connection with the question at issue, and also points evidenced by the preceding Federal statutes and Proclamation of the President. See Compagnie Universelle de Telegraphie et de Telephonie Sans Fil v. United States Service Corp. 84 N. J. Eq. 604, 95 Atl. 187; Compagnie Universelle v. United States Service Corp. 85 N. J. Eq. 601, 96 Atl. 292, 241 Fed. 606. See § 286 herein.

[18] 1 Arnould on Marine Ins. (Perkins' ed. 1850) *731; 2 Id. (Maclachlan's ed. 1887) 706; 1 Id. (9th ed. Hart & Simey) sec. 750, p. 938; Phillips on Ins. (3d ed.) 147, sec. 243. The common law permits the sovereign to grant a license: Vandyke v. Whitmore, 1 East, 475. See § 293 herein.

As to requirement of license for shipment from United States to allies and all other countries under Proclamation by President of United

for the needs of their forces may license such trading with the sanction of the government.[19] And in cases of a traffic, such as intoxicating liquors, the power of Congress to regulate commerce does not exclude the regulations by the state, except so far as they may conflict with the regulations established by Congress.[20] Sailing under an enemy's license is illegal,[1] and an agreement that such a license should be on board is unlawful and the policy void;[2] although where the vessel was bound to a neutral port the having an enemy's license was held not to avoid the insurance.[3]

States of date Aug. 27, 1917, see § 2539, and Appendix G herein.

As to necessity of pass for vessel to proceed to some neutral or allied port, see Order in Council of date March 11, 1915, par. I. given in Appendix F herein.

[19] As to power of Congress to regulate commerce, see § 2506 herein; Rev. Stats. U. S. (2d ed.) p. 1031, sec. 5306; Davis' International Law (ed. 1887) 240; Hall's International Law (ed. 1880) 478.

[20] See Cooley's Constitutional Limitations (6th ed.) 716 et seq. See § 2540 herein.

[1] Craig v. United States Ins. Co. Pet. (U. S. C. C.) 410, Fed. Cas. No. 3,340; The Anadone, 2 Wheat. (15 U. S.) 143, 4 L. ed. 205; The Fanny, 9 Cranch (13 U. S.) 191, 3 L. ed. 701; The Julia, 8 Cranch (12 U. S.) 181, 3 L. ed. 528, 1 Gall. (U. S. C. C.) 605; The Hiram, 1 Wheat. (14 U. S.) 440, 4 L. ed. 131; The Aurora, 8 Cranch (12 U. S.) 203, 3 L. ed. 536.

[2] Ogden v. Barker, 18 Johns. (N. Y.) 87; Colquhoun v. New York Firemen's Ins. Co. 15 Johns. (N. Y.) 352.

[3] Hayward v. Blake, 12 Mass. 176; Bulkley v. Derby Fishing Co. 1 Conn. 571; Craig v. United States Ins. Co. Pet. (U. S. C. C.) 410, Fed. Cas. No. 3,340; Perkins v. New England Marine Ins. Co. 12 Mass. 214. The rule, however, is that first stated. General rules covering construction, legality and effect of licenses in marine cases under decisions rendered under the licensing system: Trading without a license where one is required, is invalid: Potts v. Bell, 8 Term Rep. 548, 2 Esp. 612, 5 R. R. 452, 2 Eng. Rul. Cas. 654; Vandyke v. Whitmore, 1 East, 475. See § 2531 herein. It was formerly held that licenses must be strictly construed: The Cosmopolite, 4 Rob. C. 11, per Sir Wm. Scott; The Goode Hook, 1 Edw. 428, per Sir Wm. Scott; The Juno, 2 C. Rob. 117, per Sir Wm. Scott; although subsequently they received a more liberal construction: Flindt v. Scott, 5 Taunt. 673, 693, 15 R. R. 615, reversing s. c. 15 East, 525; 1 Duer on Marine Ins. (ed. 1845) 594 et seq., sec. 37. If an alien enemy has a license to trade, this legalizes the insurance: Wells v. Williams, 1 Salk. 46; Kensington v. Inglis, 8 East, 273, 9 R. R. 438; Conway v. Gray, 10 East, 536, overruled in Aubert v. Gray, 3 B. & S. 163, 169, 32 L. J. Q. B. 50, 9 Jur. (N. S.) 714, 7 L. T. 469, 11 W. R. 27; Usparicha v. Noble, 13 East, 332, 12 R. R. 360, 13 Eng. Rul. Cas. 563; De Tastet v. Taylor, 4 Taunt. 233, 13 R. R. 585. A license can only be used by the persons to whom it was intended to be granted: Robinson v. Morris, 5 Taunt. 700; Feize v. Thompson, 1 Taunt. 121, 122; The Jonge Johannes, 4 C. Rob. 263; Barlow v. M'Intosh, 12 East, 311; and it is not transferable unless it appears so on its face; Feize v. Thompson, 1 Taunt. 121. See cases last cited. Although it may be granted to one by name on behalf of himself and others: Rawlinson v. Janson, 12 East, 223. It may, however, be negotiable, either expressly or where the nature and objects of

**§ 2572. Misdescription of land on which building located does not avoid policy.**—The fact that a policy of insurance on a dwelling-house misdescribes the land on which the dwelling is situated does not affect the risk nor render the policy void.[4]

the grant raise impliedly such permission, as where the trade itself rather than the persons is intended to be covered: The Aceton, 2 Dod. 48; The Louisa Charlotte, 1 Dod. 308. So a license may run to "any person," then may be used by an enemy: The Louisa Charlotte, 1 Dod. 308; Mennett v. Bonham, 15 East, 477. A license to trade must be granted by competent authority: Vanharthals v. Halhed, 1 East, 487n; Shiffner v. Gordon, 12 East, 296; The Hope, 1 Dod. 226. The trade is limited by the terms of the license and must be conducted in accordance with the permission granted: Le Cheminant v. Pearson, 4 Taunt. 367, 13 R. R. 636; Anthony v. Moline, 5 Taunt. 711; The Cosmopolite, 4 C. Rob. 8; The Juffrow Catherine, 5 C. Rob. 141; Gordon v. Vaughan, 12 East, 302n; The Jonge Frederick, Edw. Adm. 357; Hagedorn v. Reid. 1 Maule & S. 567, 3 Camp. 377. The grantee should be properly described, and it is held that a misdescription of the character of the person procuring the license will invalidate both it and the insurance: Klingender v. Bond, 14 East, 484, 13 R. R. 292; contra, Lemcke v. Vaughan, 7 Dowl. & R. 236, 1 Bing. 473. And generally the character of the ship should correspond with that specified in the license, although when it does not and the change is not prejudicial and it is evident that the intention of the government is not contravened or other reasonable cause exists, the change is immaterial: The Jonge Arend. 5 C. Rob. 14; The Dankbaarheib. 1 Dod. 183; The Hoffnung, 2 C. Rob. 162; The Vrow Cornelia, 1 Edw. 340. So also should the goods correspond with the license as a general rule, although the goods will be protected which are within the terms of the license: The Cosmopolite, 14 C. Rob. 11; Pieschell v. Allnutt, 4 Taunt. 492; Keir v. Andrade, 6 Taunt. 499; The Juffrow Catherina, 5 C. Rob. 141. A license does not operate retrospectively so as to legalize a voyage already commenced; Henry v. Staniforth, 4 Camp. 270, 17 R. R. 293; The St. Ivan, Edw. Adm. 376; nor will the insurance in such be valid, although it was not effected until after the grant; Henty v. Staniforth, 1 Stark. 254. But if an act is done which requires a license, the presumption will be that it was procured rather than the contrary: Sewell v. Royal Exchange Assur. Co. 4 Taunt. 856; although one who claims the protection of a license must show a compliance with its terms: Vandyke v. Whitmore, 1 East, 475; Vanhartels v. Halhed, 1 East, 487n. If the time be limited, the privilege must be exercised within the time specified: Williams v. Marshall, 6 Taunt. 390, 7 Taunt. 468; Tulloch v. Boyd, 7 Taunt. 472, 1 Moore, 174. For other authorities see numerous cases reported: 2 Taunt. 249, 416; 3 Taunt. 131, 534, 546, 554; 4 Taunt. 4, 136, 178, 367, 478, 483n, 605, 717; 5 Taunt. 726; 1 Maule & S. 39, 220, 450; 2 Maule & S. 100, 485; 3 Maule & S. 337; 5 Maule & S. 25, 122; 3 Camp. 83n, 84n, 85, 158; 4 Camp. 339; 1 Stark. 222, 254; Busk v. Bell, 16 East, 3, 14 R. R. 270; Feise v. Newham, 16 East, 197; Oswell v. Vigne, 15 East, 70, 13 R. R. 375; Inham v. Agnew, 15 East, 517, 13 R. R. 516; Defflis v. Parry, 3 Bos. & P. 3; 1 Arnould on Marine Ins. (Perkins' ed. 1850) *719 et seq., *731 et seq.; 1 Parsons on Marine Ins. (ed. 1868) 21, 22, 353; 1 Phillips on Ins. 147, secs. 243–53; 3 Phillips on Evidence, *246.

[4] Kansas Farmers' Fire Ins. Co. v. Saindon, 52 Kan. 486, 39 Am. St. Rep. 356, 35 Pac. 15.

§ 2573. **When failure to name destination does not avoid marine risk.**—The contract is not so indefinite and uncertain as to render it void, although the point of destination is not named under a marine risk, where the contract under a "uniform canal cargo policy" is evidenced by an entry in a book accompanying the policy under the words "from" and "to," the words "from New York harbor" indicating the shipments where there is evidence that the term "harbor of New York," according to usage included certain points in the vicinity within the customhouse district of New York.[5]

§ 2574. **Policy to himself by agent of insurer and receiver void.**—An insurance agent cannot issue a policy to himself as receiver without the insurer's consent, such policy so issued being null and void.[6]

[5] Petrie v. Phœnix Ins. Co. 132 N. Y. 137, 30 N. E. 380, 43 N. Y. St. Rep. 478.

[6] Wildberger v. Hartford Fire Ins. Co. 72 Miss. 338, 48 Am. St. Rep. 558, 28 L.R.A. 220, 17 So. 282, per Whitfield, J. See §§ 660 et seq. herein.

On power of insurance agent to bind insurance company by insuring property in which he is interested personally or as agent, the company having no notice of such interest, see notes in 9 L.R.A.(N.S.) 1084, and 49 L.R.A.(N.S.) 972.

# CHAPTER LXIX.

## EXCEPTED RISKS AND LOSSES.

§ 2581. What constitutes invasion, insurrection, riot, civil commotion, or usurped power.
§ 2582. Excepted risks: fire caused by invasion, insurrection, riot, or mobs, civil commotion, or by military or usurped power.
§ 2582a. Same subject: waiver.
§ 2582b. "Directly or indirectly" by "riot:" dynamite explosions: unless fire ensues.
§ 2582c. Loss directly or indirectly caused by order of any civil authority.
§ 2582d. Same subject: loss of rentals: "interruption of business."
§ 2582e. When policy excepting one of a number of like accidental causes of damage covers damage from other like causes: floods.
§ 2582f. Effect of specially excepted peril: immediate cause of loss: earthquake: statute.
§ 2582g. Earthquake: fire started on other property and spread by conflagration.
§ 2583. Falling of building except as result of fire.
§ 2583a. Same subject: earthquake.
§ 2583b. Falling of building: explosion: lightning clause.
§ 2584. Explosion: no stipulation: insurers not liable.
§ 2585. Insurers not exempt where building blown up to prevent spread of conflagration.
§ 2586. Explosion occurring upon other premises: loss to insured property result of explosion only.
§ 2587. Explosion occurring upon other premises from which fire ensues communicating to insured premises.
§ 2588. "Loss by explosion of any kind:" insurer's liability under such clause where fire ensues: New York rule.
§ 2589. Same subject: rule in Ohio.
§ 2590. Same subject: rule in Illinois.
§ 2591. Same subject: rule in Pennsylvania.
§ 2592. Same subject: conclusion.
§ 2593. No liability for explosion "unless fire ensues."
§ 2594. Construction of other provisions as to explosion.
§ 2595. Conclusion as to excepted liability in case of explosion.
§ 2595a. Liability excepted where fires built within specified limits: estoppel.

§ 2596. Loss by theft excepted.
§ 2596a. Exception of liability: duty of assured to preserve or save property.
§ 2597. Exception of liability for "fire caused by hurricane."
§ 2598. Exception of liability for fire resulting from use of steam-engine.
§ 2598a. Excepted liability: fires from locomotives.
§ 2599. Credit insurance: insolvency of debtors: exception of liability: discontinuance of business: death of partner.

**§ 2581. What constitutes invasion, insurrection, riot, civil commotion, or usurped power.**—The term "invasion" generally has reference to the warlike or hostile entrance of an armed force into the territory of another, and the question should be, Was the invasion the proximate cause of the loss? a point not entirely free from difficulty in all cases; as where the property is destroyed to prevent its being taken by the invading force. But it may reasonably be assumed that an invading army is liable to commit acts of spoliation or burning, and, this being true, it is unimportant how the burning originated, whether by acts of carelessness or intentionally. It is sufficient that the invasion was the means or efficient cause of the loss, and the same would be true as to military or usurped power.[1]

An "insurrection" has been defined as "seditious rising against the government; a rebellion; a revolt."[2] Acts of the confederate forces occasioning the loss, done on June 28th, were declared those of a public enemy regularly organized; acts of sovereignty executed by the regularly constituted authorities, and not the acts of a mob or rioters.[3]

A "riot" is an unlawful act done or attempted to be done by three or more persons, either with or without a common cause; it may also consist of a lawful act done in a violent or tumultuous manner. It is not material whether or not there is a previous unlawful assembling, or that the rioters originally assembled for a lawful purpose. It may be a question whether an assemblage or multitude be

[1] *United States.*—See Ætna Fire Ins. Co. v. Boone, 95 U. S. 117, 24 L. ed. 395, rev'g Boon v. Ætna Fire Ins. Co. 40 Conn. 572.

*Louisiana.*—Poutz v. Louisiana State Ins. Co. 4 Mart. (N. S.) 43, 8 Mart. *80.

*Missouri.*—Barton v. Home Ins. Co. 42 Mo. 156, 97 Am. Dec. 321.

*Pennsylvania.*—Harris v. York Mutual Ins. Co. 50 Pa. St. 341.

*Virginia.*—Portsmouth Ins. Co. v. Reynolds, 32 Gratt. (Va.) 613.

*England.*—Drinkwater v. London Assurance Co. 2 Willes, 363.

See construction of clause in note under § 2582g herein.

[2] Spruill v. North Carolina Mutual Life Ins. Co. 1 Jones (46 N. C.) 126, per Nash, C. J.

[3] Harris v. York Mutual Ins. Co. 50 Pa. St. 341. But see as to acts done April 1, 1861, Portsmouth Ins. Co. v. Reynolds, 32 Gratt. (Va.) 613. See further as to who are "enemies," chapter XI. herein.

a riot. Force or violence, or some acts tending thereto calculated to cause terror to one or more, are necessary in criminal law, although there may be a riot without actual violence. In insurance cases it is not necessary to first establish the fact of a riot by judgment of a criminal court.[4] So the word "riot," when used in a fire policy, will also be given its popular and usual meaning.[5] Another definition is as follows: "'A riot is a tumultuous disturbance of the peace by three persons or more assembled together, of their own authority, with an intent actually to assist each other against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing same in a violent and turbulent manner, to the terror of the people.'"[6] And an organized

[4] Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868; Dupin v. Mutual Ins. Co. 5 La. Ann. 482, per the court; Spruill v. North Carolina Mutual Life Ins. Co. 1 Jones (46 N. C.) 126; Lycoming Fire Ins. Co. v. Schwenk, 95 Pa. St. 89, 40 Am. Rep. 629, per the court. See State v. Dean, 71 Wis. 678, 38 N. W. 341. "A riot is the doing of some unlawful act of violence, or of some lawful act in a violent and tumultuous manner, by three or more persons acting together without authority of law:" Desty's American Criminal Law (ed. 1887) pp. 247–50, secs. 98–98c. On the point of prior lawful assemblage it is held otherwise than as stated in the text (and supported by the Louisiana case cited), in North Carolina, in the case of State v. Stalcup, 1 Ired. (23 N. C.) 30, 35 Am. Dec. 732.

[5] Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 20 L.R.A.(N.S.) 277, 136 Am. St. Rep. 164, 116 S. W. 234, 38 Ins. L. J. 446.

[6] American Central Ins. Co. v. Stearns Lumber Co. 145 Ky. 255, 36 L.R.A.(N.S.) 566, 140 S. W. 148, 41 Ins. L. J. 125, 127—Hobson, C. J., adopting this definition as one sanctioned or adopted in a prior case in the same state, in Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 20 L.R.A.(N.S.) 277, 136 Am. St. Rep. 264, 116 S. W. 234, 38 Ins. L. J. 446, where Carroll, J., said: "Curiously enough, we have no statute defining or describing a 'riot,' although it is mentioned in sec. 1268 of the Kentucky Statutes of 1903, as a punishable misdemeanor; and secs. 375 and 381 of the Code of Criminal Practice contain provisions for the disbursement and quelling of riotous assemblies. Nor do we find any decision of this court in which the word has received judicial construction. We must, therefore, look to the common law for a definition of its meaning and a description of the acts that will constitute a riot. In the common-law authorities there is no substantial disagreement concerning the definition of a riot. In 4 Blackstone (Chitty's ed.) p. 147, we find the following: '"riot" is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel, as, if they beat a man, or hunt and kill game in another's park, chase, warren, or liberty, or do any other unlawful act with force and violence, or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner.' In 1 Russell on Crimes, p. 265, an old English work of high repute, the author states: '"riot" is described to be a tumultuous disturbance of the peace by three persons or more, assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them

assemblage acting together openly and audaciously and burning property are none the less rioters even though they choose the hour

in the execution of some enterprise of a private nature, and afterward actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. . . . It seems to be agreed that the injury or grievance complained of and intended to be revenged or remedied by a riotous assembly must relate to some private quarrel only, . . . or such like matters relating to the interests or dispute of particular persons in no way concerning the public. It seems to be clearly agreed that in every riot there must be some such circumstance, either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people. . . . But it is not necessary, in order to constitute this crime, that personal violence should have been committed. . . . But the violence and tumult must be in some way premeditated; for if a number of persons being met together at a fair, market, or any other lawful or innocent occasion happen on a sudden quarrel to fall together by the ears, it seems to be agreed that they are not guilty of a riot, but only of a sudden affray. . . . But, if there be any predetermined purpose of acting with violence and tumult, the conduct of the parties may be deemed riotous.' This definition is also found in 1 Hawkins, Pleas of the Crown, p. 513. Webster defines a riot to be 'The tumultuous disturbance of the public peace by an unlawful assembly of three or more persons in the execution of some private object.' And Bouvier in his Law Dictionary as 'a tumultuous disturbance of the peace by three persons or more, assembling together of their own authority with an intent mutually to assist each other against any who shall oppose them in the execution of some enterprise of a private nature, and afterward actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful.' The common-law definition of a riot is generally approved by modern text-writers on the subject of criminal law. Thus Bishop in his work on Criminal Law (volume 2, secs. 1143, 1149), although he makes slight criticism of the definition laid down by Russell on Crimes, says: 'A riot is such disorderly conduct in three or more assembled persons, actually accomplishing an object, as is calculated to terrify others. . . . The act of the rioters need not be such as it would be unlawful for one to perform. Whether in this sense lawful or unlawful, if it is done by three or more in a turbulent manner, calculated to excite terror, it is a riot.' Wharton in his work on Criminal Law (volume 2, secs. 1537, 1544), defines a riot as 'a tumultuous disturbance of the public peace by an unlawful assembly of three or more persons in the execution of some private object. . . . It must be also shown in riot that the assembling was accompanied with some such circumstances, either of actual force or violence, or at least having an apparent tendency thereto, as were calculated to inspire people with terror; such as being armed, making threatening speeches, turbulent gestures, or the like. . . . To constitute a riot it is not necessary that there should be actual fright to the public generally. It is enough if the action of the parties implicated be so violent and tumultuous as to be likely to cause fright, and if individuals are frightened.' These general definitions are approved in Aron v. City of Wausaw, 98 Wis. 592, 40 L.R.A. 733, 74 N. W. 354; State v. Stalcup, 23 N. Car. 30, 35 Am. Dec. 732; Lycoming Fire Ins. Co. v. Schwenk, 95 Pa. 89, 40 Am.

of midnight for the perpetration of their riotious acts, and the assemblage is not for that reason any the less a riot although they are called "incendiaries" or "night-riders" "If there was not a riot in this instance, new definitions of old words must be formed." [7] So a riot exists where a hundred or more men armed and masked terrorize and overawe the civil authorities and inhabitants of a town and burn and otherwise destroy property of private citizens which they assume is intended for a use detrimental to their interests.[8]

Rep. 629; Dupin v. Mutual Ins. Co. 5 La. Ann. 482; Commonwealth v. Gibney, 2 Allen (Mass.) 150; State v. Snow, 18 Me. 346; State v. Hughes, 72 N. Car. 27. It will thus be seen that the modern definition of a riot is in harmony with and follows the common law definition, and that the legal meaning of the word corresponds with the meaning given to it in ordinary usage. It has no technical import as distinguished from its signification when used in the everyday affairs of life. If we look to either Blackstone or Webster, we have the same result. . . . And it may here be observed that what constitutes a riot does not depend so much on the number of persons engaged or assembled, as it does in the manner in which they act. It is the disorder, the tumult, the terrorizing, the putting in fear, the violence, the unlawful acts that are the essential things. *Three armed men, banded together for the purpose of doing an unlawful act, with force and violence, acting in a tumultuous and disorderly manner, might be guilty of conduct amounting to a riot;* whereas, a hundred or more, although acting in concert, in a disorderly and noisy manner, and disturbing the peace, would not constitute a riot, unless some unlawful act was committed, although such a body might be an unlawful assembly. We are not, however, called upon in this case to make any nice or refined distinctions as to what number of persons, or what character of conduct, would constitute a riot if only a few were engaged in it and their actions might leave room for doubt as to whether or not what they did amounted to a riot. We can easily understand that there might be serious doubt as to whether the acts of three or a small number of persons, or, indeed, any number, acting in concert for an unlawful purpose, would amount to a riot. Whether what they did would or would not be a riot within the meaning of the definitions given would depend upon the facts and circumstances presented in the particular case. But we can say without any feeling of hesitation or sense of uncertainty that, if the facts stated in the answers do not describe a riot, it would be impossible to frame an answer that would. If a body of one hundred or more men, armed and disguised, unlawfully confederated and banded together for the purpose and with the intention of destroying the property of an individual, and who in pursuance of such unlawful conspiracy to destroy it, and at the same time intimidate, overawe, and terrorize the inhabitants and civil authorities, is not a riot, we are at a loss to know what facts it would take to constitute a riot under any definition the word has ever received."

[7] Luckett-Ware Tobacco Co. v. Globe & Rutgers Fire Ins. Co. (U. S. C. C.) 171 Fed. 147, 38 Ins. L. J. 1067.

[8] Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 20 L.R.A. (N.S.) 277n, 116 S. W. 234, 38 Ins. L. J. 446.

Mr. Marshall[9] reports a case[10] before Lord Mansfield where an insurance company, which had paid a loss occasioned by the riots of 1780, was permitted to sue the hundred in the name of the insured and to recover, under the riot act[11] full satisfaction. In this connection the law as stated by Judge Cooley[12] is, that a municipal corporation is not "responsible for the destruction of property by a mob unless expressly made so by statute, as in some states it has been.[13]

The words "civil commotion," says Lord Mansfield, were introduced by the Sun Fire Office in 1727, "words as general and untechnical as can possibly be used;" and he further declares that "civil commotion" cannot be applied to any of the other words then used, viz., invasion, foreign enemy, military usurped power, but that they mean something else. "I think a civil commotion is this, an insurrection of the people for general purposes, though it may not amount to a rebellion, while there is a usurped power," and he applies them to a case arising under the riot acts of 1780.[14] He also says concerning the facts: "The present was an insurrection of the people, resisting all law, setting the authority of the government at naught, and depriving of its protection whoever was obnoxious to them. What was the object and end of this violent insurrection? It took place in many parts of the town at the same time and the very same night. . . . What is their object? General confusion. It certainly was meant to aim at the very vitals of the constitution. . . . Newgate is burned down. The Fleet Prison, the King's Bench Prison, the New Bridewell, are burnt down, and all the prisoners set at liberty. The bank attacked, the excise and pay offices in Broad street threatened . . . military resistance necessary. . . . Many men have been killed. What is this but a civil commotion, if any precise meaning can be affixed to these words? It is said that this is a civil commotion distinct from usurped power and rebellion. It is admitted that this kind of insurrection may amount to high treason, and to be sure it may. But the office (insurer's) do not mean to try whether these rioters are guilty of high treason or not. It is not put upon that, but upon the grounds of civil commotion. It is not an occasional riot: that would be another question. I do not give an opinion what that might be." [14a]

[9] 2 Marshall on Ins. (ed. 1810) 794.

[10] Mason v. Sainsbury, 3 Dougl. 61,

[11] 1 Geo. I. c. 5, sec. 6.

[12] Cooley on Torts (2d ed.) pp. 740, *621.

[13] *Citing* Western College of Homeopathic Medicine v. City of Cleveland, 12 Ohio St. 375, and other cases.

[14] Langdale v. Mason, reported in 2 Marshall on Ins. (ed. 1810) 1791, per Lord Mansfield.

[14a] See also Spruill v. North Carolina Mutual Life Ins. Co. 1 Jones

The words "usurped power" may mean an invasion from abroad, or an internal rebellion conducted by authority, and not the power of a common mob.[15] The clause "notorious resistance to lawful authority" has been construed as meaning such an unusual and extraordinary state of affairs as that the usually constituted civil authorities are overpowered, and consequently unable and inadequate for the time being to successfully contend therewith.[16]

**§ 2582. Excepted risks: fire caused by invasion, insurrection, riot, or mobs, civil commotion, or by military or usurped power.**—If a policy contains a clause excepting loss by fire caused by invasion, insurrection, riot, or mobs, civil commotion, or by military or usurped power, there can be no recovery for damage by fire, though the superior officer of the invading army or of the rebellion has given no command that the building shall be destroyed or burned.[17] If it appears in such a case that the loss was in consequence and by reason of the military and usurped power, and that that was the proximate cause of the loss, then the insurers are not liable.[18] In a case which arose in Connecticut[19] involving the construction of such a clause the following facts appeared: The property burned was at a place occupied by military forces of the United States. Military stores had been deposited in one of the public buildings. It being found that a successful defense of the city

(46 N. Car.) 126, where it is said a civil commotion "requires the wild or irregular action of many persons assembled together."

[15] Ætna Fire Ins. Co. v. Boone, 95 U. S. 117, 24 L. ed. 395, rev'g Boon v. Aetna Fire Ins. Co. 40 Conn. 575; Barton v. Home Ins. Co. 42 Mo. 156, 97 Am. Dec. 329; City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258, per Bronson, J.; Drinkwater v. London Assurance Co. 2 Willes, 363, per Gould, J. See Portsmouth Ins. Co. v. Reynolds, 32 Gratt. (Va.) 613. "The words 'military' or 'usurped power' are ambiguous; . . . they must mean rebellion conducted by authority; as in the year 1745 when the rebels came to Derby; and if they had ordered any part of the town or a single house to be set on fire, that would have been by authority of rebellion. . . . It must be rebellion got to such a head as to be under some authority; . . . determined rebellion with generals who could give orders. . . . Usurped power takes in rebellion acting under usurped authority:" Langdale v. Mason, per Lord Mansfield, reported in 2 Marshall on Ins. (ed. 1810) 1791.

[16] Straus v. Imperial Fire Ins. Co. 94 Mo. 182, 4 Am. St. Rep. 368.

[17] Barton v. Home Ins. Co. 42 Mo. 156, 97 Am. Dec. 329. See construction of like clause in note under § 2582g herein.

On liability of insurer for property destroyed by mob, or during riot, see note in 20 L.R.A.(N.S.) 277; on scope and effect of provision exempting insurer from loss caused by military or usurped power or order of civil authorities, see note in 36 L.R.A. (N.S.) 1155.

[18] Barton v. Home Ins. Co. 42 Mo. 156, 97 Am. Dec. 329.

[19] Boon v. Ætna Fire Ins. Co. 40 Conn. 575.

could not be made, the officer in command of the forces ordered the destruction of the stores, to prevent the enemy from obtaining possession of the same, and therefore the building in which they were placed was set on fire; the fire was communicated from other buildings to that containing the insured property, and it was held that this was not within the meaning of the provision, as the setting on fire of the building containing the stores was the proximate cause of the loss, though the attack of the enemy furnished the motive for such act. It was further declared that the clause did not refer to lawful acts of military authorities of the government, but was only intended to include the unlawful acts of persons in hostility to the lawful authorities, and that the acts of the commander in ordering the firing of the buildings was a lawful act, and not within the exception in the policy.[20] In the United States supreme court, however, it is held that a loss in such a case is within the meaning of the exception or condition, and that the insurers are not liable.[1] If a house is destroyed by a riotous assemblage, and a clause in the policy excepts a loss of such a character, the insured is not liable; nor is it material that the riotous assemblage was originally for a lawful purpose.[2] Again, a person who has insured property against all direct loss or damage by fire, except as hereinafter provided, among which exceptions is loss caused directly or indirectly by riot, is not liable for property burned by an armed and masked body of one hundred or more men who overawe and terrorize the civil authorities and inhabitants of a town, and proceed to burn the property, because they think it is intended to be put to a use detrimental to their interests. In such case the riot is the direct cause of the fire and insured is not protected against loss by riot as that is excepted.[3] And a condition in a fire policy excepting "loss by fire occasioned by mobs or riots" does not extend to a loss caused by the burning of an adjoining bridge by order of the military authorities to prevent the advance of an armed force of rebels.[4] But where an insured coal-breaker was burned at night by a party of several men who fired

[20] See also Portsmouth Ins. Co. v. Reynolds, 32 Gratt. (Va.) 613.

[1] Ætna Fire Ins. Co. v. Boone, 95 U. S. 117, 24 L. ed. 395, *cited* in The Ontario, 37 Fed. 220, 228; Conner v. Manchester Assur. Co. 130 Fed. 743, 746, 65 C. C. A. 130, 70 L.R.A. 110; Perry v. Cobb, 88 Me. 435, 447, 49 L.R.A. 397, 34 Atl. 278; Portsmouth Ins. Co. v. Reynolds, 32 Gratt. 613, 619.

[2] Dupin v. Mutual Ins. Co. 5 La. Ann. 482.

[3] Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 20 L.R.A.(N.S.) 277n, 136 Am. St. Rep. 264, 116 S. W. 234, 38 Ins. L. J. 125, *distinguished* in American Central Ins. Co. v. Stearns Lumber Co. 145 Ky. 255, 36 L.R.A.(N.S.) 566, 140 S. W. 148, 41 Ins. L. J. 125.

[4] Harris v. York Mutual Ins. Co. 50 Pa. St. 341.

shots and drove away the watchman, it was held a riot, without proof of a previous unlawful assembling accompanied by force or violence.[5] So where five masked men broke forcibly into a dwelling-house and by threats of personal violence compelled the owner to vacate, and then burned down the building, this was held a loss by means of a riot, under a statute defining a riot as an act done by three or more persons in a tumultuous manner.[6]

But the blowing up of buildings by gunpowder for the purpose of arresting a conflagration is not a loss by usurped power.[7]

The construction of a clause in an insurance policy providing that notorious resistance to lawful authority should not render the company liable for loss or damage by fire arising therefrom is governed by preceding clauses, which relieve the company from payment of the loss when the fire should happen by any invasion, foreign enemy, insurrection, or civil commotion, lawful military power, usurped power, or by any person or persons engaged in a riot; and under a policy containing such clauses the company cannot escape liability from loss by a fire brought about by the efforts of four or five convicts who had combined to effect an escape from prison, where the prison power was adequate to overthrow such resistance, and where as soon as such convicts came in contact with an officer authorized to arrest they immediately yielded; nor is the company aided by the fact that exaggerated reports were circulated outside the prison walls where a large number of persons had lawfully assembled and armed themselves to render assistance.[8] If a policy insures against all direct loss or damage by fire "except as hereinafter provided" and it is subsequently stipulated that insurer "shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot," etc., the only loss insured against is "by fire" and the exception of loss caused directly or indirectly by "riot" includes that from fires which are the work of rioters. The excepting clause relates back to a loss "by fire." "We think the only fair and sensible construction of the contracts is that the policies insured the plaintiff against direct loss by fire except as further therein provided, to the effect that the defendant shall not be liable for any loss caused directly or indirectly by riot. If the loss was not by fire, it was not insured against at all, and the excepting clause was useless. If the loss was

[5] Lycoming Fire Ins. Co. v. Schwenk, 95 Pa. St. 89, 40 Am. Rep. 629.

[6] Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868, under Rev. Stats. Ind. 1881, sec. 1981.

[7] City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258. See also Field v. Des Moines, 39 Iowa, 575, 18 Am. Rep. 46.

[8] Straus v. Imperial Fire Ins. Co. 94 Mo. 182, 4 Am. St. Rep. 368.

by fire it was insured against, unless the fire bringing about the loss was caused directly or indirectly by riot. If the latter, the loss comes within the excepting clause; but in the former the loss was not insured against at all, so that in either event the defense is good." [9]

*Damage by fire caused by incendiary bomb from enemy air craft: exception clause as to insurrection, etc.* In an English case there was an insurance against loss or damage by fire with an exception of liability from "insurrection, riots, civil commotion, or military or usurped power," by means of an incendiary bomb from an enemy air craft the insured warehouse was set on fire and serious damage was sustained. It was held that recovery was precluded as the damage was within the exception for the reason that it was both a riot clause and a war clause combined and not merely the former.[9a]

**§ 2582a. Same subject: waiver.**—If the policy excepts loss or damage happening during the existence of any invasion, foreign enemy, rebellion, insurrection, or riot unless satisfactory proof be made that said loss or damage was not occasioned by or connected with, but occurred from a cause or causes independent of such invasion, etc., and insurer, without demanding proof, notifies insured that it will not pay the loss, denying liability on the ground it was occasioned by the excepted cause of "riot," such notice and denial of liability constitutes a waiver which relieves assured from producing proofs before commencing suit, and in such case it is for the jury to determine how the loss was occasioned and its finding it was not occasioned by causes so independent of the existence of a riot will stand undisturbed.[10] But where a policy insures only against loss by fire and excepts loss or damage directly or indirectly caused by a riot, the fact that insured was induced by insurer's agent to take out insurance by reason of the existence of a dangerous and unusual situation in insured's locality and the surrounding parts of the state does not constitute a waiver of said excepted loss clause, even though said loss was occasioned by "night riders" or a "riot." [11]

[9] Luckett-Wake Tobacco Co. v. Globe & Rutgers Fire Ins. Co. (U. S. C. C.) 171 Fed. 147, 38 Ins. L. J. 1067,—Evans, D. J.; Commercial Ins. Co. v. Robinson, 64 Ill. 265, 16 Am. Rep. 567, declared in so far as opposed to the above view, "to be wholly unsound and unmaintainable." The Illinois case is, however, *considered* in Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 20 L.R.A.(N.S.) 277, 136 Am. St. Rep. 164, 116 S. W. 234, 38 Ins. L. J. 446. 458, and it is also *considered* in Williamsburg City Fire Ins. Co. v. Willard, 164 Fed. 404, 90 C. C. A. 392, 21 L.R.A.(N.S.) 103, 38 Ins. L. J. 56.

[9a] Rogers, Limited v. Whittaker, 86 L. J. K. B. 790, [1917] 1 K. B. 992, 116 L. T. 249, 33 T. L. R. 270.

[10] Royal Ins. Co. v. Martin, 192 U. S. 149, 48 L. ed. 385, 24 Sup. Ct. 247.

[11] Luckett-Wake Tobacco Co. v.

**§ 2582b. "Directly or indirectly" by "riot:" dynamite explosions: unless fire ensues.**—It requires the participation of more than one person to cause a riot and this applies where it appeared from the evidence that before the fire, on several different occasions, insured's house had been considerably damaged by explosions of dynamite thrown or placed by some unknown person or persons but these acts of outrage were not shown to have been committed by more than one person. Notwithstanding these explosions, however, which considerably damaged the building the house was still worth considerably more than the amount of insurance thereon, and the evidence being conflicting and uncertain upon the point whether the building was destroyed by fire or by the explosion which occurred only a few minutes prior thereto the finding of the jury that fire was the proximate cause of the destruction of the building was not disturbed.[12]

**§ 2582c. Loss directly or indirectly caused by order of any civil authority.**—The word "indirectly" limits the words "order of any civil authority," as well as the other words in the clause in a policy exempting the insurer from liability for loss "caused directly or indirectly by invasion, insurrection, or military or civil war, or commotion, or military or usurped power or by order of any civil authority." [13]

In the absence of some such qualification as whether the order of the civil authority be legal or not, it would seem that the act causing or resulting in the loss ought to be one which the person or body of persons, by whom or by whose order it was done, had the power or authority to do, in order to bring it within the intent of this clause, and accordingly where the insured building is not burned by the rioters themselves, who are armed and have taken refuge therein, but is burnt by a deputy United States marshall who has no authority so to do, either by virtue of his office or otherwise, the direct cause of the fire and loss is said deputy marshall's un-

Globe & Rutgers Ins. Co. (U. S. C. C.) 171 Fed. 147, 38 Ins. L. J. 1067.

[12] Phenix Ins. Co. v. Jones, 16 Ga. App. 261, 85 S. E. 206. The condition of the policy was: "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority, or by theft, or by neglect of the insured, to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises, or (unless fire ensues, and, in that event, for damage by fire only), by explosion of any kind or by lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon."

On loss by explosion, see note in 19 L.R.A. 594, and 38 L.R.A.(N.S.) 474.

[13] Hocking v. British American Assur. Co. 62 Wash. 73, 36 L.R.A. (N.S.) 1155 (annotated on scope and

authorized act, even though such act was for the purpose of removing to some extent the danger involved in the performance of said officer's duty, and in such case insurer is not released from liability under a clause excepting risks of "riot" and "order of any civil authority." [14] So fire resulting from the negligence of the health officer in attempting to fumigate a house under order of the board of health, is within a clause in a policy thereon exempting the insurer from liability for fire caused directly or indirectly by order of any civil authority.[15] But under a Federal decision an order by the county supervisors to burn the grass on pasture lands to destroy grasshoppers which threaten to devastate the orchards and vineyards of the locality is an act of civil authority, whether it is strictly within their power or not, so as to relieve an insurance company from liability for loss of property to which the fire extends after it has gotten beyond control, under a provision of the policy relieving the insurer from liability for property destroyed by order of any civil authority.[16]

Again, assurer is exempt from liability for the death of a horse affected with glanders which is killed by a veterinary's advice where the civil authorities would for the same reason, have killed it on notice under the statute, and the policy insures against loss by death by disease but withholds liability for loss caused by order of any civil authority.[17]

**§ 2582d. Same subject: loss of rentals: "interruption of business."** —In a Maryland case certain buildings and the rentals thereon were insured and the buildings were totally destroyed in the great Baltimore conflagration of 1904 and as one of the results therefrom the authorities of that city refused permits for rebuilding for a considerable time. The policies in suit provided that the "assured agrees to rebuild in as short a time as the nature of the case will admit," and also, in addition, that the insurer should "not be

effect of provision exempting insurer from loss caused by military or usurped power or order of civil authority, etc.), 113 Pac. 259.

[14] American Central Ins. Co. v. Stearns Lumber Co. 145 Ky. 255, 36 L.R.A.(N.S.) 566, 140 S. W. 148, 41 Ins. L. J. 125, *distinguishing* Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 20 L.R.A.(N.S.) 277n, 136 Am. St. Rep. 264, 116 S. W. 234, 38 Ins. L. J. 125.

[15] Hocking v. British America Assur. Co. 62 Wash. 73, 36 L.R.A. (N.S.) 1155, 113 Pac. 259.

[16] Conner v. Manchester Assur. Co. 130 Fed. 743, 65 C. C. A. 127, 70 L.R.A. 106.

[17] Joplin v. National Live Stock Ins. Assoc. 61 Oreg. 544, 44 L.R.A. (N.S.) 569 (annotated on cause of death of insured animals), 122 Pac. 897, 41 Ins. L. J. 1118. See Martin v. National Live Stock Ins. Assoc. 65 Oreg. 29, 131 Pac. 511 (a case of exemption of liability where animal killed by order of civil authority, and pleading: anticipating defense).

liable for loss caused directly or indirectly by order of any civil authority" nor "beyond the actual value destroyed by fire for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise." It was held that the delay in rebuilding caused by the refusal of said permit was within the above exception and precluded recovery of rentals lost and that the fall of debris in the street occasioned the interruption of business so far as it affected building operations and this cause of delay was as clear a bar to recovery of rentals as was the ordinance delaying the granting of permits to rebuild.[18]

**§ 2582e. When policy excepting one of a number of like accidental causes of damage covers damage from other like causes: floods.**—The exception of one from a number of like causes of damage to or destruction of insured property is a recognition by the insurer of his liability for loss arising from other causes of like nature, and this applies to an insurance against all loss or arising from any accidental damage to the described property excepting only damage or destruction by fire, or lightning, and therefore covers, in such case, damage by reason of a flood, freshet, or sudden rise in a river. In addition it is also held that insurer is presumed to know that which is obvious in regard to the property assured, including the natural perils to which it is exposed.[19]

**§ 2582f. Effect of specially excepted peril: immediate cause of loss: earthquake: statute.**—A statute providing that when a peril is specially excepted in a contract of insurance, a loss which would not have occurred but for such peril is thereby excepted, although the immediate cause of the loss was a peril which was not excepted, does not operate to give the insurer an exemption wider than that which he has expressly stipulated for. Such a statute, however, has no application to a case where the "peril specially excepted" is fire directly caused by earthquake. The court, per Gilbert, C. J., said: "For a loss so caused the insurer shall not be liable. But the loss did not occur from a fire directly caused by earthquake. To

[18] Palatine Ins. Co. Ltd. v. O'Brien, 109 Md. 100, 71 Atl. 775, 38 Ins. L. J. 482; Palatine Ins. Co. Ltd. v. O'Brien, 107 Md. 341, 16 L.R.A. (N.S.) 1055n, 68 Atl. 484. That award in same case invalid, see 152 Fed. 922, 82 C. C. A. 70, 36 Ins. L. J. 616.

On construction of policy or contract insuring against loss of rents, see notes in 16 L.R.A.(N.S.) 1055; 23 L.R.A.(N.S.) 123; and L.R.A. 1916F, 694.

[19] Hey v. Guarantor's Liability & Indemnity Co. 181 Pa. St. 220, 59 Am. St. Rep. 644, 37 Atl. 402, 49 Wkly. N. C. 423, 28 Pitts. L. J. N. S. 21, 26 Ins. L. J. 1012. As to the last point and concealment, see § 1806 (marine risks), §§ 1850 et seq. (in other than marine risks).

hold that the insurance company, although it has specially provided for exemption of liability for loss by fire directly caused by earthquake, is entitled to an exemption wider than that which it stipulated for, is to hold that the intention of the statute is to deny to the contracting parties the power to make the contract which they made—a purpose not to be imputed to the lawmakers, and, indeed, one which is expressly disavowed" in another section of the Code which declares that the provisions thereof in respect to the rights and obligations of parties to contracts including the provision first above stated, "are subordinate to the intention of the parties when ascertained in the manner prescribed by the chapter on the Interpretation of Contracts; and the benefit thereof may be waived by any party entitled thereto, unless such waiver would be against public policy."[20]

**§ 2582g. Earthquake: fire started on other property and spread by conflagration.**—The great earthquake and conflagration in San Francisco in 1906 occasioned enormous loss of property, and a number of suits were brought against insurance companies. In a case decided in the Federal Court of Appeals in 1911, the clause relied on by the insurer was, that it should not "be liable for loss caused directly or indirectly by invasion," etc., "or for loss or damage occasioned by or through any volcano, earthquake, or hurricane, or other eruption, convulsion or disturbance." Insured's property was apparently not injured by the shock or shocks, but the earthquake by breaking electric circuit wires and in other ways immediately and directly caused a number of fires to start in other buildings and by reason of the conflagration they spread to insured's building and destroyed it and its contents. The insurer claimed that the loss was within the exceptions and therefore, it was not liable, but the judgment in the lower court in favor of assured was affirmed.[1] The court in the above case following the rule of comity says: "We are satisfied that the case at bar should be disposed of by an affirmative, since we are very far from being clear in our convictions that the Court of Appeals in the Ninth Circuit erred in its construction of the contract." In the case thus referred to, which was decided in another circuit, the fire was the same, following the same earthquake, and the language of the ex-

[20] Williamsburg City Fire Ins. Co. v. Willard, 164 Fed. 404, 90 C. C. A. 392, 21 L.R.A.(N.S.) 103, 38 Ins. L. J. 56, Cal. Civ. Code secs. 2628. 3268. See Pacific Heating & Ventilating Co. v. Williamsburgh City Fire Ins. Co. of Bklyn. 158 Cal. 367, 111 Pac. 4, 39 Ins. L. J. 1706.

On liability of insurer for fire caused by earthquake, see note in 21 L.R.A.(N.S.) 103.

[1] Norwich Union Fire Ins. Soc. v. Stanton, 191 Fed. 813, 112 C. C. A. 327, 41 Ins. L. J. 411.

cepting clause was substantially identical, and it was held under that decision that as it was explicitly stated that the insurance was only against direct loss or damage by fire "except as hereinafter provided" there must be read into the excepting clause the words "by fire" so that it should read "or for loss or damage by fire occasioned by or through any volcano, earthquake, or hurricane," etc.; that in common and colloquial use the words "cause" and "occasion" are used synonymously, that such is their ordinary use, and words in a policy should be given their common ordinary meaning rather than that of the lexicographers; that the use of the words "by or through" did not enlarge the meaning of the clause as they were but the repetition of words meaning the same thing, and upon the premise that the exception in the policy was for loss or damage by fire caused by any volcano, earthquake, etc., it was held that construing the policy most strongly against the insurer, the second exception exempted only from liability for loss by fire which was caused directly by earthquake, etc., and that a loss indirectly caused by the progress of a fire from a distance, although originally started by an earthquake was not within the exemption, and the judgment of the lower court holding insurer liable was affirmed. The court also declared that it was unnecessary to enter into a discussion of the question whether the earthquake was or was not the proximate cause of the loss. "Conceding that it was the procuring, efficient, predominent cause, it was not nevertheless the direct cause. It did not produce a fire on the insured premises. . . . An earthquake, unaided by other agencies produces no fire."[2] Under a Maryland decision insurer is liable for destruction of property by fire, following an earthquake, where it is stipulated that the insurer shall not be liable for loss caused directly or indirectly by invasion, etc., "or (unless fire ensues, and, in that event for the damage by fire only) by explosion of any kind or from any cause or the bursting of a boiler, or earthquake, or hurricane, or

[2] Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404, 90 C. C. A. 392, 21 L.R.A.(N.S.) 103, 38 Ins. L. J. 56, certiorari denied in 212 U. S. 581, 53 L. ed. 660, 29 Sup. Ct. 690. See German Savings & Loan Society v. Commercial Union Assur. Co. Ltd. 187 Fed. 758, 109 C. C. A. 506, 40 Ins. L. J. 1789; Commercial Union Assur. Co. Ltd. v. Pacific Union Club, 169 Fed. 776, 778, 95 C. C. A. 242; Richmond Coal Co. v. Commercial Union Assur. Co. 169 Fed. 746, 95 C. C. A. 178, rev'g 159 Fed. 985; Henry Hilp Tailoring Co. v. Williamsburgh City Fire Ins. Co. (U. S. C. C.) 157 Fed. 285; Baker v. Williamsburgh City Fire Ins. Co. (U. S. C. C.) 157 Fed. 280; Pacific Heating & Ventilating Co. v. Williamsburgh City Fire Ins. Co. of Bklyn. 158 Cal. 367, 111 Pac. 4, 39 Ins. L. J. 1706; Pacific Union Club v. The Commercial Union Assur. Co. 12 Cal. App. 503, 107 Pac. 728, 39 Ins. L. J. 729.

As to proximate cause: earthquake, see § 2833a herein.

lightning," etc. The above bracketed clause being declared to embrace both grammatically and logically each of the destructive forces of nature—not necessarily but sometimes resulting in fire—which follow, and are all alike bound up in that clause, and insurer is not bound for direct loss caused by said independent destructive forces; but it binds itself to make good the loss caused by fire ensuing from them. Another factor in this case was that by reason of the earthquake the water mains and pipes were disconnected and the water system for fire prevention was rendered useless.[3]

[3] McEvoy v. Security Fire Ins. Co. of Baltimore, 110 Md. 275, 22 L.R.A. (N.S.) 964, 132 Am. St. Rep. 428n, 73 Atl. 157, 38 Ins. L. J. 895. The entire clause was as follows: "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, labor strike, civil war, or commotion, or military or usurped power, or by order of any civil authority, to prevent the spread of fire, whether such order be legal or not, nor in consequence of any neglect of or deviation from police or municipal laws, rules or ordinances where such exist; or by theft at or after a fire; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises, or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind or from any cause, or the bursting of a boiler, or earthquake, or hurricane, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon." The following construction of this clause is of value: The court, per Pearce, J., said: "We will now examine the clause we have transcribed and upon the construction of which the decision must depend. An analysis of that clause will in our opinion show that the company has plainly exempted itself absolutely from loss caused by or in consequence of certain conditions or circumstances, and that it has conditionally and partially exempted itself from loss resulting from certain other causes, conditions, or circumstances: (1) It has absolutely exempted itself from 'loss caused directly or indirectly by invasion, insurrection, riot, labor strike, civil war, commotion, military or usurped power;' all these being various manifestations of vis major. (2) It has absolutely exempted itself from loss caused by the exercise of any paramount civil authority exerted to prevent the spread of fire. (3) It has absolutely exempted itself from loss in consequence of any neglect of or deviation from police or municipal regulations by the insured, or from loss by the neglect of the insured to use all reasonable means to save and preserve property at and after a fire, or when property is endangered by fire in neighboring premises. (4) It has absolutely exempted itself from loss by theft at or after a fire. (5) It has (conditionally and partially) exempted itself from loss resulting from explosion of any kind or cause, or the bursting of a boiler, or an earthquake, or hurricane, or lightning, unless in any of these cases fire ensues, and in that event it is liable for the damage by fire only. This being a fire policy, there is an adequate reason for each of these provisions, which abundantly justifies the construction we have indicated. When social disorder and violence reign, it has been found by experience to be necessary to contract against their effect upon certain classes of obligations such as those under consideration, and where the state or a municipality intervenes and de-

**§ 2583. Falling of building except as result of fire.**—Under a provision that "if a building or any part thereof fall except as the result of fire all insurance by this policy on such building or its contents shall immediately cease," the company exempts itself from any and all loss occurring subsequent to the falling of the building, though a fire may ensue immediately after the building has fallen. Thus, in a Massachusetts case, the policy contained such a condition. The insured building was equally and completely divided by a brick wall partition with communicating doors in each story. A girder fell in one-half, bringing down substantially the whole of that part and the goods stored therein, but leaving the other part standing uninjured. A fire afterward broke out in the fallen part destroying everything in it save the outer walls, the partition wall, and an elevator, but not communicating to the other part, and it was held that no action on the policy could be maintained.[4]

An exception of this nature in a policy is, like all other provisions, to be strictly construed. So long as the building remains standing the policy does not cease, and the insurers are not exempt, no matter how much it may be damaged by the action of the elements or any other course.[5] Where a policy provides that all insurance under it shall cease immediately in the event that the building in which the insured goods are, or any part of the build-

stroys the property of an individual for the common good, an insurer ought in justice to be released from the obligation of indemnity against which he could never safely contract. So when the insured by his own neglect causes or directly contributes to the loss insured against, it is fit that he should bear the loss himself; and if property endangered, but not destroyed by fire, is stolen at or after the fire, it does not come within the true intent and meaning of a contract of indemnity against fire. But explosions of any kind, the bursting of a boiler, an earthquake, a hurricane, or even lightning, may destroy property without fire ensuing, and then such loss does not naturally come within the scope of a fire policy; but an explosion or the bursting of a boiler may, and often does, result in fire either instantaneous or latent. An earthquake or a hurricane may level a building and scatter fire burning within thus causing the complete destruction of the material. Lightning very generally results in instantaneous fire, and is therefore made in this, as in most fire policies, an exception to its associated risks, and direct loss therefrom may be assumed by specific agreement noted on the policy. The construction of this policy, which we have thus indicated as correct in view of the reasons above stated leading to it, is also sustained by the structure of the clause in controversy which we have pointed out, and by the grammatical rules applicable to determine its meaning.

"The bracketed clause, '(unless fire ensues, and, in that event, for the damage by fire only),' both grammatically and logically embraces each of the destructive forces of nature (not necessarily, but sometimes resulting in fire) which follow and are all alike bound up with that brack-

ing, falls, except as a result of fire, the test properly is not, whether the effect of extent of collapse is such as to increase the fire risk, but the event itself, provided what falls is a material, substantial or important part of the structure.[6] If the fall of the building is caused by anything except, or as the result of, fire, recovery is precluded, but if the fire preceded and caused said fall insurer would be liable.[7] And even though the building caught fire before falling still if it fell from some other cause than fire the insured owner of a stock of goods therein cannot recover where said goods were uninjured by fire before the building collapsed.[8] If a part of a building falls, but goods remain undisturbed in another part which does not fall, it is held that the insured may recover for the goods so remaining which are destroyed by a subsequent fire, and also that the insurer is liable for damage caused by water used to extinguish the fire as to such goods as are not displaced or injured by the fall.[9] If the distinctive character of the building is not destroyed, and there is a fall of only a very small part of the structure, and no fractional part falls before the fire, this is not within an exception as to liability if the building or any part thereof fall except as the

eted clause. For direct loss caused by these independent destructive forces, the company refuses to be bound, but contracts to make good the loss caused by fire ensuing from them. If anything is needed to place the correctness of this interpretation of the policy beyond doubt, it will be found in the closing paragraph of the clause in question, viz., 'but liability for direct damage by lightning may be assumed by specific agreement hereon.' It is clear beyond question from this language that indirect loss from lightning is embraced in the risk assumed. If this were not so, then, to give any meaning to that paragraph, it would have to read 'but liability for all or any damages by lightning may be assumed by specific agreement hereon.' We have already shown that the words, 'explosion of any kind, bursting of a boiler, earthquake, hurricane, and lightning,' are subject to the same precise qualifications and limitations, and, if the policy covers indirect loss by lightning, there is no escape from the conclusion that it also covers indirect loss from earthquake."

[4] Huck v. Globe Ins. Co. (Walker v. Queen Ins. Co.; Stowe v. Girard Fire & Marine Ins. Co.) 127 Mass. 306, 34 Am. Rep. 373. See §§ 2773 et seq. herein.

On fall of building clause in fire insurance policies, see note in 32 L.R.A.(N.S.) 604.

[5] Fireman's Fund Ins. Co. v. Congregation Rodeph Sholom, 80 Ill. 558, 8 Chic. L. News, 178. See also Brenner v. Liverpool & London & Globe Ins. Co. 51 Cal. 101.

[6] Fountain v. Connecticut Fire Ins. Co. 158 Cal. 760, 139 Am. St. Rep. 214, 112 Pac. 546. 40 Ins. L. J. 519, — Cal. App. —, 117 Pac. 630. See Loomis v. Connecticut Fire Ins. Co. 16 Cal. App. 532, 117 Pac. 642.

[7] Stevenson & Foster Co. v. American Fire Ins. Co. (Pa.) 33 Pittsb. L. J. 253.

[8] Ogburn-Griffin Grocery Co. v. Orient Ins. Co. 188 Ala. 218, 66 So. 434.

[9] Lewis v. Springfield Fire & Marine Ins. Co. 10 Gray (76 Mass.) 159.

result of fire, the risk shall cease immediately.[10] And where the building was insured as a two-story and basement, etc., structure and the basement was destroyed after a windstorm had blown down the building, a recovery cannot be had under a claim that neither the basement nor any part of it fell except as the result of fire.[11] Again, under a like condition as the above, it is held that the falling of the building as the result of an explosion within the walls is not within the exception, and the insurers are, in such case, liable for a loss by fire immediately ensuing.[12] In case partition walls have been weakened and neither fire nor explosion precedes their falling but fire follows immediately thereafter the policy ceases and recovery is precluded, even though there is no question as to the fall of a material and integral part of the building, and, in order to recover, insured must show that fire alone caused said fall.[13]

Where the building adjoining the insured building had caught fire and only the walls were left standing, and, in consequence of their weakened condition, they fell the day after the fire, crushing in the insured building, it was held that the fire was the proximate cause of the loss to the insured building, and that the insurers were liable.[14] And in another case, where the policy stipulated that the risk should immediately cease if the building should fall "except as a result of fire," and it appeared that the insured property was adjacent to another building used as a feedmill, the wall between them being a partition wall, and the feedmill caught fire before it fell, and the fall was caused by the partial consumption of the feedmill and the weakening of the partition wall by fire, which wall, together with a part of the elevator insured, also fell, then the falling of the insured building is a direct loss or damage by fire. The clause "falling except as the result of fire" was held in this case to have reference only to cases where the building might fall from some other cause than fire; as, for example, defective construction, the withdrawal of necessary support, storm, flood, or other like cause, and fire thereafter ensued. But that it was not intended to exclude cases where fire was the immediate or proximate cause of the fall, and the court, per Mitchell, J., further declares that "to render the fire the immedate or proximate cause of the loss or damage, it is not necessary that any part of the insured property actually ignited or was consumed by fire. . . . The question is, Was

[10] London & Lancashire Fire Ins. Co. v. Crunk, 91 Tenn. 376, 23 S. W. 140.

[11] Teutonia Ins. Co. v. Beard, 74 Ill. App. 496.

[12] Dows v. Faneuil Hall Ins. Co. 127 Mass. 346, 34 Am. Rep. 384.

[13] Foster v. Home Ins. Co. 143 Fed. 307, 74 C. C. A. 445, 35 Ins. L. J. 161. See § 2775 herein.

[14] Johnston v. West of Scotland Ins. Co. 7 C. O. of Gen. Sess. Cas. (Shaw & Dunlop) 52.

fire the efficient and proximate cause of the loss or damage?"[15] But under a policy of insurance stipulating that if the insured building fall except as the result of fire the insurance shall immediately cease, the insurer is not liable for the loss of the building felled by a cyclone and destroyed by fire resulting from the fall.[16] Where the policy excepted loss by explosion of any kind, or where the building or any part thereof should fall except as the result of fire, and there was an explosion of dynamite followed in a few minutes by fire and it appeared that no substantial or material part of the building had fallen and that it had not become untenantable, and that assured had not abandoned it as a place of residence before the fire occurred, a finding of the jury that fire was the proximate cause of the loss was not disturbed where the evidence was conflicting and uncertain upon the point whether the explosion or fire caused the loss.[17]

§ 2583a. **Same subject: earthquake.**—Under the clause providing that if a building or any part thereof shall fall except as the result of fire, the insurance on the building and its contents shall immediately cease, insurer is liable for the entire loss, and the exemption in the clause does not apply to avoid the insurance where the walls fall from an earthquake shock and the insured goods begin to burn before said walls have fallen, but after the shock had begun, and they fell before the fire had done any material damage; nor does said clause apply to the insured building if the fire precedes its falling, or the fall of any part thereof.[18] And under such a stipulation, if the material part of the walls of a building tumble down by reason of an earthquake, and destruction is completed by a fire following thereupon, but caught from a burning structure nearby, recovery of insurance on the contents of the building cannot be had, and in such case it is unimportant whether the falling of such material part of the building before the fire, increased the risk or not.[19]

§ 2583b. **Falling of building: explosion: lightning clause.**[20]—In an Iowa case there was a storm of unusual violence and the evidence

[15] Ermentraut v. Girard Fire & Marine Ins. Co. 63 Minn. 305, 30 L.R.A. 346, 56 Am. St. Rep. 481, 65 N. W. 635.

[16] Nichols v. Sun Mutual Ins. Co. 71 Miss. 326, 42 Am. St. Rep. 465, 14 So. 263.

[17] Phenix Ins. Co. v. Jones, 16 Ga. App. 261, 85 S. E. 206.

[18] Davis v. Connecticut Fire Ins. Co. 158 Cal. 766, 32 L.R.A.(N.S.) 604 (annotated on fall of building clause in fire insurance policies), 112 Pac. 549, 40 Ins. L. J. 524. See Loomis v. Connecticut Fire Ins. Co. 16 Cal. App. 532, 117 Pac. 642. See § 2792 herein.

[19] Fountain v. Connecticut Fire Ins. Co. 158 Cal. 760, 139 Am. St. Rep. 214, 112 Pac. 546, 40 Ins. L. J. 519. — Cal. App. —, 117 Pac. 630.

[20] See § 2790 herein.

was conflicting upon the point whether the collapse of the building was caused by a stroke of lightning or by water undermining the walls. The policy to which a lightning clause was attached, although whether it had been so attached was a question in issue, also stipulated that if the building or any part thereof should fall except as a result of fire all insurance on such building or its contents should immediately cease. In answer to the contention that as the lightning clause was subject to the terms and conditions of the policy insurer was not liable in that the loss or damage occurred after the walls fell, the court declared that the evident design of that clause was to obviate liability for loss by fire consequent upon or subsequent to the falling of the insured building and that possibly all insurance under the lightning clause except as a result of the lightning would have ceased upon the falling of the building and that this would seem a fair interpretation of the two clauses read together.[1] If a policy on a house and furniture contains a lightning clause, followed by a provision distinctly excluding liability for loss by explosion, it is plain that a loss by explosion is not contemplated by the parties as being embraced within the protection of the policy. Accordingly, if lightning strikes a powder-house, in which neither the company nor the insured has any interest, on the other side of a street from the insured property, seventy-one feet distant, and which stroke is followed by an explosion that destroys the house and furniture, the company is not liable.[2]

§ 2584. **Explosion: no stipulation: insurers not liable.**[3]—In the absence of any provision in the policy the insurers are not liable for loss by explosion of steam or other agent acting by expansion without combustion.[4] So where sugar in a sugar-house covered by an ordinary fire policy was destroyed by an explosion of the boilers used in manufacturing, the damage being caused by the explosion and not by fire, the insurer was held not liable.[5]

§ 2585. **Insurers not exempt where building blown up to prevent spread of conflagration.**—The necessity not infrequently arises for blowing up a building with some explosive to prevent the spreading of a conflagration. Where such a necessity arises, and an insured

[1] Cummins v. Pennsylvania Fire Ins. Co. 153 Iowa, 579, 37 L.R.A. (N.S.) 1169, 134 N. W. 79, 41 Ins. L. J. 490.—Ladd, J. See § 2790 herein.

[2] German Fire Ins. Co. v. Roost, 55 Ohio St. 581, 36 L.R.A. 236, 60 Am. St. Rep. 711, 45 N. E. 1097. See § 2589 herein.

On liability for loss by lightning, see note in 26 L.R.A. 267.

[3] See §§ 2586–2595, 2768 et seq. herein.

[4] Scripture v. Lowell Mutual Ins. Co. 10 Cush. (64 Mass.) 356, 57 Am. Rep. 111.

[5] Millaudon v. New Orleans Ins. Co. 4 La. Ann. 15, 50 Am. Dec. 550; Marcy v. Sun Ins. Co. 14 La. Ann. 264.

building is so destroyed, the insurers are liable. If the policy stipulates that "the insurer shall not be liable for an explosion by gunpowder," it is nevertheless a loss within the policy if the building is blown up in order to prevent the spreading of a large fire.[6] In the case so deciding it appeared that the insured building had, however, caught fire, and Sherwood, J., in his opinion says: "Had this means been resorted to before the fire had actually begun its work of destruction upon the property insured, it might be a question whether the underwriters would be liable." His subsequent words, however, would be equally pertinent had the fire not reached the insured property. They are as follows: "It is certainly very much against the true interests of insurers to raise any objections founded on the honest efforts of the insured or others to prevent the spread of fires, much more to print clauses meant to make the right of recovery depend upon what is or is not done by strangers or others present at the fire. Life indeed, as well as property, is often in peril, but where it is not, men might be disposed, under such circumstances, out of regard for the insured, to stand still and let the property perish rather than imperil his rights by interfering with his claim for indemnity against the insurers. It would be a novel clause to introduce into a policy that in case of fire the insurance should be void if any water were applied to extinguish it. Quite as novel would it be were it provided that if there were no water nothing should be done. Yet the defendants in this case have told us that the clause that the insurers should not be liable for an explosion by gunpowder was meant to guard against the very thing which had been done. Had the citizens of Americus, instead of resorting to gunpowder, succeeded in any other way in separating the building in question from those contiguous to it, we would probably have been told that it was destruction by a mob, against which there is a provision in most policies, if not in this. We construe this clause differently and more for the interests of the underwriters when we say that fire originating from an explosion of gunpowder was what was meant to be guarded against, and not an honest effort, even if it was injudicious, on the part of those present to stop the flames." [7]

**§ 2586. Explosion occurring upon other premises: loss to insured property result of explosion only.**—Where the fire did not happen

[6] Greenwald v. Insurance Co. 3 Phila. (Pa.) 323, 7 Am. L. Reg. (O. S.) 282.

[7] This language is *quoted* in a later case in New York City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258, where an insured building which the flames had not reached was blown up by order of the mayor of the city, in order to prevent the fire from spreading, and it was there held that the insurers were liable for the loss to the insured property.

at the premises insured, but broke out in a building about two hundred feet distant, causing an explosion by gunpowder, which by the concussion of the air injured a building insured against fire, it was held that such a loss could not have been within the reasonable intent of the parties, and was not covered by the policy.[8] So in an English case, where it appeared that the insured premises were damaged by an explosion of a powder magazine, occurring about a mile distant, it was held not to be a loss within the policy.[9] So under a Tennessee decision, if, while a building is burning, an explosion occurs therein which injures neighboring property without igniting it a fire policy on the latter property which excludes liability for loss by explosion does not cover such injuries. In this case the explosion was in a neighboring building about forty feet away and was caused by fire on those premises igniting powder and dynamite therein stored. The fire itself did not reach the insured property, but the explosion produced thereby resulted in loss and damage to insured stock. The explosion referred to was wholly due to the preceding fire. Among the several claims made by the insurer was one of which the court, per Neil, J., says: "It is insisted by counsel for complainants that since an explosion produced in progress of a precedent fire is held to be the result of the fire and the loss by such explosion a loss by fire, damage produced thereby in neighboring buildings should be treated like damage by smoke and water, destruction by the falling of buildings or other injuries by fire agencies without actual ignition in their operation upon adjoining buildings and that the element of distance is unimportant. Abstractly speaking the deduction seems sound; but logical conclusions cannot always be safely reached by pressing processes of logical illation to their ultimate result. The weight of authority is against complainant's contention."[10] Under another decision the fall of a building because of an explosion in a burning building in the vicinity, is not within the protection of a policy insuring against direct loss or damage by fire, where the policy also provides that the insurer shall not be liable for loss caused, directly or indirectly, by explosion of any kind.[11] Again, it is declared that

[8] Caballero v. Home Mutual Ins. Co. 15 La. Ann. 217. See §§ 2582g–2768 et seq. herein.

On liability for damage by explosion in neighboring building, see note in 38 L.R.A.(N.S.) 476.

[9] Everett v. London Assur. Co. 19 Com. B. (N. S.) 126, 11 Jur. (N. S.) 546, 34 L. J. C. P. 299, 13 Week. Rep. 862.

[10] Hall & Hawkins v. National Fire Ins. Co. 115 Tenn. 513, 112 Am. St. Rep. 870, 92 S. W. 402, 35 Ins. L. J. 507.

See Germania Fire Ins. Co. v. Roost, 55 Ohio St. 581, 36 L.R.A. 236, 60 Am. St. Rep. 711, 45 N. E. 1097.

[11] Hustace v. Phenix Ins. Co. 175 N. Y. 292, 62 L.R.A. 651, 67 N. E.

"the manifest weight of authority clearly sustains the proposition that damage to insured property caused only by concussion consequent upon an explosion occurring at a distance from the premises upon which the insured property is situated, no fire ensuing in the insured property, is not recoverable under the fire insurance policy although the explosion was caused by and incident to a fire in progress on the distant premises." [11a]

**§ 2587. Explosion occurring upon other premises from which fire ensues communicating to insured premises.**—If the company excepts a loss by explosion, it is not liable for any loss or damage which the insured premises may sustain which is the mere result of concussion of an explosion upon other premises than those insured.[12] If, however, explosion occurs upon other premises than those where the insured property is located, from which fire ensues, and communicates to the insured property, is the company liable? Under a decision in the United States supreme court [13] it was held that the company was not liable in such case. The facts were these: The policy provided that "insurers shall not be liable for loss or damage that may happen by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake, or hurricane." Cotton stored in a warehouse was insured; the street upon which the warehouse was located was about fifty feet in width, and upon the other side of the street was another warehouse wherein an explosion occurred, which threw down the walls and scattered many combustible materials in the street. Fire followed as the result of the explosion and fall of the building, and was communicated to the warehouse containing the insured cotton from another building, which had been fired as a result of the explosion. It was held that insurers were not liable if the fire took place by means of the explosion, and that it did so take place unless some new power or force had intervened between the burning of the cotton and the explosion, and also that the fact that the fire destroyed another building before it was carried to the cotton did not operate as a new cause, and was no new force or power.[14] In

592, 32 Ins. L. J. 688. See this case also under § 2593 herein.

[11a] Metropolitan Casualty Ins. Co. of N. Y. v. Bergheim, 21 Colo. App. 527, 122 Pac. 812, 41 Ins. L. J. 1107, 1112.—Walling, J.

[12] Hall & Hawkins v. National Fire Ins. Co. 115 Tenn. 513, 112 Am. St. Rep. 870, 5 Ann. Cas. 777, 92 S. W. 402, 35 Ins. L. J. 507, *considered* as to this point under § 2586 herein. See also §§ 2593, 2771 herein.

[13] Louisiana Mutual Ins. Co. v. Tweed, 7 Wall. (74 U. S.) 44, 19 L. ed. 65. See §§ 2768 et seq. herein.

[14] We think the words of the Illinois court are noteworthy in this connection: Commercial Ins. Co. v. Robinson, 64 Ill. 265, 16 Am. Rep. 557. This point was not, it is true, directly before the court, the question in this case being whether a fire directly after an explosion was excepted. The court, however, in its argu-

other words where an explosion produced or set in operation the fire which burned the plaintiff's cotton, and which was carried to the cotton by first burning another building, the loss is included in the exception in the policy that the insurers will not be liable for a loss which happens by means of an explosion. The accidental circumstance that the wind was blowing in a direction to favor the progress of the fire toward the warehouse cannot be considered a new cause, so as to render the explosion too remote.[15]

ment, supposes such a case, and says: "When a person takes out a policy and pays the premium, he takes it for granted without reading the policy that he cannot make the risk more hazardous by storing highly inflammable materials upon the premises. He knows that it would be acting in bad faith with the company, and that the policy has probably provided against it, but he would have no reason to suppose that among the voluminous stipulations of the policy there would be found one intended to deprive him of its benefit because a fire which has destroyed his property originated in another house a half-mile distant in the explosion of a camphene lamp. Most fires originate in acts of carelessness, and it is chiefly to guard themselves against the carelessness of others that prudent persons insure. Yet the construction of this policy contended for by the company would make the insured assume the liability for the carelessness of others. The great fire at Chicago is supposed to have originated in the overturning and explosion of a lamp, but we are not aware that any of the insurance companies that suffered by that fire have sought to interpose this defense, although this clause is a very common one in insurance policies, and was probably contained in many that had been issued on the property there destroyed. Counsel for the company, feeling the unreasonable character of their interpretation of this condition in cases where the fire comes from an explosion on other premises, speak of it as if it only referred to explosions on the premises of the insured. But the policy will have no such construction or limitation. We must either hold that the clause refers to loss by explosion simply, without reference to fire or to losses by fire occasioned by explosions anywhere, whether on or remote from its premises. There is no middle term. One is consistent with the context, reasonable in itself and just to both parties. The other requires the interpolation of two additional words in the policy, is inconsistent with the context, and in a large degree would make fire insurance a mere mockery." This decision is *considered* in Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 20 L.R.A.(N.S.) 277, 136 Am. St. Rep. 164, 116 S. W. 234, 36 Ins. L. J. 446, 458, also in Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404, 90 C. C. A. 392, 21 L.R.A.(N.S.) 103, 38 Ins. L. J. 56, but it is declared "to be wholly unsound and unmaintainable" in Luckett-Wake Tobacco Co. v. Globe & Rutgers Fire Ins. Co. (U. S. C. C.) 171 Fed. 147, 38 Ins. L. J. 1067, at least so, in so far as opposed to that decision.

[15] Louisiana Mutual Ins. Co. v. Tweed, 7 Wall. (74 U. S.) 44, 19 L. ed. 65.

*Cited* in: *United States.*—The G. R. Booth, 171 U. S. 450, 454, 43 L. ed. 234, 238, 19 Sup. Ct. 9; Washington & G. R. Co. v. Hickey, 166 U. S. 521, 527, 41 L. ed. 1101, 1103, 17 Sup. Ct. 661; Scheffer v. Washington City V. M. & G. S. R. Co. 105 U. S. 249, 251, 26 L. ed. 1070, 1071; Aetna Fire Ins. Co. v. Boon, 95 U. S. 117, 131, 24 L. ed.

In the first edition of this treatise we said: Can such a doctrine as that stated in the United States supreme court be sound? It does

295, 399; Travelers' Ins. Co. v. Leaver, 19 Wall. (86 U. S.) 531, 542, 22 L. ed. 155, 158; Phenix Ins. Co. v. Charleston Bridge Co. 65 Fed. 628, 632, 13 C. C. A. 58, 62, 25 U. S. App. 200; Southwestern Telegraph & Telephone Co. v. Robinson, 50 Fed. 810, 813, 1 C. C. A. 684, 688, 2 U. S. App. 205, 16 L.R.A. 547; Crandall v. Accident Ins. Co. 27 Fed. 40, 46, aff'd 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. 685; Washburn v. Western Ins. Co. 9 Ins. L. J. 426, Fed. Cas. No. 17,216; Boon v. Aetna Ins. Co. 12 Blatchf. 24, 29, Fed. Cas. No. 1,639.

*Alabama.*—Thompson v. Louisville & N. R. Co. 91 Ala. 496, 499, 11 L.R.A. 147, 8 So. 406.

*California.*—Hawthorne v. Siegel, 88 Cal. 159, 166, 22 Am. St. Rep. 291, 25 Pac. 1114.

*Colorado.*—Blythe v. Denver & Rio Grande Ry. Co. 15 Colo. 333, 336, 11 L.R.A. 617, 22 Am. St. Rep. 403, 25 Pac. 702; Denver, Texas & Gulf Ry. Co. v. Robbins, 2 Colo. App. 313, 318, 30 Pac. 261.

*Connecticut.*—Boon v. Aetna Ins. Co. 40 Conn. 575, 580.

*Dakota.*—Pielke v. Chicago, Milwaukee & St. Paul Ry. Co. 5 Dak. 444, 41 N. W. 669.

*District of Columbia.*—Dashiell v. Washington Market Co. 10 App. D. C. 94.

*Illinois.*—Wolff Manufacturing Co. v. Wilson, 152 Ill. 9, 14, 26 L.R.A. 229, 231, 38 N. E. 694; Heuer v. North Western National Ins. Co. 144 Ill. 393, 400, 19 L.R.A. 594n, 598, 33 N. E. 411; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 260, 18 L.R.A. 215, 220, 32 N. E. 285; Schmidt v. Mitchell, 84 Ill. 195, 200, 25 Am. Rep. 446; Fent v. Toledo P. & W. Ry. Co. 59 Ill. 349, 353, 14 Am. Rep. 13; Peoria v. Adams, 72 Ill. App. 673; Heuer v. West Chester Fire Ins. Co. 44 Ill. App. 429, 437; Miller v. London & Liverpool Fire Ins. Co. 41 Ill. App. 395, 397.

*Indiana.*—Pennsylvania Co. v. Congdon, 134 Ind. 226, 231, 39 Am. St. Rep. 251, 33 N. E. 795; Louisville, N. A. & C. R. Co. v. Nitsche, 126 Ind. 229, 237, 9 L.R.A. 750, 753, 22 St. Rep. 582, 26 N. E. 51.

*Iowa.*—Walrod v. Webster County, 110 Iowa, 349, 352, 47 L.R.A. 480, 482, 81 N. W. 598; McKenna v. Baessler, 86 Iowa, 197, 200, 17 L.R.A. 310, 311, 53 N. W. 103; Small v. Chicago, R. I. & P. Ry. Co. 55 Iowa, 593, 8 N. W. 437.

*Kentucky.*—Shields v. Louisville & N. R. R. Co. 97 Ky. 103, 110, 27 L.R.A. 680, 683, 29 S. W. 978.

*Louisiana.*—Tanneret v. Merchants' Mutual Ins. Co. 34 La. Ann. 253.

*Maine.*—Perry v. Cobb, 88 Me. 435, 447, 49 L.R.A. 389n, 397, 34 Atl. 278.

*Maryland.* — Annapolis & Elk Ridge Co. v. Gantt, 39 Md. 143.

*Massachusetts.*—Stone v. Boston & Albany R. Co. 171 Mass. 536, 540, 41 L.R.A. 794, 797, 51 N. E. 1; Lynn Gas & Electric Co. v. Meriden Fire Ins. Co. 158 Mass. 570, 576, 20 L.R.A. 297, 304, 35 Am. St. Rep. 540, 33 N. E. 690; Freeman v. Mercantile Mutual Accident Assoc. 156 Mass. 351, 354, 17 L.R.A. 753, 755, 30 N. E. 1013; Tuttle v. Travelers Ins. Co. 134 Mass. 175, 176, 45 Am. Rep. 316; Dows v. Merchants Ins. Co. 127 Mass. 346, 347, 34 Am. Rep. 384.

*Michigan.*—Selleck v. Lake Shore & M. S. R. Co. 93 Mich. 375, 379, 18 L.R.A. 154n, 157, 53 N. W. 556; Lewis v. Flint & P. M. R. Co. 54 Mich. 55, 63, 52 Am. Rep. 790, 19 N. W. 744.

*Missouri.* — Haley v. St. Louis Transit Co. 179 Mo. 30, 35, 64 L.R.A. 295, 297, 27 S. W. 731; State (ex rel. Kearney) v. Finn, 87 Mo. 316; Logan v. Wabash R. Co. 96 Mo. App. 466, 70 S. W. 734.

*New Jersey.*—Hammill v. Pennsylvania R. Co. 56 N. J. L. 370, 378, 24 L.R.A. 531, 535, 29 Atl. 151; Delaware, Lackawanna & Western R. Co.

not seem consistent with the intention of the parties. The insured is entitled to the benefit of all doubts in case of restrictions in the policy. The question seems pertinent whether such a case is not within the rule requiring a strict construction against the insurer, and whether the construction given is not opposed to the doctrine contra proferentum. To hold that the insurer is exempt from liability in cases of this character would operate in a great measure to defeat the very object of insurance. It would seem, however, from the numerous citations of that case that the rule declared therein is fully supported, even though in a later decision in the same court it is said of that case by Mr. Justice Miller, who also delivered the opinion therein, that "It went to the verge of sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama warehouse; but it rested on the ground that no other proximate cause was found."[16] Again, liability for loss resulting from destruction by fire of a building insured by a policy exempting the insurer from liability for loss caused by explosions of any kind (unless fire ensues, and in that event for the damage by fire only) and providing that if the building or any part thereof falls, except as the result of fire, the insurance shall immediately cease, will attach under the former clause, and not be defeated by the latter, where one corner of the building is knocked down by

v. Salmon, 39 N. J. L. 299, 308, 23 Am. Rep. 214.

*New York.*—Glazier v. Hebron, 16 N. Y. Supp. 503, 62 Hun, 141; Sauter v. New York Central & Hudson River R. Co. 6 Hun, 450; Trapp v. McClellan, 74 N. Y. Supp. 130, 68 App. Div. 366.

*Oregon.*—Ahern v. Oregon Telegraph & Telephone Co. 24 Oreg. 276, 292, 22 L.R.A. 635, 640, 33 Pac. 403.

*Pennsylvania.*—Pennsylvania R. Co. v. Kerr, 62 Pa. 353, 368, 1 Am. Rep. 431; Swanson v. Crandall, 2 Pa. Super. Ct. 89.

*Rhode Island.*—Prue v. New York P. & B. R. Co. 18 R. I. 360, 368, 27 Atl. 450.

*Tennessee.*—Chattanooga Light & Power Co. v. Hodges, 109 Tenn. 331, 337, 60 L.R.A. 459, 460, 97 Am. St. Rep. 844, 70 S. W. 616.

*Texas.*—Seale v. Gulf, C. & S. F. R. Co. 65 Tex. 274, 278, 57 Am. Rep. 602; Texas & P. R. Co. v. Beckworth, 11 Tex. Civ. App. 153, 155, 32 S. W. 347.

*Virginia.*—Portsmouth Ins. Co. v. Reynolds, 32 Gratt. 613, 618.

*West Virginia.*—Snyder v. Philadelphia Co. 54 W. Va. 149, 158, 63 L.R.A. 896, 900, 102 Am. St. Rep. 941, 46 S. E. 366; Smith v. County Court, 33 W. Va. 713, 724, 8 L.R.A. 82n, 88, 11 S. E. 1; Pegram v. Stortz, 31 W. Va. 220, 234, 6 S. E. 485; Washington v. Baltimore & O. R. Co. 17 W. Va. 197.

*Wisconsin.*—Atkinson v. Goodrich Transportation Co. 60 Wis. 141, 157, 50 Am. Rep. 352, 18 N. W. 764; Kellogg v. Chicago & N. W. R. Co. 26 Wis. 223, 284, 7 Am. Rep. 69.

*Distinguished* in: Northwest Transportation Co. v. Boston Marine Ins. Co. 41 Fed. 793, 804; Washburn v. Miami Valley Ins. Co. 2 Flipp. 664, 669, 2 Fed. 633, 637; Pennsylvania Co. v. Whitlock, 99 Ind. 16, 27, 50 Am. Rep. 71.

[16] Scheffer v. Railroad Co. 105 U. S. 249, 26 L. ed. 1070. See §§ 2768 et seq. herein.

an explosion in a neighboring building, and fire immediately appears in the exposed part, caused either by the flame of the explosion, or by fires liberated thereby in the building insured.[17]

**§ 2588. "Loss by explosion of any kind:" insurer's liability under such clause where fire ensues:[17a] New York rule.**—The question has not infrequently arisen as to the construction of the clause "loss by explosion of any kind" immediately following the provision exempting insurers from liability "for any loss or damage by fire caused by means of an invasion," etc. In many cases it is contended by the insurers, and the claim has been sustained by the courts, that the words "by fire" were to be understood as if used after the word "loss," so as to read "loss by fire or by explosion of any kind." We will note briefly the decisions upon this point. The case of Hayward v. Liverpool & London Fire & Life Insurance Company[18] has been often referred to as sustaining this claim, but the words of the condition in that policy expressly excluded liability for subsequent fire, and the case cannot be properly cited as sustaining such a view. The policy there provided that the insurer should not be liable for any loss or damage "by fire which shall happen or arise from any foreign invasion . . . or by any explosion." In another case, however, in New York[19] this precise question arose. The policy provided that the insurers would not be liable "for any loss or damage by fire, . . . nor for any loss occasioned by the explosion of a steam-boiler, or explosions arising from any other cause, unless specially specified in the policy." A boiler upon the premises exploded, and the explosion was the immediate cause of a fire which damaged the insured property. The insurers claimed that the latter part of the clause as to loss by explosion was intended to include therein loss by fire the result of explosion. The court in this case held, in substance, that as the policy covered loss by fire only, the exception would be meaningless unless it referred to loss by fire, since the insurer was not liable for loss which was merely the result of an explosion, even in the absence of any provision in the policy; that the provision referred "prima facie to such a loss as by the prior provisions of the contract the defendants would be bound to indemnify against," and not to one which

[17] Leonard v. Orient Ins. Co. 109 Fed. 286, 48 C. C. A. 369, 54 L.R.A. 706.

[17a] On explosion clause in fire insurance policy, see note in 32 L.R.A. (N.S.) 607; on loss by explosion, generally, see notes in 19 L.R.A. 594, and 38 L.R.A.(N.S.) 474.

[18] 3 Keyes (N. Y.) 456, 2 Abb. Dec. (N. Y.) 349, 5 Abb. Prac. (N. S.) 142, 7 Bosw. (N. Y.) 385, overruling s. c. 19 Abb. Pr. (N. Y.) 116. See §§ 2593, 2768 et seq. herein.

[19] St. John v. American Mutual Fire & Marine Ins. Co. 11 N. Y. 516 (opinions were filed by six judges in this case).

would not be embraced in the general terms of the policy, and as to which there was no occasion to introduce an exception.[20]

**§ 2589. Same subject: rule in Ohio.**—In Ohio,[1] the same question has arisen concerning a policy containing a provision of this nature, but worded differently, although the same question arose as to the construction. The provision was as follows: "This company is not liable for loss or damage by lightning or tornado unless specially mentioned and insured against, but will be responsible for loss or damage to property consumed by fire occasioned by lightning. Nor will this company be responsible for any loss or damage to property consumed by fire happening by reason of or occasioned by any invasion, . . . nor to any loss or damage occasioned by or resulting from any explosion whatever." The ground of the decision was much the same as that in the New York case above.[2] The court said: "The foundation point, however, in construing this condition is found in the general undertaking of the policy. It will be observed that the underwriter undertakes to insure against loss and damage by fire only, but nevertheless against loss and damage by fire generally, and the maxim 'causa proxima non remota spectatur' applies. Now, we think, without doubting, that the purpose of inserting this condition was to relax the rigor of this maxim, and exempt from the general risk of the policy certain losses which would otherwise fall within its scope and meaning." The court then considers the different clauses in the exception, and says: "Unless there is something in the subject matter of this clause that indicates that the words 'by fire' were omitted for the purpose of showing a design to adhere to and continue the general risk in case an explosion should result in a fire, we think that they or their equivalent should be supplied by implication or construction. Is such purpose indicated by any fair use of the terms employed? That a loss other than by combustion resulting from explosion, when the explosion itself is caused by a destructive fire already in progress, comes within the general risk of a policy against fire only is a doctrine not only reasonable in itself, but is sustained by authority.[3] And it is quite clear that a loss by fire which is occasioned by an explosion is within the like risk.

[20] As to other New York cases, see § 2593 herein.

[1] United Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio, 340, 10 Am. Rep. 735. See §§ 2768 et seq. herein.

[2] St. John v. American Mutual Ins. Co. 11 N. Y. 516. See German Fire Ins. Co. v. Roosi, 55 Ohio St. 581, 36 L.R.A. 236, 60 Am. St. Rep. 711, 45 N. E. 1097, *considered* under § 2583b herein.

[3] Waters v. Merchants' Louisville Ins. Co. 11 Pet. (36 U. S.) 213, 225, 9 L. ed. 691; Scripture v. Lowell Mutual Fire Ins. Co. 10 Cush. (64 Mass.) 357, 57 Am. Rep. 111; Millaudon v. New Orleans Ins. Co. 4 La. Ann. 15, 50 Am. Dec. 550.

These terms are certainly comprehensive enough to include both descriptions of loss, whether by explosive force or loss superinduced by combustion. . . . We can find no good reason for doubting that loss and damage by fire resulting from an explosion was intended to be exempted by this condition from the general risk of the policy, and are of opinion, therefore, that this clause, properly construed, should read, 'nor any loss or damage by fire occasioned by or resulting from any explosion whatever.' " There is a later case [4] in this state which, though the court in its decision attempts to distinguish it from the case we have just cited, does not seem entirely in harmony with that decision. The policy in this case provided that the insurers should not be liable for damage to property by lightning aside from fire, nor for damages occasioned by the explosion of a steam-boiler, nor for damages by fire resulting from such explosion nor explosions caused by gunpowder, gas, or other explosive substances. A fire was caused by an emission of gas from oil which was being distilled. The fire extended to other parts of the works and there ignited gas and oil, which exploded, and was scattered over the premises, destroying the works. It was held that the insurers were exempt from loss caused directly by the explosive force of the gas, but were not exempt from losses occurring by fire which was a consequence of the explosion. It will be seen that the courts attempt to distinguish this case [5] from that of United Life, Fire, and Marine Insurance Company v. Foote.[6] But it would seem that exactly the same reasoning by which the court reached its conclusion in the first consideration of the question would have controlled in the second, or vice versa. The cases are certainly so clearly controlled by the same principles that different conclusions should not be reached. The general undertaking is of a loss by fire only, and that the provisions are meaningless unless construed as extending to losses by fire would equally apply in the later case. The conditions are practically the same, and if this rule is applicable in the one case it is in the other. If the provision was meaningless in the former case it certainly is in the latter. The two cases cannot be reconciled, though there is an attempt made by the court to distinguish them, and the doctrines stated in the later case must, we think, be considered as being contrary to that laid down in the much-quoted case of the United Life, Fire & Marine Insurance Company v. Foote.[7]

[4] Boatman's Fire & Marine Ins. Co. v. Parker, 23 Ohio St. 85, 13 Am. Rep. 228.

[5] Boatman's Fire & Marine Ins. Co. v. Parker, 23 Ohio St. 85, 13 Am. Rep. 228.

[6] 22 Ohio St. 340, 10 Am. Rep. 735.

[7] 22 Ohio St. 340, 10 Am. Rep. 735.

**§ 2590. Same subject: rule in Illinois.**—A rule has been laid down in Illinois which is directly contrary to that stated in at least the earlier New York cases,[8] and which is also contrary to that stated in the supreme court of the United States.[9] The policy in this case provided that the company should not be held liable "for any loss caused by the explosion of gunpowder, camphene, or any explosive substance or explosion of any kind." It was held that the company was not exempted by such clause from liability from losses by fire caused by explosion, but simply from liability for losses occasioned by the explosion itself.[10] In this case the insurers claimed the provision as to explosions would be inoperative unless it was held as referring to loss by fire consequent upon an explosion, since the company was not in any case liable for loss the result of explosion. The company claimed that the words "by fire" used in the first part of the clause above mentioned were implied in the clause excluding loss by explosion. The court, however, held that a reasonable construction of the clause would be to include therein only loss directly due to explosion, and not loss by fire which ensues as a result of an explosion; that the former construction was consistent with the words of the clause as a reasonable construction and just to both parties, while to give the latter construction would be to insert two words which were not in the clause, which were inconsistent with the terms of the policy, and which would be unjust to the insurer.[11]

**§ 2591. Same subject: rule in Pennsylvania.**—In a case which arose in Pennsylvania[12] a conclusion similar to that reached in Illinois[13] was arrived at, and the Illinois case was also cited and approved.

[8] See § 2588 herein. See also §§ 2768 et seq. herein.

[9] Louisiana Mutual Ins. Co. v. Tweed, 7 Wall. (74 U. S.) 44, 19 L. ed. 65.

[10] Commercial Ins. Co. v. Robinson, 64 Ill. 265, 16 Am. Rep. 557, *considered* in Spring Garden Ins. Co. v. Imperial Tobacco Co. 132 Ky. 7, 20 L.R.A.(N.S.) 277, 136 Am. St. Rep. 164, 116 S. W. 234, 38 Ins. L. J. 446, 458, also in Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404, 90 C. C. A. 392, 21 L.R.A.(N.S.) 103, 38 Ins. L. J. 56, but declared, however, "to be wholly unsound and unmaintainable," in Luckett-Wake Tobacco Co. v. Globe & Rutgers Fire Ins. Co. (U. S. C. C.) 171 Fed. 147, 38 Ins. L. J. 1067, at least so, in so far as opposed to that decision.

[11] The opinion in this case contains a discussion of several decisions upon this point. See Heuer v. Westchester Fire Ins. Co. 44 Ill. App. 429, aff'd 151 Ill. 531, 37 N. E. 873.

[12] Heffron v. Kittanning Ins. Co. 132 Pa. St. 460, 20 Atl. 698. See Stevenson & Foster Co. v. American Fire Ins. Co. (Pa.) 33 Pitts. Leg. J. 253. See §§ 2768 et seq. herein.

[13] Commercial Ins. Co. v. Robinson, 64 Ill. 265, 16 Am. Rep. 557. (See note to this case under § 2590 herein).

**§ 2592. Same subject: conclusion.**—It will be seen from the cases cited in the foregoing sections that there is much conflict and uncertainty as to the construction of such a condition. New York has held in early cases [14] that it means loss or damage by fire, since the clause excepting loss by explosion is meaningless unless so construed, and in the Hustace case,[15] as we have stated, recovery was precluded because explosion in a nearby building and not fire was the cause of the fall of the insured building and consequent loss and insured did not claim to recover for the burning of the debris, and in addition the excepting clause was different.

The cases in Ohio are not in harmony, and later cases certainly favor a contrary view.[16] In Illinois [17] and Pennsylvania.[18] also, the courts have decided directly contrary to the cases in New York. There are certainly strong arguments leading to the conclusions upon each side of the case. Little can be added by us to these arguments as presented in the opinions. It seems from a careful examination of all the decisions that the rule of the Illinois court [19] is most reasonable. It certainly is more in line with ordinary rules governing the construction of contracts of insurance and exceptions therein; it is more consistent with justice, and more in accord with the apparent intention of the parties. These provisions are inserted by the assurer, and in case of doubt they should be construed strictly against him, nor should they be extended by implication so as to embrace cases which are not clearly within the exception. The insurer should not be permitted to insert clauses with equivocal meanings calculated to lead the insured to reasonably understand one thing and then rely upon the courts to give by implication an entirely different construction. The insured has a right to rely upon the contract as made, and can reasonably be justified in assuming that in omitting the words "by fire" the insurer was content to leave it to the courts to determine the proximate cause of the loss, and to grant such remedy as the contract calls for under a fair and reasonable construction, having in view the general rule which obtains in construing exceptions with reference to the words used to express the parties' intentions, for it is clearly within the power of those contracting to expressly provide in clear and unequivocal terms exactly what is intended.

[14] See § 2588 herein. See also §§ 2768 et seq. herein.

[15] Hustace v. Phenix Ins. Co. 175 N. Y. 292, 62 L.R.A. 651, 67 N. E. 592, 32 Ins. L. J. 688, *considered* under § 2593 herein.

[16] See § 2589 herein.

[17] See § 2590 herein.

[18] See § 2591 herein.

[19] See § 2590 herein.

**§ 2593. No liability for explosion "unless fire ensues."** —Another provision as to explosion is that the insurer shall not be liable for any loss or damage "caused by explosion unless fire ensues," and then for loss or damage by the fire only. In an action on a policy which contained such a provision,[20] it appeared that an explosion occurred as a result of certain vapor coming in contact with a lighted lamp. The explosion shattered the walls of the building, and a fire immediately ensued. It was held that an instruction to the jury that the insured was entitled to recover the entire amount of their loss, whether the loss was due to the fire or to the violence of the explosion, was erroneous, as the defendant was not liable for the loss which arose from the force or violence of the explosion. They were liable for the loss by fire, however.[1] Where a fire insurance on sulphuric acid exempted the insurer from liability for loss by explosion unless fire ensued, and the building in question was blown down by a storm, and the chamber containing the acid was broken and the acid lost, and the plaintiff claimed that the storm blew fire in contact with escaping gases and air and created an explosion, which caused the loss, it was held that in either case there was no liability under the policy.[2] The insurers are liable upon a policy which contains a condition of this nature where fire originates in the insured premises, and the fire subsequently produces an explosion which destroys the property; the entire loss in such a case is held to be a loss by fire.[3] So an explosion which occurs in an insured building during the progress of a fire therein, is regarded as a mere incident of the preceding fire, and the whole loss is within the risk assumed, although the policy excluded liability for loss by explosion.[4] Under another decision in New York

[20] Briggs v. North British Mercantile Ins. Co. 66 Barb. (N. Y.) 325. The provision in this case was, that the insurer shall not be liable "for a loss by lightning of any kind unless fire ensues, and then for a loss by damage by fire only." See §§ 2768 et seq. herein.

[1] Briggs v. North British Mercantile Ins. Co. 66 Barb. (N. Y.) 325, aff'd Briggs v. North American & Mercantile Ins. Co. 53 N. Y. 446, 447.

[2] Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403. The condition in this policy read that insurer should not be liable "for any loss caused by the explosion of gunpowder or any explosive substance . . . or explosion of any kind unless fire ensues, and then for the loss or damage for fire only."

[3] Washburn v. Farmer's Ins. Co. 2 Fed. 304. The condition in this case provided that the insurer should not be liable for loss "covered by the explosion of gunpowder or any explosive substance or explosion of any kind unless fire ensues, and then for the loss or damage by fire only." See also Washburn v. Miami Valley Ins. Co. 2 Flip. (U. S. C. C.) 664, 2 Fed. 633; Hall & Hawkins v. National Fire Ins. Co. 115 Tenn. 513, 112 Am. St. Rep. 870, 92 S. W. 402, 35 Ins. L. J. 507, 510.

[4] Hall & Hawkins v. National Fire Ins. Co. 115 Tenn. 513, 112 Am. St.

it appeared that there was a fire in a nearby building which was immediately followed by an explosion and the effect of concussion was that the insured building fell and became a total loss. Prior to such fall there was no fire in the insured building and no damage had been caused by the fire, but after the fall the debris was consumed by the fire in the adjacent building where it had originated as above stated. The insured did not claim to recover for the burning but only for the damages consequent upon the explosion based upon the claim that the falling of the building was due to the fire. It was held that there could be no recovery because the explosion and not the fire was the cause of the fall. In other words, that the fall of a building because of an explosion in a burning building in the vicinity is not within the protection of a policy insuring against direct loss or damage by fire, where the policy also provides that the insurer shall not be liable for loss caused, directly or indirectly, by explosion of any kind. The court, per Parker, C. J., said: "There are authorities that both in reasoning and decision tend otherwise, but attention is not called to them in detail because the position of this court as to that question is settled. Our object in calling attention to a few of the authorities in other states has been to show that this court is not alone in the position taken. Counsel for plaintiffs insists that the wreck of plaintiff's building by the explosion in the Tarrant Building was direct loss or damage by fire within the meaning of the policy, and that the situation calls for precisely the same disposition as if the question was presented in an action upon a policy covering the Tarrant Building, where the fire had been raging for something like thirty minutes before the explosion. He quotes from opinion of the court in Heffron v. Kittanning Ins. Co.:[5] 'Nor are losses by explosion foreign to the risks assumed by insurance against fire. They are like damages by smoke and water, losses by theft, destruction by the fall of a building, or injury by fire agencies without actual ignition, all of which are to be found among the losses excepted against in clauses of policies of insurance.' This he follows with instances and authorities supporting them as where goods are injured by water thrown to extinguish a fire; where goods are lost or damaged in the course of an effort to remove them in order to save them from fire raging in the building adjoining; where an insured building is blown up under direction of public authorities to prevent the spread of a conflagration (supported by early authorities in this state); and where the insurers were held liable for theft of in-

Rep. 870, 92 S. W. 402, 35 Ins. L. J. 507.

[5] 132 Pa. 580, 586, 20 Atl. 698.

sured property during fire. While it is true that in the cases cited as holding these several propositions, cases which cover a variety of jurisdictions, the insured was held liable as for a loss by fire, the decision usually was placed on the ground that the fire was the proximate cause of the loss. In this way very substantial additions were made by the courts to the liability expressly covered by the contract of insurance and hence the exemption clauses became features in some contracts of insurance before the standard policy was adopted in this state, and when it was created such a clause was incorporated into it. The fact that the courts, prior to the insertion of the explosion exemption clause, held that under the policy the insurer was liable as for a loss by fire does not make it a loss by fire direct, if it is in reality a loss by explosion. Where a policy contains a provision that there shall be no liability for explosion of any kind as well as a provision for liability for direct loss by fire, each provision must be given full force and effect unrestrained by decisions made before the explosion exemption clause became a feature of the contract. So while it may be that but for the explosion clause we should feel constrained to follow those earlier decisions to which reference was made generally in the Briggs Case,[6] and hold defendant liable because a fire in another building was the cause of the explosion, we are not permitted to do that in view of the exemption clause relieving defendant from liability from explosions of any kind; and so we held in the Briggs Case charging the insurance company with the loss by fire which in that case followed the explosion and compelling plaintiff to bear the loss caused by the explosion." [7]

This last considered case was urged by insurer as supporting its view under a decision before the Tennessee court, but in that case the court, per Neil, J., declared that while the deductions made by counsel was a very plausible one still "the cases which we have cited go upon the theory that, in order to satisfy the terms of a policy insuring against direct loss by fire, the latter must always be regarded as the efficient cause where its effects are produced in direct sequence, though one of the incidents of that sequence may be explosion and that it could not have been intended to nullify such predominant cause. There is room for the exception in favor of losses produced by explosion notwithstanding this con-

[6] Briggs v. The North British & Mercantile Ins. Co. 53 N. Y. 446, aff'g 66 Barb. 325.

[7] Hustace v. Phenix Ins. Co. 175 N. Y. 292, 62 L.R.A. 651, 67 N. E. 592, 32 Ins. L. J. 688. The clause in this case was: "This company shall not be liable for loss caused directly or indirectly . . . by explosion of any kind." "Unless fire ensues, and in that event for damage by fire only."

struction, in view of the fact that explosions are frequently produced by flame, as by a lighted match, a gas jet, a lighted lamp, fire from a furnace, and the like." And it was decided in that case that the weight of authority is to the effect that where the fire occurs in the property insured and an explosion takes place therein during the progress of the fire, the effects of which are covered by the policy, and such explosion is a mere incident of the preceding fire, the latter is treated as the efficient cause, and the whole loss is within the risk insured although the policy in terms excludes liability for loss by explosion. It was also decided that if, while a building is burning, an explosion occurs therein which injures neighboring property without igniting it, a fire policy on the latter property which excludes liability for loss by explosion does not cover such injuries.[8] Again, in a comparatively recent New York case the insurance was against all direct loss or damage by fire "except as hereinafter provided" a subsequent clause stipulated that: "This company shall not be liable for loss caused directly or indirectly by invasion . . . or (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind" and it was held that a fire which precedes and causes the explosion is not embraced within the exception from the provision which insures against all direct loss or damage by fire and that the words "by explosion of any kind" were not intended to refer to the agency which produced the explosion but referred to the different kinds of material that explode. The court, per Haight, J., said: "Webster defines 'ensues' as meaning 'to follow or come afterwards; to follow as a consequence or in chronological succession; to result.' The provision, therefore, embraced in the exception 'unless fire ensues' should be read as meaning 'unless fire follows or comes after or as a consequence of the explosion.' This being the meaning of the provision, it is apparent that a fire, which precedes and causes the explosion, is not embraced in the exception contained in the policy from the provision which insures against all direct loss or damage by fire. Nor do we think that the words 'by explosion of any kind' were intended to refer to the agency which produced the explosion, but have reference to the different kinds of material that explode, such as powder, dynamite, gas, dust, etc. Had the Legislature, in adopting the standard form of policy, intended to have included explosions caused by fire with explosions from which fire ensues among the losses excepted from the provisions of the policy, it doubtless would have done so in express terms. That such was

[8] Hall & Hawkins v. National Fire Rep. 870, 92 S. W. 402, 35 Ins. L. J. Ins. Co. 115 Tenn. 513, 112 Am. St. 507.

not its intention we think is clearly evident from the fact that they were careful to limit the exception to those explosions from which a fire ensues. This form of fire insurance policy and the construction which we have given to it is not new. It has frequently been considered by the courts and text-writers upon the subject, who have quite uniformly reached the conclusion that when a negligent or hostile fire exists within the insured premises, and an explosion results therefrom under such circumstances as to constitute the fire the proximate cause of the loss and the explosion merely incidental, the company becomes liable upon its policy for the loss resulting therefrom."[9] Under a Colorado decision where loss by explosion was excepted a distinction is made between a case where the explosion precedes and where it follows the fire the insurer being liable in the former case only for loss by fire not caused thereby, while in the latter case the entire loss is recoverable if the explosion is an incident of and caused the fire.[10] If the policy stipulates for insurance against all such immediate loss or damage as may occur by fire and also excludes liability for loss caused by explosions of any kind unless fire ensues and then for the loss or damage by fire only, and gasolene was kept on the premises and the lighting of a match caused an explosion of gasolene vapor, but no fire ensued, although the building fell, it was held that a loss occurring solely from an explosion not resulting from a preceding fire was covered by the exception; that an explosion which occurred from the contact of escaping vapor with a lighted match held by an employee of assured was likewise within said exception and also that a match, lighted and held by an employee of assured, coming in contact with the vapor and causing an explosion was not "fire" within the meaning of the policy.[11]

[9] Wheeler v. Phenix Ins. Co. 203 N. Y. 283, 38 L.R.A.(N.S.) 474n, (annotated on liability of insurer for loss caused by explosion), 96 N. E. 452, 41 Ins. L. J. 247, 250. The court also said: "We do not regard the case of Briggs v. North American & Mercantile Ins. Co. 53 N. Y. 440, or the case of Hustace v. Phenix Ins. Co. of Brooklyn, 175 N. Y. 292, 62 L.R.A. 651, 67 N. E. 592, as in conflict with the views hereinabove expressed." See § 2772 herein.

[10] German American Ins. Co. v. Hyman, 42 Colo. 156, 94 Pac. 27, 16 L.R.A.(N.S.) 77. See Stevenson & Foster v. American Fire Ins. Co. (Pa.) 33 Pittsb. Leg. Int. 253.

[11] Mitchell v. Potomac Ins. Co. 183 U. S. 42, 46 L. ed. 74, 22 Sup. Ct. 22, 31 Ins. L. J. 570.

See also as to the last point in the text:

*Colorado.*—German American Ins. Co. v. Hyman, 42 Colo. 156, 94 Pac. 27, 16 L.R.A.(N.S.) 77, 37 Ins. L. J. 251, 260; Metropolitan Casualty Ins. Co. of N. Y. v. Bergheim, 21 Colo. App. 527, 122 Pac. 812, 41 Ins. L. J. 1107, 1109.—Walling, J.

*Illinois.* — Heuer v. Northwestern

**§ 2594. Construction of other provisions as to explosion.**—Another provision excepting the insurers from liability which has come before the courts for construction is, that in case the insured property "be damaged by the bursting of a boiler, or by explosion from any cause, this policy shall be void the instant the casualty by explosion occurs." In an action on a policy containing this provision it was held [12] that the clause was unambiguous, was binding upon the insured, and that the policy ceased to be of any force the instant the explosion occurred. Where a policy provided that the insurer would not be liable for any loss "occasioned by explosions of any kind, by means of invasion," etc., it was held that this did not mean that the policy limited the loss to explosions occasioned by invasion.[13]

**§ 2595. Conclusion as to excepted liability in case of explosion.**—From a consideration of the cases in the preceding sections upon the question of insurers' liability where loss by explosion is excepted, it will be seen that the decisions are not at all in harmony. There is one class of decisions to the effect that if the insurers except loss by explosion, it means loss by fire the result of explosion, as otherwise the condition is meaningless. We find another class where it is held that the exception does not include loss by fire which ensues immediately after an explosion, but only includes all cases of loss by explosion alone. We then find a case in the United States supreme court which holds that the insurers are exempt even though the explosion occurs upon other premises and communicates by other buildings to the insured property, unless some new and distinct cause intervenes. These decisions certainly cannot be reconciled. We have seen that the insurers are exempt from loss the immediate result of the concussion, though the explosion occurs upon other premises, and there does not seem to be any case which disputes this. If this point is not disputed, then are not the words of the Illinois court pertinent in this connection? They are as follows: [14] "We must either hold

National Ins. Co. 144 Ill. 393, 19 L.R.A. 954, 33 N. E. 411.

*Iowa.*—Vorse v. Jersey Plate Glass Ins. Co. 119 Iowa, 555, 60 L.R.A. 838, 97 Am. St. Rep. 330, 93 N. W. 569, 32 Ins. L. J. 359.

*Missouri.*—Stephens v. Fire Assoc. of Phila. 139 Mo. App. 369, 123 S. W. 63.

*New Jersey.*—Ross v. Liverpool & London & Globe Ins. Co. 83 N. J. L. 340, 84 Atl. 1050, 42 Ins. L. J. 99. See § 2779 herein.

[12] Waldeck v. Springfield Fire & Marine Ins. Co. 53 Wis. 129, 10 N. W. 88, s. c. 56 Wis. 96, 14 N. W. 1. See §§ 2768 et seq. herein.

[13] Smiley v. Citizens' Fire, Marine & Life Ins. Co. 14 W. Va. 33.

[14] Commercial Ins. Co. v. Robinson, 64 Ill. 265, 16 Am. Rep. 557. (See note to this case under § 2570 herein). See §§ 2768 et seq. herein.

that this clause refers to loss by explosions simply without reference to fire, or to losses by fire occasioned by explosions anywhere, whether on or remote from the premises; there is no middle term, and it must receive one of these constructions or the other." And is this not true? Certainly, the case of Mutual Insurance Company v. Tweed,[15] already considered, is in line with this view. If we admit this latter doctrine, can it be reasonably said to be a construction in accord with the intentions of the parties? Do not the insurers intend exactly what they say when they exclude loss by explosion? Do they intend to exclude subsequent losses by fire occurring as an immediate and direct result of such explosion? These questions and others have arisen in the discussion of the subject, and for a fuller consideration of them we can only refer to the opinions in the cases which we have cited, where will be found several learned discussions of the principles involved. The decisions certainly cannot be reconciled as they at present stand, and the question is indeed an open one presenting a wide field for argument.

**§ 2595a. Liability excepted where fires built within specified limits: estoppel.**—Where a policy issued by a corporation formed under an act to provide for the formation of county co-operative insurance companies[16] exempts the association from liability "for any loss resulting from any open fire, built by the insured with his knowledge or consent, within fifty feet from any insured building," and the insured buildings were destroyed by fire caused by a spark from a bonfire at a distance less than that as above stipulated, said fire being ignited by insured to burn up rubbish, the insurer is not estopped to claim a forfeiture by the acts of the association's board of directors who went to the place of fire in order to adjust the loss, in accordance with the by-laws, and upon ascertaining the facts stated that they could not adjust the loss but that they would make out proofs which could be presented to the board and they directed the preparation thereof and assured incurred expense in preparing said proofs and in traveling and attending the meeting of the board of which he was notified; said acts in advising proofs and referring assured to said board being the course prescribed by the by-laws.[17]

[15] 7 Wall. (74 U. S.) 44, 19 L. ed. 65.

[16] Laws N. Y. 1880, p. 540, c. 362.

[17] Draper v. Oswego County Fire Relief Assoc. 190 N. Y. 12, 82 N. E. 755, 37 Ins. L. J. 221, *citing* Knights & Ladies of Columbia Ins. Order v. Shoaf, 166 Ind. 367, 77 N. E. 738; McCoy v. Northwestern Mutual Relief Assoc. 92 Wis. 577, 47 L.R.A. 68, 66 N. W. 697, although the court said: "We are not disposed to go to the length" of the Wisconsin case.

**§ 2596. Loss by theft excepted.**—A condition in an insurance policy that the company will not be liable "for any loss or damage to goods contained in a show-window when the loss or damage is caused by the light in the window, nor shall the company be liable for loss by theft," applies to theft from the show-windows, and not to theft committed in the necessary removal of goods to save them from impending conflagration.[18] But where a policy provided that the insurers should "not be liable to make good any loss by theft, or any loss or damage by fire" occasioned by riots, etc., it was held that the exception of liability for theft was not confined to fires so occasioned, but extended to losses by theft at any fire.[19]

**§ 2596a. Exception of liability: duty of assured to preserve or save property.**—If the policy requires insured to use all possible diligence to preserve property exposed to danger from fire and exempts insurer from liability for loss arising from failure or neglect to comply with such requirement the circumstances of the case, such as the imminence of the peril, etc., must determine the necessity for removal. We, have, however, fully considered this question elsewhere herein.[20]

**§ 2597. Exception of liability for "fire caused by hurricane."**—It is held under a policy of this character that a loss resulting from the falling of a building during a high wind and a fire subsequently occurring is not covered by the policy.[1] In this case the action was brought on two policies, each of which contained these provisions; "1. This company shall not be liable for any loss or damage by fire caused by means of a hurricane; 2. If the building shall fall except as the result of a fire, an insurance by this company on it or its contents shall at once cease and determine." The fire occurred during a severe hurricane, and evidence tended to show that its origin was by the breaking of a lamp by falling timbers, the house being partially blown down. Stayton, C. J., said: "The petition should have averred that the fire did not occur from one of the excepted causes. This was necessary to show a cause of action, for the company did not insure against loss by fire caused by a hurricane, nor were the policies binding at all for a loss by a fire occurring after the fall of the house, unless the fall was caused by fire, for the parties had contracted that in

[18] Lieber v. Liverpool & London & Globe Ins. Co. 6 Bush (69 Ky.) 639, 99 Am. Dec. 695. See § 2821 herein.

[19] Webb & Co. v. Protection & Aetna Ins. Co. 14 Mo. 3.

On liability for loss by theft during fire, see note in 35 L.R.A.(N.S.) 892.

[20] See §§ 2812 et seq. herein.

[1] Pelican Fire Ins. Co. v. Troy Co-operative Assoc. 77 Tex. 225, 13 S. W. 980.

that event the contract of insurance should no longer be operative." [2]

**§ 2598. Exception of liability for fire resulting from use of steam-engine.**—In a Maryland case the provision was, "this company will not become responsible for any loss or damage by fire . . . resulting from the use of any steam-engine temporarily employed for the purpose of threshing out crops of any kind." There was also a condition stipulating that, in case of an engine being stationed on the premises in close proximity to the buildings insured, the company should appoint a committee to examine forthwith and ascertain the amount of increased risk, and if increase of risk was found, an additional premium note should be given for the increase. Notice was given the general agent of the company of the use of an engine for grinding bark. No committee was, however, appointed, nor any note given, and it was held that if the use of the engine increased the risk, and as no additional note was given the right to recover would not be defeated unless the loss occurred from that increase.[3]

**§ 2598a. Excepted liability: fires from locomotives.**—Notwithstanding an exception of liability from fires occasioned by locomotives a recovery may nevertheless be had where a building is destroyed by fire communicated from a building on the railroad right of way which was ignited from sparks from the locomotive where by the rule of construction against insurer the exception of liability is intended to apply only to fires directly caused by such sparks.[4]

**§ 2599. Credit insurance: insolvency of debtors: exception of liability: discontinuance of business: death of partner.**[5]—If a credit indemnity policy stipulates for nonliability on the bond in the event of failure of or discontinuance of business by the indemnified, the death of a member of a creditor firm long after goods have been sold and delivered does not operate on the date of said death as such discontinuance of business is within the exclusion; nor does it release the obligor company from its liability to make

[2] See § 2825 herein.

[3] Schaeffer v. Farmers' Mutual Fire Ins. Co. 80 Md. 563, 31 Atl. Rep. 317. See Siemers v. Meeme Mutual Protection Ins. Co. 143 Wis. 114, 139 Am. St. Rep. 1083, 126 N. W. 669; Thurston v. Burnett & Beaver Dam Farmers' Mutual Fire Ins. Co. 98 Wis. 476, 41 L.R.A. 316, 74 N. W. 131, 27 Ins. L. J. 602.

[4] Montgomery v. Southern Mutual Ins. Co. 242 Pa. 86, 88 Atl. 924, 51 L.R.A.(N.S.) 518 (annotated on scope and effect of clause in fire insurance policy exempting insurer from liability for loss by fire from or occasioned by locomotive engines). As to rights of parties where fire is so occasioned, see Farmers Alliance Mutual Fire Ins. Co. v. Vallie, 35 Colo. 78, 83 Pac. 964.

[5] See §§ 2786–7 herein.

good a loss arising from the subsequent insolvency of the debtor during the continuance of the bond. The term "discontinuance by the indemnified" has relation to the act of the indemnified, either voluntary or an act consequential thereon.[6] In the case holding as above, the court, per McSherry, J., says: "The object of this peculiar kind of indemnity is to guarantee vendors against loss by reason of the insolvency of their debtors; and if the debt has been contracted during the continuance of the bond of indemnity and while the firm or the individual protected by the bond is actually engaged in business, though the loss happens after the death of one member of the creditor firm or after the death of the individual creditor when there is no firm, the contingency contracted against—the insolvency of the debtor—is precisely the same as though the death of the creditor had not occurred at all. If, in the case of an individual creditor who is indemnified by such a bond, and who, after selling his goods, dies, it be held that the bond is made void because of his death, there would be superadded, by construction, a provision of avoidance, beyond the two designated in the eighth clause. The failure of the person indemnified, and his discontinuance of business are specified. His death is not. In addition, then, to the requirements that he should not fail and should not discontinue business, the obligation of the bond would be made subject to the further condition that the creditor survive the period of time covered by the contract of indemnity. And thus, by pure implication, there would be written into the eighth condition heretofore quoted a contingency not therein expressed or even necessarily implied. And in the case of a firm precisely the same condition would exist. Undoubtedly, the death of a member of a firm does, by operation of law, dissolve the partnership, but such a dissolution of the firm can in no sense be said to be a discontinuance of business by the indemnified. The surviving partners wind up the concern. The dissolution is by operation of law and not by the act of the parties, and the discontinuance of business on the part of the firm is not a discontinuance by the firm, but by operation of the law and in consequence of an act of God. Obviously, the term 'discontinuance by the indemnified' has relation to the act of the indemnified (either his voluntary act or the consequence of his voluntary act) precisely as the other condition (the failure of the creditor) relates to a situation arising from his own acts or conduct. Had the design been to constitute the death of the creditor a ground for avoiding the bond, the addition of the words 'and the death of the indemnified' or words of like import would have placed the matter beyond

[6] American Credit Indemnity Co. v. Crassard, 83 Md. 272, 34 Atl. 703.

dispute; and every individual purchasing such a bond would then have been advised in plain terms that the contingencies which he encountered and was obliged to avoid so as to enable him to recover on a bond were not only his own failure in or discontinuance of business but his death during the period covered by the indemnity. The construction contended for by the appellant places death (an act of God) in the same category as discontinuance of business by the indemnified (an act of the individual). It does not discriminate between what is the act of the party himself, on the one hand, and the consequence resulting from his death which, on the other hand, is not his own act, but makes the one the equivalent of the other in so far as respects the continuance of the validity of the bond. And it does this, too, by ascribing to the words of the bond a meaning which at best is both strained and unnatural. In resisting the enforcement of an obligation of this character upon the ground here relied on, the defendant must show that its refusal to fulfill its contract is justified by some term of defeasance contained in the undertaking itself, and unless this appears with reasonable clearness, the obligor cannot escape liability. If we entertain any reasonable doubt as to the correct interpretation to be placed on words we have been considering, that doubt would be sufficient to solve the question against the defendant, because its contract to indemnify must stand in full force unless more than a doubt exists as to whether the defeasible conditions embrace the particular ground of avoidance relied on."

An exclusion of liability for losses for credit given "exceeding a credit of thirty per cent on the lowest capital rating," in a policy insuring against loss by insolvency of customers, excludes merely the excess above that amount, and not the entire loss in case credit is given above that amount.[7]

[7] Shakman v. United States Credit 383, 53 Am. St. Rep. 920, 66 N. W. System Co. 92 Wis. 366, 32 L.R.A. 528. See §§ 2786 et seq. herein.

# CHAPTER LXX.

## EXCEPTED RISKS AND LOSSES—LIFE, ACCIDENT, CASUALTY, AND TORNADO.


§ 2606. Death "in known violation of law."

§ 2607. "Death in known violation of law:" construction: refers to voluntary criminal acts.

§ 2608. Same subject: refers to both civil and criminal law.

§ 2609. Same subject: conclusion.

§ 2610. Death or injury in violation of law.

§ 2610a. Same subject: carrying concealed weapons.

§ 2610b. Conviction of felony.

§ 2611. Excepted liability where death occurs "by the hands of justice."

§ 2611a. Same subject: killing adulterer by husband: wife's paramour.

§ 2612. Death: use of intoxicants.

§ 2613. Intemperance: "If the insured becomes so far intemperate as to impair his health."

§ 2613a. If insured becomes "so far intemperate or use drugs to such an extent as to impair his health."

§ 2613b. "Under the influence" of intoxicants or narcotics: limitation of liability.

§ 2613c. Intemperance: degree of intoxication.

§ 2614. Death: intemperance: waiver of provision.

§ 2615. Death: intemperance: use of drugs: by-laws of society.

§ 2616. Death caused by submission to illegal operation.

§ 2617. Accident policy: injuries where no visible mark.

§ 2617a. Visible marks of contusions or wounds: "wounds" defined.

§ 2618. Excepted liability where death or injury "may be caused by intentional injuries inflicted by assured or any other person."

§ 2619. Dueling or fighting.

§ 2619a. Death in assault, quarrel, or fight.

§ 2619b. Assault: death or injury in self-defense: aggressor: offending party.

§ 2619c. Assault upon officer of the law: resisting arrest.

§ 2619d. Injuries while hunting.

§ 2620. Excepted liability: taking of poison: contact with poisonous substances: inhaling gas.

§ 2621. Poison or anything accidentally taken, administered, or inhaled.

§ 2622. Entering or leaving moving train or car: riding as passenger: standing or riding on steps or platform.
§ 2623. Rules and regulations of common carriers and employer: violation of "a rule of corporation."
§ 2624. Voluntary exposure to obvious or unnecessary danger.
§ 2624a. Same subject: negligence or contributory negligence.
§ 2624b. Voluntary exposure to unnecessary danger: death in attempt to save life: negligence.
§ 2624c. Voluntary exposure to unnecessary danger: waiver.
§ 2625. Walking or being on railway bridge, track, or "roadbed."
§ 2625a. Walking or being upon a railroad track or bridge: voluntary exposure to unnecessary danger.
§ 2626. Instances within the exception of voluntary exposure.
§ 2627. Instances not within the exception of voluntary exposure.
§ 2628. Death by disease excepted: fits.
§ 2629. Disease caused by accident: death superinduced by other causes not death by excepted disease.
§ 2629a. Pre-existing disease: disease and accidental injury concurring.
§ 2629b. Death from disease as primary, secondary or final cause.
§ 2630. Death from disease as a "secondary cause" not death by accident.
§ 2630a. Death by drowning excepted: presumptions.
§ 2631. Death caused by "medical treatment for disease" or "surgical treatment," excepted.
§ 2631a. Unnecessary lifting and voluntary overexertion.
§ 2632. Occupation: exception of liability for "wrecking."
§ 2632a. Employers' liability policy: injuries while making extraordinary repairs.
§ 2632b. Employers' liability policy: violation of law.
§ 2632c. Same subject: waiver.
§ 2633. Accident to property: loss by fire excepted.
§ 2633a. Excepted risks: automobiles or motor vehicles: fires: violation of law: collision.
§ 2634. Plate glass: fire: explosion: tornado insurance.
§ 2634a. Automatic fire extinguishers: exception of injury from leakage: earthquakes, cyclones, etc.

**§ 2606. Death "in known violation of law."**—In connection with the clause exempting the insurers from liability in case of death of assured "by his own hand," there is also generally found the clause exempting them from liability in case the insured shall die in the "known violation of any law," whatever may be the nature of the violation of the law, and whether the violation refers to merely the criminal or both the criminal and civil law, the death, in order to avoid the policy, must be caused or occasioned while

the act in violation of the law is being committed, and be not merely in consequence of the act and subsequent thereto. The act causing the death must be so close and immediate in its relation to all the other acts as to form a part of one continuous transaction.[8] So the policy is not avoided by the fact that the insured had had illicit intercourse with the wife of H. shortly before H. had killed him.[9] So the death of a wife's paramour, killed by a wronged husband while attempting to commit, or immediately after the commission of an act of adultery, is not caused in the violation of, or an attempt to violate, any criminal law, within the meaning of a stipulation in a life policy, exempting the insurer in that event from full liability under the policy.[10] And where the insured had entered a public building, and by a show of force and by means of threats had obtained a sum of money, and was shot and killed while escaping, it was held that he having obtained the money, and being merely in the act of escaping, he was not at the instant of death violating any law, and a recovery could be had on the policy.[11] But where A's life was insured and A and B planned an assault on C, and B seized and held C, and C drew a pistol while A was running away, and the pistol was discharged and A was killed, it was held that whether the discharge of the pistol was intentional or not the policy was rendered void.[12]

[8] Travelers Ins. Co. v. Seaver, 19 Wall. (86 U. S.) 531, 22 L. ed. 155; Cluff v. Mutual Benefit Life Ins. Co. 95 Mass. 308, s. c. 99 Mass. 317, 318; Harper v. Phœnix Ins. Co. 19 Mo. 506; Bradley v. Mutual Benefit Life Ins. Co. 45 N. Y. 422, 6 Am. Rep. 115.

On provision against liability in event of death or injury in consequence of violation of law as applied to death or injury resulting from a personal encounter, see note in L.R.A.1917C, 199.

[9] Goetzmann v. Connecticut Mutual Life Ins. Co. 5 Thomp. & C. (N. Y.) 572, s. c. 3 Hun (N. Y.) 515.

[10] Supreme Lodge Knights of Pythias v. Crenshaw, 129 Ga. 195, 13 L.R.A.(N.S.) 258, 121 Am. St. Rep. 216, 58 S. E. 628.

On necessity that assured's death be reasonable and legitimate consequence of violation of law in order to relieve insurer, see note in 13 L.R.A.(N.S.) 258.

[11] Griffin v. Western Mutual Benefit Assoc. 20 Neb. 620, 57 Am. Rep. 848, 31 N. W. 122.

[12] Murray v. New York Life Ins. Co. 96 N. Y. 614, 48 Am. Rep. 658, aff'g 30 Hun (N. Y.) 428. The words of the court in Cluff v. Mutual Benefit Life Ins. Co. 13 Allen (95 Mass.) 308, are pertinent in connection with this question. "Assuming that Cluff did commit a criminal assault, it may not necessarily follow that he died in the known violation of the law. If he was shot while the assault continued, such would be the case. But if it had ceased, and Cluff was not threatening to renew it, and Cox had withdrawn out of his reach and then shot him, not in the course of the affray, but merely to revenge himself for what had been done or to prevent the seizure of the horses, then at the time he was killed Cluff was not engaged in a known violation of the law within the meaning of the policy. For he must have received

So the death of insured while engaged in a horse race contrary to law, was caused by a violation of the law, although his opponent disregarded the rules of the course, and intentionally sought to run him off the track.[13]

**§ 2607. "Death in known violation of law:" construction: refers to voluntary criminal acts.**—The cases are not in harmony as to the meaning of this provision. It is held in some courts that it refers only to voluntary criminal acts, while in others the provision is construed as referring to any act in violation of law which might naturally lead to a conflict which would endanger the life of the insured. In a Massachusetts case[14] it was held that the condition must be construed to refer to a voluntary criminal act on the part of assured, known by him at the time to be a crime against the law, and not to mere trespasses against property or other infringements of civil laws, with no criminal consequence attached. This case also held that offenses against persons and the property of another such as are recognized as crimes by the common law and the laws of civilized countries generally will be presumed to be crimes in each state of the Union, and the insured will be presumed to know the criminal laws of the state under the jurisdiction of which he was.[15] In Missouri[16] and in New York[17]

the mortal wound during and while engaged in the commission of a crime, and not merely in consequence of it afterward. . . . The question to be considered is: Were the two acts—the assault by Cluff and the firing of the pistol by Cox—a part of one conflict for the possession of the horses, or had Cox abandoned his attempt to retain the custody of the horses, and had Cluff desisted in his assault? Was the fight over, or had Cox merely retired to a more advantageous position? In short, if Cluff in the first instance did commit a criminal assault and the firing of the pistol was a part of the same continuous transaction, then the condition of the policy was violated."

[13] Travelers Ins. Co. v. Seaver, 19 Wall. (86 U. S.) 531, 22 L. ed. 155.

*Cited* in: *Georgia.* — Gresham v. Equitable Accident Ins. Co. 87 Ga. 497, 499, 13 L.R.A. 838, 839, 27 Am. St. Rep. 263, 13 S. E. 752.

*Indiana.*—Bloom v. Franklin Life Ins. Co. 97 Ind. 478, 486, 49 Am. Rep. 469.

*Massachusetts.*—Freeman v. Mercantile Mutual Accident Assoc. 156 Mass. 351, 354, 17 L.R.A. 753, 755, 30 N. E. 1013.

*Missouri.* — Wolff v. Connecticut Mutual Life Ins. Co. 5 Mo. App. 236, 243.

*Virginia.*—Portsmouth Ins. Co. v. Reynolds, 32 Gratt. 613, 619.

[14] Cluff v. Mutual Ben. L. Ins. Co. 99 Mass. 317.

[15] In this case it appeared that the insured had started to unhitch and take a pair of horses, the property of his debtor, and that the son of the debtor had shot the insured. The point was raised that as the insured had done such act under an honest claim of right he was not guilty of the crime of larceny, and in reference to this the court at p. 329, said: "If the defendants should be able to satisfy the jury that Cluff had no color of title or right in or to the property nor of legal authority to take it; and that he made no claim of any such title or right, nor of any authority except that, having a debt against the

decisions have been rendered which are substantially in accord with the Massachusetts doctrine.

§ 2608. **Same subject: refers to both civil and criminal law.**—In a case in Indiana[18] the court held that the clause referred to a known violation of a positive law, either criminal or civil, where the reasonable and natural consequences of such violation would be to increase the risk, but did not refer to any violation of either law which did not tend to have such a result. This is substantially the same view as that expressed by Justice Grover in the dissenting opinion in Bradley v. Mutual Benefit Life Insurance Company,[19] who said: "No one would contend that had the insured died in the state of New York from heart disease while engaged in selling lottery tickets the case would have come within the proviso. It might have been within the strict letter, but not at all within the intention of the parties, for the reason that the violation of law, although criminal, had no possible connection with the death, and in no possible way increased the risk. . . . Again, suppose the death occurred from injury received while the assured was attempting to obtain by force the possession of a chattel of which another was in possession, the title to which was claimed by both, but which was really in the insured, the case would come within the proviso, for the reason that the risk was increased and the death caused by the violation of law by the assured, although such law was the civil law only, the deceased having committed no breach of the peace or any indictable offense. . . . It follows that when the death occurs during the known violation of law by the assured, when such violation eminently tends to violence dangerous to life, the case comes within the proviso."

§ 2609. **Same subject: conclusion.**—From an examination of the cases cited in the foregoing sections, it will be seen that the weight of authority favors the view that "death" in the known violation of the law "refers only to a voluntary criminal act, and not to

owner of the horses, he claimed a right to seize his property in payment by way of self-redress without regard to law, we think the defendants would then be entitled to a verdict. Such a claim would be a claim of the privilege to commit a crime, which the law will not recognize to be honestly made as a claim of right."

[16] Harper v. Phœnix Ins. Co. 19 Mo. 506.

[17] Bradley v. Mutual Benefit Life Ins. Co. 3 Lans. (N. Y.) 341, rev'd 45 N. Y. 422, 6 Am. Rep. 115. In the supreme court it has been held that this provision should not be limited in its application to criminal acts, but should be construed as having been intended to prohibit the insured from doing any act in violation of the law which would naturally lead to a conflict by which his life would be endangered. The court of appeals, however, reversed this decision.

[18] Bloom v. Franklin Life Ins. Co. 97 Ind. 478, 49 Am. Rep. 469.

[19] 45 N. Y. 422, 6 Am. Rep. 115.

mere acts of trespass." And such a view seems to be supported by the better reasoning. The words are inserted by the insurers for their own benefit and protection. They are used to exempt them from liability in case a certain event or events take place. It is an acknowledged rule of law that courts do not favor forfeiture, and in case of doubt a construction is to be given which is most favorable to the insured, and against the insurer who has introduced the clause. There is manifestly a doubt as to the meaning of this clause. If we, then, apply the general rule above stated as to forfeiture, the doctrine as stated originally in Missouri seems the correct one. If the insurer had intended to include such violation of both civil and criminal law as increased the risk, it would have been within his power to do so. But he has introduced a clause as to the meaning of which there is doubt, and consequently it should be strictly construed against him. If this clause stood alone, and not in connection with other clauses of exemption, it might then be construed as referring to those cases of violation of either civil or criminal law which increase the risk. In most cases, however, it is to be found in connection with other clauses excepting the insurers from liability. When so found should not the maxim "noscitura sociis" control? The other clauses are generally those excepting the insurer from liability in case the insured die by the hand of justice, or while engaged in dueling. One of these refers to crimes punishable by death, and the other to a violation of the criminal law. By applying this maxim we can reach the conclusion that those cases where death results in a violation of the criminal law only were intended. In all cases the intentions of the parties are to be ascertained, if possible. A construction is not to be given beyond the clear intent of those contracting. In none of the cases do the courts contend that a strict and literal construction should be given to this clause. If such were the case, there would be many forfeitures which neither party could reasonably have contemplated when effecting the contract. It being admitted that the words are not clear, and that there is a doubt, and it being a fact that the words are introduced by the insurer for his own benefit, it would seem in accordance with the rules as to forfeiture that the construction most favorable to the insured should be given, and, therefore, the doctrine which we have stated at the beginning of this section is more clearly in accordance with the manifest intentions of both parties to the contract.

§ 2610. **Death or injury in violation of law.**—Where a statute[20] forbade traveling on Sunday except from necessity or charity, and

[20] Rev. Laws Vt. secs. 4315, 4316.

forbade hunting, it was held that where the insured went hunting in violation of the law, and while returning was injured, the insurers were not liable upon an accident policy which provided that in case of "a violation of the law wholly or partly, directly or indirectly," producing an injury, they should not be liable.[1] But one who has started to hunt prairie chickens with a loaded gun at a season when it is unlawful to kill them, and who is injured by an accidental discharge of his gun as he is climbing a bank, is not engaged in violation of law within the exception of an accident policy.[2] And it is held that although hunting on Sunday is prohibited by a statute, yet where the injury was sustained at a friend's after hunting, this is not an accident while violating the law.[3]

If the act causing death is in no manner connected with or part of an attempt to carry out any criminal purpose there is no violation of, or attempt to violate any criminal or penal law.[3a]

Under a life policy providing that it shall be void if insured dies in consequence of any violation of, or attempt to violate any criminal law of the United States, or of any state where insured may be, no recovery can be had if death results from the insured having voluntarily submitted to an illegal operation known to be dangerous to life, with intent to cause an abortion, without any justifiable medical reason. To permit a recovery in such case is against public policy.[4] In an action on an accident policy containing a condition that the insurers would not be liable for death by an accident caused by a violation of law, a recovery cannot be had in a state where horse racing is a misdemeanor, for death by accident while engaged in a horse race.[5] But in a suit upon a benefit certificate providing that no claim should be made for any injury which might happen "when engaged in or in consequence of any crim-

[1] Duran v. Standard Life & Accident Ins. Co. 63 Vt. 437, 25 Am. St. Rep. 773, 13 L.R.A. 637, 22 Atl. 530, 44 Alb. L. J. 317, 20 Ins. L. J. 1035. But *compare* Matthes v. Imperial Accident Assoc. 110 Iowa, 222, 81 N. W. 484, 29 Ins. L. J. 622.

[2] Cornwell v. Fraternal Accident Assoc. 6 N. Dak. 201, 40 L.R.A. 437, 69 N. W. 191.

[3] Prader v. National Mutual Assoc. 95 Iowa, 149, 63 N. W. 601.

[3a] Supreme Lodge Knights of Pythias v. Beck (Pythias Knights Supreme Lodge v. Beck) 181 U. S. 49, 55, 21 Sup. Ct. 532, 48 L. ed. 741.

[4] Wells v. New England Mutual Life Ins. Co. 191 Pa. St. 207, 53 L.R.A. 327, 71 Am. St. Rep. 763, 43 Atl. 126.

As to dueling or fighting: death in assault, quarrel, or fight, see §§ 2619 et seq. herein.

[5] Travelers' Ins. Co. v. Seaver, 19 Wall. (86 U. S.) 531, 22 L. ed. 155. *Cited* in Aetna Life Ins. Co. v. Vandecar, 86 Fed. 282, 289, 30 C. C. A. 48, 55, 57 U. S. App. 446; Gresham v. Equitable Accident Ins. Co. 87 Ga. 497, 499, 13 L.R.A. 838, 839, 27 Am. St. Rep. 263, 13 S. E. 752; Accident Ins. Co. v. Bennett, 90 Tenn. 250, 269, 25 Am. St. Rep. 685, 16 S. W. 723.

inal act," an answer that at the time the plaintiff was injured he was in a public highway in a drunken condition, which is a criminal act, under the statutes of Indiana, and "that the injury happened to the plaintiff while he was engaged in and in consequence of a criminal act," is bad on demurrer, the conclusion being a mere conclusion of law, and no positive connection being shown between the alleged criminal act and the injury.[6] Again the laws of a state may provide that no person shall walk on or along a railroad track except where the same may be laid across or along streets or highways, yet if the public have been permitted to cross a railroad company's track for such period of time as to create a license, it is not "violating the law," within the meaning of an accident policy which excepts liability for injuries received "while violating the law," for a person to cross the company's tracks at such place.[7]

Under a provision in an accident policy that the insurance will not cover death while the insured is engaged in any unlawful act, it is held that the insurers will not be absolved from liability unless it appears that the natural and reasonable consequence from such violation of the law is to increase the risk.[8] And a provision in a life policy exempting the insurer from liability for injuries to the insured while engaged in or in consequence of some unlawful act does not extend to exempt the insurer from liability because of the infraction of law by the insured, when the act has no connection with the injury, or when the act is in violation of some obligation of morality or rule of policy not recognized or adopted as law. Living in fornication is not an unlawful act, unless it is accompanied with circumstances of notoriety or publicity; and the fact that the insured was so living, at the time of his death, does not exempt the insurer from liability under this clause.[9] So in order that assured's death may be said to have been caused or superinduced by violation of a criminal law within the meaning of an insurance policy exception of liability therefor it must appear that his act bore such a relation to his death that the latter would not have occurred at the time and place, if assured had not been engaged in violating the law, and this applies where it is claimed that such death was caused or superinduced by such violation or attempted violation

[6] National Benefit Assoc. v. Bowman, 110 Ind. 355, 11 N. E. 316.

[7] Lehman v. Great Eastern Casualty & Indemnity Co. 39 N. Y. Supp. 912, 7 App. Div. 424, aff'd without opinion in 158 N. Y. 689, 53 N. E. 1127.

[8] Conboy v. Railway Officials & Employees' Accident Assoc. 17 Ind. App. 62, 60 Am. St. Rep. 154, 46 N. E. 363, s. c. 43 N. E. 1017.

[9] Insurance Co. v. Bennett, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723.

because it would not have occurred except assured had carried a concealed weapon, and also because it was also claimed that it occurred in a fight which he had voluntarily begun.[10] The defense that death resulted or was in consequence of a violation of criminal law must be established by at least a preponderance of evidence.[11] But a preponderance of evidence is sufficient to show that one met death while violating the law contrary to the provisions of the policy. The fact need not be established beyond a reasonable doubt.[12]

Under an Illinois decision suicide is not a crime which constitutes the violation of any criminal law, and even though the attempt to commit suicide may be a crime, one who has accomplished the act cannot be said to be guilty of an attempt to commit the act.[12a]

Where a life policy does not contain a provision in terms against a claim under the policy, if the death was caused by intentional

[10] Baker v. Supreme Lodge Knights of Pythias, 103 Miss. 374, 60 So. 333, 42 Ins. L. J. 348.

[11] Supreme Lodge Knights of Pythias v. Lipscomb, 50 Fla. 406, 39 So. 637.

On duty of insured to negative death or accident from excepted cause, see notes in 4 L.R.A.(N.S.) 636, and 50 L.R.A.(N.S.) 1006.

[12] *United States.*—New York Accident Ins. Co. v. Clayton, 8 U. S. C. C. A. 213, 59 Fed. 559, 19 U. S. App. 304. The court, per Sanborn, C. J., says: "The court charged the jury that in order to avail itself of this defense the company must prove it beyond a reasonable doubt. This was clearly erroneous. Where a criminal act is alleged in a civil suit, proof beyond a reasonable doubt is not required to warrant a verdict and decision in support of the allegation. A preponderance of the evidence is sufficient. This is so well settled by the authorities in this country that it does not permit discussion:" *Citing*

*United States.*—United States v. Shapleigh, 4 U. S. C. C. A. 237, 54 Fed. 126, 134.

*Iowa.*—Welch v. Jugenheimer, 56 Iowa, 11, 8 N. W. 673.

*Kentucky.*—Ætna Ins. Co. v. Johnson, 11 Bush (74 Ky.) 587, 21 Am. Rep. 223.

*Louisiana.*—Hoffman v. Western Marine & Fire Ins. Co. 1 La. Ann. 216.

*Maine.*—Ellis v. Buzzell, 60 Me. 209 (a preponderance of testimony will support a plea of justification in an action for slander charging adultery); Knowles v. Scribner, 57 Me. 495 (suit of bastardy).

*Massachusetts.*—Schmidt v. New York Union Mutual Fire Ins. Co. 1 Gray (67 Mass.) 529.

*Missouri.*—Rothschild v. American Central Ins. Co. 62 Mo. 356.

*New Hampshire.* — Matthews v. Huntley, 9 N. H. 146; Folsom v. Brawn, 5 Fost. (25 N. H.) 114.

*New Jersey.*—Kane v. Hibernia Mutual Fire Ins. Co. 38 N. J. L. 441, 20 Am. Rep. 409, 17 Am. L. Rep. (N. S.) 293, 297.

*Pennsylvania.*—Young v. Edwards, 72 Pa. St. 257, 267.

*Vermont.*—Bradish v. Bliss, 35 Vt. 326.

*Wisconsin.*—Blaeser v. Milwaukee Merchants' Mutual Ins. Co. 37 Wis. 31, 19 Am. Rep. 747; Washington Union Ins. Co. v. Wilson, 7 Wis. 169. 1 Greenleaf on Evidence, sec. 13a.

[12a] Royal Circle v. Acherrath, 204 Ill. 549, 63 L.R.A. 452, 58 Cent. L. J. 128, 33 Ins. L. J. 20, 68 N. E. 492.

injury inflicted by insured, or any other person, but contains merely a provision that the policy only covers injuries effected through "accidental means," an injury not anticipated, and not naturally to be expected by insured, though intentionally inflicted by another, is an accidental injury within the meaning of the contract.[13]

**§ 2610a. Same subject: carrying concealed weapons.**—The carrying concealed weapons and being shot in a difficulty after leaving a bawdyhouse, neither fact being shown to have naturally been the cause of assured's death, do not bring the death within the exception of liability in consequence of a violation of law.[14] To relieve a life insurance company from liability for the death of an insured who came to his death while violating the statute prohibiting the carrying of concealed weapons, it must be shown that the offense was being committed, and that it brought about the death of the deceased.[15] And the burden of proof is upon the party alleging such fact to show that the insured was carrying a weapon concealed unlawfully where he had a right to carry it concealed under certain circumstances, even though it be conceded that the fact that insured had it concealed had such an effect upon his or the other party's conduct as without it his death would not have occurred.[16]

**§ 2610b. Conviction of felony.**—In order to constitute a conviction within the meaning of a clause in a policy that it shall be void and forfeited if assured shall be convicted of a felony there must be a condemnation by the court of last resort where the law provides that such condemnation is necessary to make one a convict and this applies where assured died pending a motion for rehearing after a case had been appealed and affirmed after a second trial of assured which resulted in a conviction for manslaughter.[17]

**§ 2611. Excepted liability where death occurs "by the hands of justice."**—Though the policy contains a condition that there can

[13] Insurance Co. v. Bennett (Accident Ins. Co. of North America v. Bennett) 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723.

[14] Jones v. United States Mutual Accident Assoc. 92 Iowa, 652, 61 N. W. 485.

[15] Interstate Life Assur. Co. v. Dalton, 165 Fed. 176, 91 C. C. A. 210, 23 L.R.A.(N.S.) 722. See Brown v. Mystic Workers of the World, 151 Ill. App. 517.

[16] Baker v. Supreme Lodge Knights of Pythias, 103 Miss. 374, 60 So. 333, 42 Ins. L. J. 348.

[17] Woodmen of the World v. Dodd, — Tex. Civ. App. —, 134 S. W. 254. See Baker v. Modern Woodmen of America, 140 Mo. App. 619, 121 S. W. 794.

On conflict of laws as to effect of of execution of insured for crime or conviction of felony, on right to recover life or accident insurance, see note in 52 L.R.A.(N.S.) 284.

be no recovery thereon if the insured die "by the hands of justice," yet it has been held that such a provision is unnecessary.[18] Though this risk might be expressly covered, yet no recovery could be had thereon if the insured should die by such means, since it would be against public policy to permit a recovery in such cases; accordingly, since an insurance against such a risk would not be upheld, it necessarily follows that a policy would be void in those cases even where it is expressly assumed by the insurer, and therefore the stipulation avoiding it is unnecessary. "Death by the hands of justice" has been defined by Tyndall, C. J., in Borradaile v. Hunter[19] as death in "consequence of a felony previously committed;" that is, death which is the result of a trial and sentence by a judicial proceeding. In the words of the court in a North Carolina case,[20] "to die by the hands of justice is to die by some judicial sentence for the commission of some felony."[1] So it is decided that the innocence of an insured who was executed after conviction of a capital crime, does not change the rule that insurance cannot be recovered upon the life of a person who is executed for crime, even if the policy makes no provision for forfeiture on that account.[2] The question might arise whether if after the insured had been executed it could be, perhaps, shown by newly discovered evidence that the insured was innocent of the crime for which he was convicted. We do not believe that such a defense could be introduced. The insured has died by the hands of justice, having been duly convicted and sentenced. The manner of death which the policy excepted has occurred. It does not seem that the question of his innocence is in any way material. It may seem a hardship for the persons to whom the policy is made pay-

[18] Amicable Soc. v. Bolland, 4 Bligh (N. S.) 194, 2 Dow. & Cl. 1, rev'g Bolland v. Disney, 3 Russ. 351.

[19] 5 Man. & G. 639, 5 Scott (N. R.) 418, 12 L. J. C. P. 225, 7 Jur. 443.

[20] Spruill v. North Carolina Mutual Life Ins. Co. 1 Jones (46 N. C.) 126.

[1] In this case the policy provided that "in case the said slave should die by means of any invasion . . . or by the hands of justice the policy should be void." The slave escaped, and while resisting arrest, was shot by the sheriff. It was held that death did not ensue within the meaning of any of those clauses.

[2] Burt v. Union Central Life Ins. Co. 105 Fed. 419, 44 C. C. A. 548, 59 L.R.A. 393; Burt v. Union Central Life Ins. Co. 187 U. S. 362, 47 L. ed. 216, 23 Sup. Ct. 139.

*Cited* in: *Massachusetts.*—Reagan v. Union Mutual Life Ins. Co. 189 Mass. 555, 558, 2 L.R.A.(N.S.) 824, 109 Am. St. Rep. 659, 76 N. E. 217.

*Pennsylvania.*—Collins v. Metropolitan Life Ins. Co. 27 Pa. Super. Ct. 345, 356.

*Tennessee.*—Box v. Lanier, 112 Tenn. 393, 404, 64 L.R.A. 458, 463, 79 S. W. 1042.

*Virginia.*—Plunkett v. Supreme Conclave Improved Order of Heptasophs, 105 Va. 643, 648, 55 S. E. 9.

able, who have been dependent on the insured for support and for whose protection the policy was procured, yet the insurer is entitled to the benefit of every provision of the policy when it is clear and definite. Certainly, this provision is clear.[3] This question is also now settled in the Federal supreme court, at least in so far as that court is concerned, and it is there held that although there is no policy provision excluding death by law a legal execution for crime is not a risk covered by a contract of insurance, and this also applies where the place of contract gives no right to recover in such case.[4]

Notwithstanding the preceding conclusion and decisions it is held that the legal execution of a person for a crime committed by him does not constitute any defense to an action by his legal representative on a policy upon the life of the deceased, in a state whose constitution declares that no conviction shall work a corruption of blood or forfeiture of estate.[5]

§ 2611a. **Same subject: killing adulterer by husband: wife's paramour.**—The death of an adulterer, at the hands of the husband, either while attempting intercourse with the wife or immediately after the completion of intercourse, is not within the condition of a life policy that "if death is caused or superinduced at the hands of justice, or in violation of or attempt to violate any criminal law," the insurer shall not be liable for the full amount of the policy: the killing at the hands of justice must be by some person authorized to carry out the commands of the law; or by one who is permitted by the law to do the act in the advancement of public justice.[6]

§ 2612. **Death: use of intoxicants.**—Life policies stipulate against liability in case death occurs while assured is intoxicated, or occurs as a result of the intemperate use of intoxicants. The most frequent forms of the condition are that the policy shall be void "if the death shall be caused by the use of intoxicating drinks,"[7] or

[3] Clift v. Schwabe, 3 C. B. (O. S.) 437, 2 Car. & K. 134, 17 L. J. C. P. 2, per Justice Wightman.

[4] Northwestern Mutual Life Ins. Co. v. McCue, 223 U. S. 234, 56 L. ed. 419, 38 L.R.A.(N.S.) 57, 32 Sup. Ct. 220, 41 Ins. L. J. 815, rev'g McCue v. Northwestern Mutual Life Ins. Co. 167 Fed. 435, 93 C. C. A. 71, *citing* Burt v. Union Central Life Ins. Co. 187 U. S. 362, 47 L. ed. 216, 23 Sup. Ct. 139.

[5] Collins v. Metropolitan Life Ins. Co. 232 Ill. 37, 14 L.R.A.(N.S.) 356 (annotated on effect of the execution of insured for crime, on right to recover life or accident insurance), 122 Am. St. Rep. 54, 83 S. E. 542.

[6] Supreme Lodge Knights of Pythias v. Crenshaw, 129 Ga. 195, 13 L.R.A.(N.S.) 258 (annotated on necessity that assured's death be reasonable and legitimate consequence of violation of law in order to relieve insurer), 121 Am. St. Rep. 216, 58 S. E. 628.

[7] Mutual Life Ins. Co. v. Stibbe, 46 Md. 302, 312.

where death shall occur "while the insured was or in consequence of his having been under the influence of intoxicating drink,"[8] or if the insured shall "die by reason of intemperance from the use of intoxicating liquors."[9] Where the policy provides that the company shall not be liable for injuries which are received while the insured is intoxicated, or in consequence of his being "under the influence of intoxicating liquors," the phrase "under the influence of intoxicating liquors" is held to mean a condition amounting to intoxication. So an instruction to the jury that if the insured was under the influence of liquor, whether intoxicated or not, the company is not liable, was held to be erroneous.[10] But where a life policy was conditioned to be void in case death should occur "while the insured was or in consequence of his having been under the influence of intoxicating drink," and the insured while intoxicated was shot and killed, it was held that if the insured was under the influence of intoxicating drink when he died the policy was avoided, and that it was immaterial whether or not drunkenness was the cause proximate or remote of the death.[11] Again, where the policy provided that the insurers should not be liable where death "shall be caused by the use of intoxicating drink or opium," it was held that an instruction to the effect that death must be directly caused by such use and not remotely was correct.[12] In one of the above cases it will be observed that the policy excepted death while the insured was "under the influence of intoxicating drink," while in the case last noted it excepted death "caused by the use of intoxicating drink." In another case in Iowa the policy was to be void if the insured died "by reason of intemperance from the use of intoxicating liquors." The case came before the supreme court twice.[13] The evidence showed that the insured had during one of his periodical debauches, and while in a fit of delirium tremens, escaped from those who were taking care of him, and with no clothing on wandered through the streets and contracted a cold, resulting in congestion of the lungs and brain,

As to representations and warranties: temperate habits: drunkenness: use of intoxicating liquors, see § 2096 herein.

[8] Shader v. Railway Passengers Ins. Co. 66 N. Y. 441, 23 Am. Rep. 65.

[9] Ranney v. Mutual Benefit Life Ins. Co. (1873) U. S. C. C. 1st Dist. of Mass.

On scope and effect of provisions in policies of insurance forbidding use of intoxicating liquor, see notes in 15 L.R.A.(N.S.) 206, and 25 L.R.A.(N.S.) 1241.

[10] Standard Life & Accident Ins. Co. v. Jones, 94 Ala. 434, 10 So. 530.

[11] Shader v. Railway Passengers Ins. Co. 66 N. Y. 441, 23 Am. Rep. 65.

[12] Mutual Life Ins. Co. v. Stibbe, 46 Md. 302, 312.

[13] Miller v. Mutual Benefit Life Ins. Co. 31 Iowa, 235, 7 Am. Rep. 122, s. c. 34 Iowa, 222.

from which he died. In the trial of the case the jury had been instructed as follows: "If you find that Miller's death was produced by other causes, then you should find for the plaintiff on this branch of the case. The policy must be construed strictly against the defendant, and if you find that Miller's death was only contributed to by the intemperate use of liquor, then you must find for the plaintiff upon this branch of the case. In order to avoid the policy the defendant must satisfy you by a preponderance of evidence that the sole or paramount cause of Miller's death was caused by the intemperate use of intoxicating liquors." The supreme court, when the case was put before it,[14] first held the instruction to be correct, and said: "The defendant claims that 'if intemperance shortens life, it is a cause of death within the meaning of the policy,' and that the policy is thereby avoided. It rarely, if ever, happens that the intemperate use of intoxicating drinks is indulged in for a considerable period without to some extent shortening life. The consequences of the construction contended for by the defendant would, therefore, be that an insurance company which had assured the life of one known to be intemperate, and which had charged a higher rate of insurance in consequence of such fact, could exonerate itself from liability upon the policy by showing that the life of the assured had been shortened by intemperance. A sound principle does not lead to consequences so unjust and unreasonable. A proximate cause of an effect is that which immediately precedes and produces it, as distinguished from the *remote, mediate, or predisposing* cause. When several causes contribute to death as a result, it may be extremely difficult to determine which was the remote and which the immediate cause, yet this difficulty does not change the fact that the death is to be attributed to the proximate and not the mediate cause."[15] In a subsequent consideration of this case, however,[16] the court held that the verdict and judgment must be set aside, as the evidence showed conclusively that the death was due to the excessive use of intoxicating liquors. In a case in the Federal courts[17] the policy was also conditioned to be void in case the insured died "by reason of intemperance from the use of intoxicating liquors." The insurers

[14] Miller v. Mutual Benefit Life Ins. Co. 7 Am. Rep. 122, 31 Iowa, 235.

[15] See also Holterhoff v. Mutual Benefit Life Ins. Co. (Cin. Sup. Ct.) 4 Big. L. & A. Cas. 395; Mutual Benefit Life Ins. Co. v. Holterhoff, 2 Cin. Sup. Ct. 379.

[16] Miller v. Mutual Benefit Life Ins. Co. 34 Iowa, 222.

[17] Ranney v. Mutual Benefit Life Ins. Co. (1873) U. S. C. C. 1st Dist. Mass.

claimed that death occurred while the insured had the delirium tremens, and consequently the policy was avoided. It appeared from the evidence that the physician had administered large quantities of morphine as a remedy, and the plaintiff claimed that though the insured had delirium tremens, the death was directly caused by the amount of morphine administered. The court in instructing the jury said: "If the disease from which the insured was suffering was delirium tremens, a mania a potu, or other disease resulting from intemperance from the use of intoxicating liquors, and that disease, though not necessarily mortal, yet from want of helpful application or neglect of proper care or treatment produced exhaustion or fever, and consequent death, the death would probably be considered as resulting from the intemperance, even if the disease were not so mortal in itself, but that with good care and under favorable circumstances the insured might have recovered; yet if it became the cause of death by reason of the most efficacious mode of treatment not having been adopted, then the plaintiff would not be entitled to recover. If the death of the insured was caused by any drug administered to him in the course of medical practice for the purpose of cure, in sufficient quantity to produce death, and death was the result of the drug and not of the disease, then in such case the death could not properly be considered as resulting from the intemperance in the use of intoxicating liquors, and the plaintiff upon that branch of the case would be entitled to recover." It will be seen that the courts are not in harmony as to the meaning of the phrase "die by reason of intemperance from the use of intoxicating liquors." On the one hand, it is contended that this phrase only includes those cases where intemperance is the proximate or direct cause of death. On the other hand, it is contended that if the intemperance is the primary or substantial cause of the death, though some other cause may intervene from which death results, yet if the intemperance is the proximate and direct cause of the subsequent causes, and immediately connected with the death in one direct series of causes, then it is within the provision. It is not contended if intemperance is the remote cause, in the sense of simply rendering the system more susceptible to disease from which death ensues, that death in such a case is within the meaning of the exception. In any case, in order to bring it within the meaning of the provision, the intemperance must at least be the substantial cause immediately connected with the other cause or causes from which death ensues, and in such close sequence that the death is directly traceable to the

intemperance as the operating cause.[18] The quantity of liquor which is drank by assured is not alone the test of the fact whether he was under the influence of intoxicating liquor; as in case where the testimony of those with him at the time he met with his accident was that they considered him sober.[19] If a certificate of insurance is issued by an order whose distinguishing feature is its requirement of daily abstinence from the use of liquors as a beverage, and if the application for such insurance contains an agreement that the assured will comply with all the laws, regulations, and requirements of the order and the certificate, a statement that it is issued upon the express condition that the assured shall in every particular while a member of the order comply with all its laws, rules, and requirements, the policy becomes forfeited and void upon the assured commencing the use of alcoholic liquors as a beverage. His suspension or expulsion from the order is not a condition precedent to such forfeiture.[20] And where liability is excluded if death results directly or indirectly from the use of intoxicating liquors a breach of the exception precludes recovery in the absence of a waiver or estoppel.[1] But a provision in a benefit certificate "that the Travelers' Protective Association of America shall not be liable . . . in case of injury, disability or death happening to the member while intoxicated, or in consequence of his having been under the influence of any narcotic or intoxicant, or disability when caused, wholly or in part, by duelling, fighting, wrestling, war or riot," does not apply in any case of death, but of disability only.[2] So an insured person who dies from drinking wood alcohol by mistake does not die from the intemperate use of intoxicating liquors.[3] If the policy insures against injuries or death caused

[18] The nonuse of alcoholic stimulants or opium does not mean that the insured has never taken liquor or opium, and that he is ignorant of the taste of either. Something more than an occasional or incidental use is implied. There must be to some extent a habit or custom in that regard, and one may occasionally indulge in liquor without having acquired a habit of so doing. Grand Lodge Ancient Order United Workmen v. Belcham, 48 Ill. App. 346, per Wall, J.

[19] Prader v. National Masonic Accident Assoc. 95 Iowa, 149, 63 N. W. 601. In this case the deceased was injured by stepping into a hole, it appearing that he and two others had drank from a quart bottle of whisky, some of which was left, and on their return he also drank two glasses of wine, and thereafter met with the accident.

[20] Hogins v. Supreme Council Champions of Red Cross, 76 Cal. 109, 9 Am. St. Rep. 173, 18 Pac. 125.

[1] Colver v. Modern Woodmen of America, 154 Iowa, 615, 135 N. W. 67.

[2] Roth v. Travelers' Protective Assoc. of America, 102 Tex. 241, 132 Am. St. Rep. 871, 115 S. W. 31.

[3] Modern Woodmen of America v. Lawson, 110 Va. 81, 135 Am. St. Rep. 927, 65 S. E. 509.

directly, independently and exclusive of all other causes, insured's degree of good health may be such as to exclude evidence of his use of intoxicants under a claim that he was by such use less able to withstand disease for in such case unless said use contributed to the loss or death evidence of such use would be immaterial.[4]

**§ 2613. Intemperance: "if the insured becomes so far intemperate as to impair his health."**—A policy which provides that it shall be void if the insured becomes "so far intemperate as to impair health or induce delirium tremens" is avoided where the insured's death is substantially due to the use of intoxicants in excess, where they are not taken by medical advice or for medical purposes, though it may appear that he has not become habitually intemperate or had delirium tremens.[5] It is for the jury to determine whether the death is caused by intemperance.[6] Again, if a policy of life insurance provides that it shall be void if the insured shall use alcoholic drinks so as to injure his health, and that the insurer may cancel the policy when it comes to its knowledge that the insured has made false statements in this respect, or does so use alcoholic liquor, and that the policy shall be void if he dies from the effects of intoxication or while intoxicated, and the insurer's agent makes out a policy well knowing the insured to be an habitual drunkard, and afterward receives the premium without canceling the policy, the insurer thereby waives all the conditions in the policy except that making it void if the insured dies while intoxicated or from the effects of intoxication.[7] In a case in Minnesota it is held that the word "temperate," referring to the use of liquors, means the habits of the insured, and does not extend to exceptional or occasional instances, nor mean total abstinence, but merely abstinence from excessive or injurious use.[8] And a policy providing that

[4] Fidelity & Casualty Co. of N. Y. v. Cooper, 157 Ky. 544, 126 S. W. 111.

[5] Ætna Life Ins. Co. v. Davey, 123 U. S. 739, 31 L. ed. 315, 8 Sup. Ct. 331. *Cited* in Hadley v. Provident Savings Life Assur. Soc. 90 Fed. 390, 392; Renn v. Supreme Lodge Knights of Pythias, 83 Mo. App. 442, 447; Janneck v. Metropolitan Life Ins. Co. 43 N. Y. Supp. 669, 13 App. Div. 514, 517. See Mutual Protective League v. Cole, 160 Ky. 805, 170 S. W. 184. See § 2096 herein.

[6] Ætna Life Ins. Co. v. Davey, 123 U. S. 739, 31 L. ed. 315, 8 Sup. Ct. 331.

[7] Newman v. Covenant Mutual Ins. Co. 76 Iowa, 56, 1 L.R.A. 659, 14 Am. St. Rep. 196, 40 N. W. 87. See § 2614 herein.

[8] Chambers v. North Western Mutual Life Ins. Co. 64 Minn. 495, 58 Am. St. Rep. 549, 67 N. W. 367. If the representation is that applicant's habits are "sober and temperate," and insured became intemperate during the year preceding his death, but there was a division of medical opinion whether or not the risk was thereby materially increased, it was held that there was sufficient evidence of change of habits and an increase of risk to avoid the policy: Boyce v. Phœnix Mutual Life Ins. Co. 14

it shall be void if the insured shall become so far intemperate as to impair his health, is not avoided by his death caused by the use of alcoholic stimulants, if they were taken in good faith under medical advice and for medical purposes.[9]

Again in Indiana, it is held that the use of intoxicating liquors to the extent of impairing the health seriously, but which does not permanently injure it, will not operate as a forfeiture of the contract, under a condition that it shall be invalidated if assured "shall become so far intemperate" as to impair his health seriously and permanently or induce delirium tremens;[9a] and that a general stipulation as to forfeiture for a certain degree of intemperance is controlled by a specific and separate stipulation that the company may cancel the policy if the assured becomes intemperate to a certain degree.[9b]

**§ 2613a. If insured becomes "so far intemperate or use drugs to such an extent as to impair his health."**—If it is stipulated that the policy shall be void if insured becomes "so far intemperate, or use drugs to such an extent as to impair his health" an impairment of health must result as intemperance of itself is insufficient to constitute a breach but if he does become so far intemperate as to impair his health the policy is voided notwithstanding the direct and proximate cause of his death was not such impairment of health.[10]

**§ 2613b. "Under the influence" of intoxicants or narcotics: limitation of liability.**—It is not an unreasonable provision to limit the amount of recovery, otherwise payable, in case the accident insured against occurs while assured is "under the influence" of any intoxicant or narcotic.[11] If it is stipulated that the amount of indemnity for disability shall be limited while insured is intoxicated it is immaterial whether or not the injury was caused by intoxication and this is so held even though the same limitation exists

Supr. Ct. Rep. (Can.) 723, per Ritchie, C. J., and Strong, J. (Fourmer and Henry, JJ., dissenting); United States Mutual Accident Assoc. v. Newman (84 Va.) 52, 3 S. E. 805.

[9] Ætna Life Ins. Co. v. Ward, 140 U. S. 76, 35 L. ed. 371, 11 Sup. Ct. 720. *Cited* in Knights of Pythias v. Allen, 104 Tenn. 625, 636, 58 S. W. 241.

[9a] Ætna Ins. Co. v. Deming, 123 Ind. 384, 24 N. E. 86.

[9b] Northwestern Mutual Life Ins. Co. v. Hazlett, 105 Ind. 212, 55 Am. Rep. 192, 4 N. E. 582.

[10] Robertson v. Fraternal Union of America, 85 S. Car. 221, 67 S. E. 247.

As to representations and warranties: temperate habits: drunkenness, opium habit, etc., tobacco and use of, see §§ 2076, 2096, 2097 herein.

[11] Grinnell (Furry's Admr.) v. General Accident Ins. Co. 80 Vt. 526, 15 L.R.A.(N.S.) 206 (annotated on scope and effect of provisions in policies of insurance forbidding use of intoxicating liquor), 68 Atl. 655.

where intoxication causes the injury.[12] So where it is stipulated that if insured is killed while in any degree under the influence of intoxicating liquors and he is killed while lying on a railroad track a finding that he was intoxicated will be sustained.[13] But the fact that insured had taken drinks just before he had received an injury, will not, if he was not drunk, bring him within the clause of the policy that it shall not "cover any accidental injury which may happen to me while under the influence of intoxicating drinks." [14]

§ 2613c. **Intemperance: degree of intoxication.**—If insured becomes intoxicated to such an extent as to impair his ability to care for himself, and thus increases the probability of his suffering accidental injury, it constitutes intoxication within the meaning of an accident policy clause limiting insurer's liability in case insured is injured while "insane, delirious, or under the influence of any intoxicant or narcotic." [15] But habitual use is meant by a provision of forfeiture of the certificate in case a member becomes intemperate in the use of intoxicating liquors.[16] A person is under the influence of an intoxicant, within the intent of a limitation of liability clause in an accident policy in such cases where he has recovered from intoxication only so far as to be fairly able to take care of himself.[17] And it is held not essential to determine whether or not assured had acquired a fixed habit of intoxication where the exception was the intemperate use of intoxicating liquors or of death from the use thereof and a fall which resulted in assured's death was directly attributable to his intoxicated condition for in such case there was a use of intoxicating liquors within the exception.[18] The question, however, whether or not insured was intoxicated at the time of his fall from a window which resulted in death, may under the evidence be one

[12] Mossop v. Continental Casualty Co. 137 Mo. App. 399, 118 S. W. 680.

[13] Little v. Iowa State Traveling Men's Assoc. 154 Iowa, 440, 134 N. W. 1087.

[14] Fidelity & Casualty Co. v. Chambers, 93 Va. 138, 40 L.R.A. 432, 24 S. E. 896.

[15] Bakalars v. Continental Casualty Co. 141 Wis. 43, 25 L.R.A.(N.S.) 1241 (annotated on scope and effect of provisions in policies of insurance forbidding use of intoxicating liquor), 122 N. W. 721.

*When definition of "intoxication" erroneous* and prejudicial, see Gall v. Sovereign Camp of Woodmen of the World, 166 Mich. 690, 132 N. W. 468, 40 Ins. L. J. 1964.

As to representations and warranties: temperate habits: drunkenness: use of intoxicating liquors, see § 2096 herein.

[16] Ury v. Modern Woodmen of America, 149 Iowa, 706, 127 N. W. 666.

[17] Grinnell (Furry's Admr.) v. General Accident Ins. Co. 80 Vt. 526, 15 L.R.A.(N.S.) 206n, 68 Atl. 655.

[18] Ury v. Modern Woodmen of America, 149 Iowa, 706, 127 N. W. 665.

for the jury.[19] If a policy insuring against accident limits the amount of the liability when a loss was "while under the influence of any intoxicant or narcotic," a finding that the assured was not under the influence of intoxicating liquor, "so as to prevent him from being fairly able to take care of himself," does not entitle him to recover, except to the extent to which the policy authorized recovery while under the influence of an intoxicant.[20]

§ 2614. **Death: intemperance: waiver of provision.**—A provision in a policy that the insurer will upon the death of the insured pay a certain amount if, in the opinion of the surgeon of the company, the insured did not die of intemperance, is a condition precedent to the right of recovery by those claiming under the policy.[1] But a mutual benefit association issuing a certificate with a provision avoiding it in case the insured injured his health by the use of stimulants, with the right to cancel it during his life for such action, to a person known to its agent to be a confirmed drunkard waives its right to defend an action on the certificate on that ground.[2] In an action on an accident policy to recover for the death of the assured, where the defense was that the deceased fell from a window while drunk, evidence that shortly before the accident deceased did not appear to be drunk; that he was seen early the next morning and there were no signs of vomit on him; that when the attending physician first saw him he thought he was drunk, but the idea was quickly dispelled; that deceased took a glass of beer just before going home, and was not drunk then, and that he only had three glasses of beer, and never drank whisky—is sufficient to sustain the finding that deceased was not drunk at the time of the accident.[3]

§ 2615. **Death: intemperance: use of drugs: by-laws of society.**—Where the by-laws of a society provided that no recovery could be had in case of death by intemperance, and the assured agreed in his written application to comply with the by-laws, it was held that no recovery could be had where the insured died from the excessive

[19] Fenton v. Iowa State Traveling Men's Assoc. 139 Iowa, 166, 117 N. W. 251 (condition in this case was an exception of liability for any accident to a member while he was in any degree under the influence of intoxicating liquors or narcotics or which shall happen on account or by reason or in consequence of the use thereof); Hegna v. Modern Brotherhood of America, 118 Minn. 368, 136 N. W. 1035.

[20] Grinnell (Furry's Admr.) v. General Accident Ins. Co. 80 Vt. 526, 15 L.R.A.(N.S.) 206n, 130 Am. St. Rep. 1012, 68 Atl. 655.

[1] Campbell v. American Popular Life Ins. Co. 1 MacAr. (8 Dist. Col.) 246, 29 Am. Rep. 591, s. c. 1 MacArthur (Dist. Col.) 471.

[2] Newman v. Covenant Mutual Benefit Assoc. 76 Iowa, 56, 14 Am. St. Rep. 196, 1 L.R.A. 659, 40 N. W. 87.

[3] Travelers' Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. 553.

use of liquor.[4] So a condition in a fraternal benefit certificate, that all payments made and all rights accrued thereunder shall be forfeited, and that the certificate shall be void if the member becomes so intemperate in the use of drugs or alcoholic liquors as permanently to impair his health or to produce delirium tremens, is self-executing.[5] And a by-law of a benefit society that benefits shall be withheld from widows of members who die through intemperance or debauchery is not an unreasonable regulation. It does not aim to regulate behavior of members, but to prevent acts which increase the demand for relief.[6] A by-law, however, of a fraternal insurance society, which provides that, if any member heretofore or hereafter adopted shall become intemperate in the use of drugs, the benefit certificate held by such member, shall, by such acts, become and be absolutely null and void as to benefits, and all payments made thereon shall be thereby forfeited, does not apply to the case of a member who, prior to the enactment of such by-law, had become intemperate in the use of drugs, and continued so thereafter.[7] But where the defense was that insured's certificate had lapsed because of his addiction to morphine and there is no testimony from which it can be legitimately inferred that deceased during the period in question was in such a physical condition that morphine was necessary to, or would, prolong his life, and he was not in a critical condition requiring "temporary relief" from morphine and not where its habitual and regular use was required to prolong his life it constitutes error to submit the question to the jury.[8]

**§ 2616. Death caused by submission to illegal operation.**—Though the policy may not expressly except liability where death is the result of an illegal operation, still no recovery can be had upon a policy of life insurance, on the ground of public policy, if death results from the insured having voluntarily submitted herself to an illegal operation, known to her to be dangerous to life, with intent to cause an abortion without any justifiable medical reason.[9]

[4] Hogins v. Supreme Council Champions of Red Cross, 76 Cal. 109, 9 Am. St. Rep. 173, 18 Pac. 125. See §§ 2076, 2096, 2097 herein.

[5] Modern Woodmen of America v. Breckenridge, 75 Kan. 373, 10 L.R.A. (N.S.) 136, 89 Pac. 661.

[6] St. Mary's Beneficial Soc. v. Burford, 70 Pa. St. 321.

[7] Taylor v. Modern Woodmen of America, 72 Kan. 443, 5 L.R.A. (N.S.) 283n, 83 Pac. 1099.

As to amendments, etc., of by-laws etc., prohibiting use of intoxicating liquors or drugs, see § 379f herein.

[8] Conley v. Supreme Court Independent Order of Foresters, 158 Mich. 190, 122 N. W. 567, 38 Ins. L. J. 1112.

On morphinism of insured as affecting policy, see note in 39 L.R.A. 265.

[9] Hatch v. Mutual Life Ins. Co. 120 Mass. 550, 21 Am. Rep. 541, 542.

On liability under accident policy for death or injury resulting from

A woman who solicits and submits to a criminal abortion to get rid of an illegitimate foetus, violates the criminal laws, within the meaning of a clause in a life policy exempting the company from liability for death by violation of, or attempting to violate, the criminal law.[10]

**§ 2617. Accident policy: injuries where no visible mark.**—A condition in an accident policy that it does not cover injuries of which there are no "external and visible signs of injury upon the body of the insured," extends only to bodily injuries not resulting in death.[11] So where an accident policy covered a weekly indemnity for injuries not resulting in death, as well as a payment in case of death, and also provided that the insurance "shall not extend to any bodily injury of which there shall be no external and visible sign upon the body," and assured was found dead in his room, it being evident that his death had been caused by breathing illuminating gas, and there were no external or visible signs of injury upon his body, and the court found as a fact that the death was occasioned by accidental means, it was held that his death was one against which the decedent was insured, and that the above exception of liability in the policy, clearly had reference only to the weekly claim for indemnity, and not to an injury resulting in the death of the assured.[12]

It is pertinent in this connection to assert, and it should be an underlying principle, that in cases of this character the following rules of construction ought to apply: that the intention of the parties must govern, reference being had to the nature of the risk, the subject-matter and the object to be accomplished, and that where the terms of the policy are clear and unambiguous no room is left for construction; nor should the language employed in these contracts of exception from or limitation of liability be so extended or applied as to release insurer unless it clearly imports such intent and in cases of ambiguity the rule as to construction against

surgical operation or medical treatment, see notes in 26 L.R.A.(N.S.) 1004, and L.R.A.1915E, 955.

[10] Wells v. New England Mutual Life Ins. Co. 191 Pa. St. 207, 53 L.R.A. 327, 71 Am. St. Rep. 763, 43 Atl. 126.

As to abortions, inquiry concerning, see § 1987a herein.

[11] Paul v. Travelers' Ins. Co. 112 N. Y. 472, 8 Am. St. Rep. 758, 3 L.R.A. 443, 20 N. E. 347; McGlinchey v. Fidelity & Casualty Co. 80 Me. 25, 6 Am. St. Rep. 190, 14 Atl. Rep. 13; Eggenberger v. Guarantee Mutual Accident Assoc. 41 Fed. 172.

On what constitutes external and visible signs of injury within exemption provision of accident policy, see note in 49 L.R.A.(N.S.) 1022; on external, visible or violent character of means, see note in 2 B. R. C. 377.

[12] Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347.

On death from asphyxiation, see notes in 2 L.R.A.(N.S.) 168, and L.R.A.1917D, 740.

insurer should also govern;[13] nor is it necessary in applying the above rule to encroach upon the province of the jury and the right of the parties to have it determine such questions of fact as should, under the law be properly submitted to it. It would, therefore, seem logically to follow that a clause in an accident policy precluding recovery where there are no "external and visible signs of injury upon the body of insured," or a provision that the insurance "does not cover injuries of which there is no visible mark upon the body," or clauses of like tenor and effect, should, within said rules of construction, be limited to their clearly expressed intent and not be so construed as to release insurer even though there are no "external and visible signs of injury upon the body," or "no visible mark upon the body," where it is reasonably clear that the injury or injuries in question resulted from or, within governing rules in such cases, were caused by an accident insured against and as a direct consequence thereof death has ensued; and even though death does not ensue, it may well be conceived that an accident may occur which results in serious injury or disablement, even though there is no visible mark upon the body, and the existence of such injury be ascertainable by observation or examination, in which case such exception or limitation of liability clauses should be enforced not only to protect insurer against fraudulent and sham claims but insured should also be given that protection for which he has in good faith contracted under his policy including protection against a strained interpretation to his detriment and not in accordance with the intent of his contract. That these propositions are supported by the authorities will appear from the above decisions as well also as from other adjudications which we have considered under this section.

So under an Indiana decision where a benefit certificate precluded recovery unless there was a visible mark upon the body caused by the accident, the body itself not being deemed such visible mark in case of death, the rule of construction against insurer governs and the term "visible" will be interpreted in its broad sense so that where assured in consequence of an accident died from a dislocated neck a recovery could be had if the results were ascertainable by examination, even though the then visible marks of the injury did not appear at the time of insured's death or thereafter.[14] And within the above principles where a theretofore

[13] See chapter on Construction, §§ 205 et seq. herein.

[14] Mutual Trust & Deposit Co. v. Travelers' Protection Assoc. of America, 57 Ind. App. 329, 104 N. E. 880. "Visible" is defined as: "Capable of being seen; perceptible by the sight, apparent, open, conspicuous. . . . Syn. Perceivable, perceptible, discernable, apparent, ob-

healthy person dies from angina pectoris caused by an accident in falling from his bicycle, a recovery may be had under the policy, even though there are no visible marks upon the body, where insured's face was pallid immediately following the accident, and he became emaciated.[15] So where one, by lifting a heavy weight, causes a dilatation of his heart, resulting in his subsequent death, the injury is one where there is a visible external mark, if at once he becomes deathly pale and sick, his hands and feet cold, and perspiration stands out on his face and hands, and the next day his color changes from a ruddy to a bluish gray color, and so remains until his death.[16]

The application of the above stated underlying principles and the distinction above suggested between questions of law and fact, may also be instanced by a Minnesota case where a locomotive engineer was insured under a policy entitling him to a specified amount per week not exceeding a certain limited time "if totally disabled by accidental injury from following his vocation." Under the by-laws recovery was precluded for "an invisible injury unless certified to by a medical expert designated by the association." While insured was running his engine at a rapid rate it was derailed. Only slight external injuries were sustained by him but the evidence tended to show that, beginning a few days after the accident, and as a result thereof, he was so mentally deranged as to unfit him for duty and that this condition continued for nearly two years. It was decided that if his condition could be ascertained by observation or examination, it was a "visible injury" within the meaning of the by-law, but whether the injury was visible, and resulted from the accident was for the jury, and it was error to tell the jury in substance that if the alleged injury existed, and was "due to an outside force" insured was entitled to recover, since the question whether the injury was visible, the evidence not having been conclusive on that point, was not submitted to them to determine, and the charge practically eliminated the provision of the by-laws, above stated, from the case and submitted only the question whether plaintiff's mind had been unbalanced as claimed and if so whether that condition resulted from the accident, and a motion for a new trial having been denied the order was reversed. The court, per Taylor, C., said: "The purpose of such a provision

vious, manifest, clear, distinct, evident, plain." Webster's Universal Dict. (1910–1911).

[15] Root v. London Guarantee & Accident Co. Ltd. 86 N. Y. Supp. 1055, 92 App. Div. 578.

[16] Horsfall v. Pacific Mutual Life Ins. Co. 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028.

is to protect the insurer against sham claims, by barring the insured from recovering for alleged injuries of which there is no proof, except his own assertion. But it is well settled that visible injuries, within the meaning of such a provision, are not limited to external injuries, but also include any internal injuries, the existence of which may be ascertained through observation or examination." [17] And where an accident policy contained a clause that "the benefits shall not extend to any bodily injury of which there shall be no external and visible signs upon the body of the insured," and the evidence showed that the body of the insured when found had bloody froth at the mouth, and spots of blood upon the face and breast, and red spots on the body, and the defendant asked the court to instruct the jury that if there were no visible signs of an injury upon the body of the insured, except the froth and red spots, it did not constitute visible and external signs of injury, it was held that this was a question of fact properly determined by the jury, and the instruction was rightly refused.[18]

So insurance against accident, which it is stipulated shall not cover injuries of which there is no visible external mark upon the body of the assured, covers an accident of which there was no visible mark at the time of the injury, if there was such a mark afterward and as a result of the injury.[19] And any visible evidence of an internal strain which may appear within a reasonable time after the injury is received is "a visible mark upon the body." It need not be a bruise, contusion, laceration, or broken limb, and this applies where insured's shoulder was accidentally injured by a fall and the discoloration showed thereon and also upon his

[17] Peterson v. Locomotive Engineers' Mutual Life & Accident Ins. Assoc. 123 Minn. 585, 49 L.R.A. (N.S.) 1022n, 144 N. W. 160, 43 Ins. L. J. 268, *citing* the following cases:

*United States.*—Dent v. Railway Mail Assoc. (U. S. C. C.) 183 Fed. 840, 40 Ins. L. J. 828, s. c. 213 Fed. 981; Barry v. United States Mutual Accident Assoc. (U. S. C. C.) 23 Fed. 712, aff'd United States Mutual Accident Assoc. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. 755.

*Colorado.*—Union Casualty & Surety Co. v. Mondy, 18 Colo. App. 395, 71 Pac. 677.

*Iowa.*—Pennington v. Pacific Mutual Life Ins. Co. 85 Iowa, 468, 39 Am. St. Rep. 306, 52 N. W. 482.

*New Hampshire.*—Thayer v. Standard Life & Accident Ins. Co. 68 N. H. 577, 41 Atl. 182, 28 Ins. L. J. 89.

*New York.*—Menneilly v. Employers' Liability Assur. Corp. 148 N. Y. 596, 31 L.R.A. 686, 51 Am. St. Rep. 716, 43 N. E. 54; Gale v. Mutual Aid & Accident Assoc. 66 Hun, 600, 21 N. Y. Supp. 893.

*Washington.*—Horsfall v. Pacific Mutual Life Ins. Co. 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028.

[18] United States Mutual Accident Assoc. v. Newman, 84 Va. 52, 3 S. E. 805.

[19] Pennington v. Pacific Mutual Life Ins. Co. 85 Iowa, 468, 39 Am. St. Rep. 306, 52 N. W. 482.

arm.[20] And if the policy does not specify when the visible, external marks must be produced and does not state that the accident must at the very time of its happening have produced a visible or external sign, still if the visible marks are the result of the accident it is no defense that they did not instantly appear, but appeared subsequently, where the policy precludes recovery unless the accident alone results in producing visible, external marks of injury or violence suffered by the body or member; and the above applies where assured's hand had come into contact with poison ivy and shortly thereafter showed a discoloration which turned into an eruption and spread causing his death, such death being held accidental.[1] There is also a visible mark on the body where insured dies and an autopsy discloses redness of the tissue of the brain on one side.[2] So a provision in a policy that, to render the insurer liable, the death or disablement must not be from an accident that bears no external or visible marks, means that there must be some external and visible evidence that the death was accidental, and not that there must be external and visible marks on the person of decedent.[3]

Drowning, although not accompanied by external marks, is covered by a policy insuring against personal injury leaving upon the body external marks, where drowning appears in the list of accidents insured against, and a separate provision limits the liability to a certain percentage of the face of the policy in case of drowning in the absence of an eyewitness.[4] Under a policy insuring against death from such violent and accidental injuries as shall externally be visible on the body, and which alone caused death, evidence that the insured was found dead and mangled on

[20] Thayer v. Standard Life & Accident Assoc. 68 N. H. 577, 41 Atl. 182, 28 Ins. L. J. 89.

On injury or disability from strain as within provision as to external, violent, and accidental means, see note in 42 L.R.A.(N.S.) 562.

[1] Dent v. Railway Assoc. (U. S. C. C.) 183 Fed. 840, 40 Ins. L. J. 828, s. c. 213 Fed. 981.

[2] Union Casualty & Surety Co. v. Mondy, 18 Colo. App. 395, 71 Pac. 677. Blood from insured's ear and nostril, issuing therefrom after death is "visible sign." Goodes v. Order of United Commercial Travelers of America, 174 Mo. App. 330, 156 S. W. 995.

[3] Menneiley v. Employers' Liability Assur. Corp. 148 N. Y. 596, 31 L.R.A. 686, 51 Am. St. Rep. 716, 43 N. E. 54, rev'g 72 Hun, 477, 25 N. Y. Supp. 230.

[4] Lewis v. Brotherhood Accident Co. 194 Mass. 1, 17 L.R.A.(N.S.) 714, 79 N. E. 802.

On liability for death by drowning, see note in 42 L.R.A.(N.S.) 631; on validity and construction of provision requiring the fact or circumstance of loss to be established by eye witness, note in 51 L.R.A.(N.S.) 221; on whether general requirement as to external, violent, and accidental means applies to a separate provision as to liability in case of death or injury from certain specified causes, see note in 27 L.R.A.(N.S.) 480.

a railroad track, establishes a prima facie case, and casts the burden of death upon insurer to show that death resulted from violation of some of the conditions in the policy specially pleaded in defense.[5]

**§ 2617a. Visible marks of contusions or wounds: "wounds" defined.**—In a Michigan case the policy provided: "That injury includes only the result of external, violent and accidental means leaving on the body marks of contusions or wounds visible to the naked eye" and it was held not error to charge that "the mark visible to the eye on the body required by the policy, need not be a bruise, contusion, laceration, or broken limb, but may be any visible indication of an internal injury, which may appear within a reasonable time after the injury is received, such for instance, as discoloration of the part of the body affected." This was immediately followed by the following sentence, which the court declared should be read in connection therewith: "In legal medicine the word 'wounds' means injuries of every description that affect either the hard or soft parts of the body and it comprehends bruises, contusions, fractures, luxations, etc. In law the word means any lesion of the body." In this case there was a red inflamed mark on the right side between the hip and the back appearing upon assured's arrival home immediately after the accident and an examination made by the physician the next day disclosed a discoloration of the skin, swelling, and redness over the right kidney and hip and in a few days thereafter insured died and the doctor testified that the injury caused the death and judgment against insurer was affirmed.[6] The Michigan case is relied on in a Vermont decision where the policy insured against accidental injuries from external causes leaving "external and visible marks of a wound" and the evidence fairly and reasonably tended to show that as a natural consequence of a bruise or abrasion of the skin upon insured's finger, a felon of the most severe kind developed without any intervening cause, within twenty-four hours, and it was decided that there was a distinction between the legal and surgical definition of "wound" and that said word should be given its legal construction of "any lesion of the body" and included the bruise if any there was, upon insured's finger of which the felon was the direct and natural consequence and that said felon con-

[5] Meadows v. Pacific Mutual Life Ins. Co. 129 Mo. 76, 50 Am. St. Rep. 427, 31 S. W. 578.

On duty of insured to negative death or accident from excepted cause, see notes in 4 L.R.A.(N.S.) 636, and 50 L.R.A.(N.S.) 1006.

[6] Thompson v. Loyal Protective Assoc. 167 Mich. 31, 132 N. W. 54, 40 Ins. L. J. 2168. See also for substantially the same ruling as to the meaning of "visible injury," Royal Casualty Co. v. Nelson, — Tex. Civ. App. —, 153 S. W. 674.

stituted an "external and visible marks" of the wound left upon assured's body by the accidental injury.[7]

**§ 2618. Excepted liability where death or injury "may be caused by intentional injuries inflicted by assured or any other person."**—An ordinary provision in accident policies is that exempting the insurer from liability in case the insured dies or suffers any disabilities which may have been caused by intentional injuries inflicted by the insured or any other person. Where a policy contains such a provision, no recovery can be had where injuries are inflicted by the insured intentionally, or when insane, or if he is murdered;[8] for murder is an "intentional injury" within the exception from liability in an accident policy;[9] and although there

[7] Robinson v. Masonic Protection Assoc. 87 Vt. 138, 47 L.R.A.(N.S.) 924 (annotated on liability under accident policy for injury resulting in felon or abscess), 88 Atl. 531, 42 Ins. L. J. 1794. The court, per Watson, J., said: "The word 'wound' is defined in Bouvier's Law Dictionary as follows: 'Any lesion of the body.' In this it differs from the meaning of the word when used in surgery. The latter only refers to a solution of continuity; while the former comprises not only these, but also every other kind of accident, such as bruises, contusions, fractures, dislocations, and the like.' The definitions given by Rapalje and Lawrence in their Law Dictionary, is exactly to the same effect, making the same distinction. And in Stewart's Legal Medicine, a book published in 1910, sec. 100, the same distinction between the surgical and the legal definitions is noticed."

[8] Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. 1360; Travelers' Ins. Co. v. McCarthy, 15 Colo. 351, 22 Am. St. Rep. 410, 11 L.R.A. 297, 25 Pac. 713; De Graw v. National Accident Soc. 4 N. Y. Supp. 912, 20 N. Y. St. Rep. 607, 51 Hun (N. Y.) 342.

On provision exempting insurer or limiting its liability in case of an injury intentionally inflicted by another, see note in 48 L.R.A.(N.S.) 524; on murder of insured by beneficiary as affecting right to proceeds, see note in L.R.A.1917B, 671.

[9] Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. 1360.

*Cited* in: *United States.*—Brown v. United States Casualty Co. 88 Fed. 38, 44; Travelers' Protective Assoc. of America v. Langholz, 86 Fed. 60, 62, 29 C. C. A. 630, 52 U. S. App. 643.

*Alabama.*—Orr v. Travelers Ins. Co. 120 Ala. 647, 651, 24 So. 997.

*Colorado.*—Travelers Ins. Co. v. McCarthy, 15 Colo. 351, 353, 11 L.R.A. 297, 298, 22 Am. St. Rep. 410, 25 Pac. 713.

*Georgia.*—Travelers Ins. Co. v. Wyness, 107 Ga. 584, 590, 34 S. E. 113.

*Illinois.*—Railway Officials & Employees Accident Assoc. v. McCabe, 61 Ill. App. 565; United States Mutual Accident Assoc. v. Millard, 43 Ill. App. 148, 149.

*Maine.*—Matson v. Travelers Ins. Co. 93 Maine, 469, 473, 74 Am. St. Rep. 368, 45 Atl. 518.

*Missouri.*—Lovelace v. Travelers Protective Assoc. 126 Mo. 104, 115, 30 L.R.A. 209, 213, 47 Am. St. Rep. 638, 28 S. W. 877; Phelan v. Travelers Ins. Co. 38 Mo. App. 640, 646.

*Pennsylvania.*—Miller v. Inter-State Casualty Co. 6 Lack. Legal News, 64.

*Texas.*—Johnson v. Travelers Ins. Co. 15 Tex. Civ. App. 314, 316, 39 S. W. 972; Travelers Ins. Co. v. Houston, 3 Tex. App. Civ. Cas. (3 Willson) 508.

may have been no provocation for the killing, yet the policy is avoided;[10] and where a policy insuring against accidents exempts the insurer from liability for injuries intentionally inflicted on himself by the assured, or inflicted upon himself or received while insane, the court cannot interpolate the word "intentionally" before the second clause, and hold the insurer liable for injuries received by the assured while insane, though not intentionally inflicted or received.[11] So a policy insuring against accident, but providing that for injuries received while the assured was insane, the measure of liability of the insurer should be a sum equal to the premium paid, does not warrant a recovery for injuries received during a period of insanity, though not self-inflicted nor due to want of sanity.[12]

Intentional injuries inflicted by insured or any other person, for which the insurer is exempted from liability by the terms of an accident policy, cannot be restricted to injuries inflicted by the insured, or through his procurement or consent; and the insurer is not liable for the death of insured resulting from intentional injury inflicted by another person.[13] Nor under such a provision can there be a recovery when injury to the insured is intentional as to the person inflicting it, though accidental as to the insured, in that he does not expect or anticipate it.[14] Nor can insured recover if the evidence of intentional injury preponderates against the presumption of accident.[15] Again, failure of police officers, having charge of the holder of an accident policy, to protect him from assaults by other persons, will not take his killing by them out of a provision in the policy that no recovery can be had upon it in case of death from intentional injuries inflicted by insured or any other person.[16] An injury intentionally inflicted on an assured by another person, is an accidental injury within the meaning of a policy against injuries from external violence and accidental

*Wisconsin.*—Butero v. Travelers Accident Ins. Co. 96 Wis. 536, 540, 65 Am. St. Rep. 61, 71 N. W. 811; Button v. American Mutual Accident Assoc. 92 Wis. 83, 85, 53 Am. St. Rep. 900, 65 N. W. 861. See Garrila v. United States Health & Accident Ins. Co. (Pa.) 63 Leg. Intell. 288, 15 Dist. Rep. 432.

[10] Fischer v. Travelers' Ins. Co. 77 Cal. 246, 1 L.R.A. 572, 19 Pac. 425.

[11] Blunt v. Fidelity & Casualty Co. 145 Cal. 268, 67 L.R.A. 793, 104 Am. St. Rep. 34, 78 Pac. 729, 34 Ins. L. J. 166.

[12] Blunt v. Fidelity & Casualty Co. 145 Cal. 368, 67 L.R.A. 793, 104 Am. St. Rep. 34, 78 Pac. 729, 34 Ins. L. J. 166.

[13] Travelers' Ins. Co. v. McCarthy, 15 Colo. 351, 11 L.R.A. 297, 25 Pac. 713.

[14] Butero v. Travelers' Accident Ins. Co. 96 Wis. 536, 65 Am. St. Rep. 61, 71 S. W. 811.

[15] Butero v. Travelers' Accident Ins. Co. 96 Wis. 536, 65 Am. St. Rep. 61, 71 S. W. 811.

[16] Jarnagin v. Travelers' Protective Assoc. 133 Fed. 892, 68 L.R.A. 499.

means, though the policy provides that the insured shall not be liable for intentional injuries. The word "intentional" so used, refers to the acts of the insured alone.[17]

A person insured under an accident policy containing a provision that the insurance shall not cover "intentional injuries inflicted by the insured, or by any other person, except burglars and robbers," cannot recover when he is violently assaulted by another person, not a burglar or robber, who intentionally strikes him, causing the injury under which he claims to recover.[18]

In Kentucky a condition in a life policy that no claim shall be made under the policy when death or injury is caused by intentional injuries inflicted by the assured or any other person bars a recovery where the assured is waylaid and assassinated for the purpose of robbery;[19] and in a later case in this same state it is held that if an officer is shot by a prisoner, whom he is attempting to arrest, the death is within an exception of liability for "intentional injuries inflicted by the insured or any other person."[20] It was subsequently held, however, that intentional killing by a third person of insured without the latter's connivance or foreknowledge, constituted an accident within the intent of the policy and that the omission of the word, "death" from a clause providing that the policy shall not extend to, or cover intentional injuries inflicted by any other person when it is used in other excepting clauses immediately contiguous, renders insurer liable for the murder of insured.[1] And where assured is assassinated by some person unknown, the recovery can only be that limited by an exemption of liability under a clause providing that only a certain amount is recoverable in case of injury fatal or otherwise, or where injuries are intentionally inflicted upon assured by any person other than himself.[2] And the inference is held conclusive that a person shooting another intended to take his life where he approaches him from behind and deliberately aims and fires a deadly weapon at him, and the person so shot dies from the wound thus inflicted, nor is this inference rebutted by the fact that other persons were in close proximity to the one killed and might have been

[17] Button v. American Mutual Accident Assoc. 92 Wis. 83, 53 Am. St. Rep. 900, 65 N. W. 861.

[18] Matson v. Travelers' Ins. Co. 93 Me. 469, 74 Am. St. Rep. 368, 45 Atl. 518.

[19] Hutcheraft v. Travelers' Ins. Co. 87 Ky. 300, 12 Am. St. Rep. 484, 8 S. E. 570, 10 Ky. Law Rep. 260.

[20] American Accident Co. v. Carson, — Ky. —, 30 S. W. 879.

[1] American Accident Co. v. Carson. 99 Ky. 441, 18 Ky. L. Rep. 308, 34 L.R.A. 301, 59 Am. St. Rep. 473, 36 S. W. 169.

[2] General Accident Fire & Life Assoc. Corp. Ltd. v. Stedman, — Tex. Civ. App. —, 153 S. W. 692.

injured by the shot.[3] In a Michigan case a deserter was shot, as alleged, in self-defense by an officer, who attempted to arrest him, and it was held, under an exemption of liability clause, exonerating insurer if the death of assured was the result of design on the part of assured or of any other person, that if when the officer fired the shot he did not know the man he fired at was the assured and did not intend to kill him, it could not be said as a matter of law that assured lost his life by design of the officer, as the design contemplated by the policy must be the design that intended the actual result and not the design of the act itself which resulted in the killing of one contrary to the design.[4] Under a Georgia decision if a policy insures against bodily injuries effected through external, violent and accidental means, but exempts insurer from liability in case of injuries intentionally inflicted upon assured by any other person, sane or insane, such provision has reference to assured as the person against whom the intention to injure is formed and upon whom, in pursuance of such intent, the injury is inflicted, and the clause does not apply where a person intending to inflict an injury upon another inflicts bodily injury upon assured by mistake, instead of upon the one whom he had intended to injure, and assured has done nothing to bring about the injury and is not aware of any intent to injure him. In brief, insured is not intentionally injured where the intent is formed against another person and carried out upon assured through mistaking him for that person.[5] As opposed to the Georgia decision and distinguished from the Michigan case, it is held in Alabama that it is wholly immaterial whether or not insured was known to the slayer, or whether he mistook him for some other person whom he intended to shoot, and that if in fact, having the mental capacity, he intended to shoot the human being who accosted him and threatened to obstruct his flight from arrest, his act was an intentional act, and the killing was an intentional result irrespective of what he may have supposed was the name or personal identity of his victim, and accordingly it was held that the act was voluntary and the shooting was in no sense accidental so far as the assailant was concerned, and it therefore came within the restrictive clause of the policy. In this case there was a limitation of the amount payable where the injury, causing the loss, resulted wholly, or in part, from the intentional act of assured or any

[3] Gaynor v. Travelers' Ins. Co. 12 Ga. App. 601, 77 S. E. 1072.

[4] Utter v. Travelers' Ins. Co. 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812. *Examine* Railway Mail Assoc. v. Moseley, 211 Fed. 1, 127 C. C. A. 427, 43 Ins. L. J. 807, fully *considered* elsewhere herein.

[5] Newsome v. Travelers' Ins. Co. 143 Ga. 785, 85 S. E. 1035.

other person. Insured, a police officer, was shot and killed by a drunken person who was fleeing from arrest and was shooting at anybody and everybody who opposed him. The court, per Somerville, J., said: "What is an 'intentional act' may seem a matter of very simple solution to the intelligent layman, but to the judge who is familiar with the learning of the books, and who ventures into the metaphysical subtleties which encumber judicial definition, the question is full of difficulty.

"In its present application, the phrase ought to be given that simple and common sense meaning which the parties to the contract intended it should express.

"Obviously, we think, this meaning is not to be determined upon a consideration merely of the criminal responsibility of the actor, nor of his moral accountability according to the refined principles of psychology.

"(1) If the actor has intelligence enough to understand the physical nature and consequence of his act, and, without the compulsion of an irresistable physical force, or of an irresistable insane impulse, consciously directs his action so that the injury of the insured is the natural or probable consequence thereof, then that injury is the result of an intentional act.

"Of course, the injury of the person must be intended, as well as the act which causes such injury.[6] But it must always be presumed that injury which is the natural or probable result of the conscious and voluntary application of unlawful force to the person of another was the intended result of that action.

"It follows, from what we have said, that either the insanity or the drunkenness of an actor may be of such a degree as to lead to the conclusion that an act in question was not his intentional act.

(2) "Where, as here, the evidence tends to show not only the drunkenness of the actor causing the injury, but also the degree of his drunkenness, and exhibits also contemporaneous conduct of an equivocal character, his capacity to do an intentional act is very clearly a question of fact for the jury.[7]

"The trial court properly submitted this issue to the jury. But the capacity of McGuffin, the slayer of the insured, to form a specific intent to kill him, is not an accurate test of his capacity to do an intentional injurious act; nor was the entertainment of such an intent by McGuffin an essential element of an intentional injury to the assured—as seems to have been stated to the jury by

[6] Orr v. Travelers' Ins. Co. 120 Ala. 647, 652. 24 So. 997. King v. State, 90 Ala. 613, 8 So. 856. See also Snead v. Scott, 182 Ala. 97,

[7] Armour v. State, 63 Ala. 173; 62 So. 36, 39.

the trial judge." [8] Under an Indiana decision it is declared that intentional injuries inflicted upon the assured by some other person within the meaning of such a clause, refers to injuries which the other person actually directed against assured and intended to inflict upon him, and that the contract has reference to the actual intention of the person inflicting the injury, rather than such an intention as the law presumes against a wrongdoer, so that if an act is shown which would reasonably and naturally result in injury to some one of several persons, the presumption exists that the actor intended to injure someone, but no presumption exists against anyone except said actor that he intended the injury for the particular person who received it, that is, the injury actually inflicted must be the one which it was intended to inflict and that the intention of such actor controls and it is immaterial that the injury may have been wholly unforeseen and unexpected by assured. In this case, however, the facts were different in that shots were fired into a group of men by a bank robber, and insured, a bank cashier, was killed, and it was held that when one is murdered, without fault, it is an accident, and death by accidental means, covers an event which takes place without expectation or foresight.[9]

An objection that the injury inflicted upon assured was not the precise one intended by the person who made the assault, will not be considered where insured sustained an injury and the person inflicting it intended to inflict it and did so, and assured was without fault in the matter, and this applies under a clause exempting insurer from liability for intentional injuries "inflicted by the insured, or by any other person, except burglars or robbers" and assured was violently assaulted by another person not a burglar or robber, and in such case there can be no recovery.[10]

A distinction is made, in so far as the intention is concerned between the act and the result thereof, as where insured was struck by another and died from a fracture of the skull caused by a fall upon the pavement, for in such case it was the blow and not the fatal result which was intentionally inflicted. The court, per Sharp, C., said: "In the absence of any provision to the contrary, a policy insuring against death effected through 'external, violent and accidental means,' an injury inflicted intentionally by another upon the insured, but without the foreknowledge or connivance of the

[8] Continental Casualty Co. v. Cunningham, 188 Ala. 159, L.R.A.1915A, 538, 66 So. 41, 44 Ins. L. J. 452.

[9] Travelers' Protective Assoc. of America v. Fawcett, 56 Ind. App. 111, 104 N. E. 991.

[10] Matson v. Travelers' Ins. Co. 93 Me. 469, 45 Atl. 518, 29 Ins. L. J. 354.

insured, is within the terms of the policy rendering the company liable. If the injury is not brought about by the agency of the insured, and if it is not anticipated by him, it is none-the-less accidental as far as he is concerned, although it may be inflicted with malice and premeditation by the other party: the great weight of authority being that an injury intentionally inflicted upon the insured by another is accidental, if it is unintentional on the part of the insured. As a protection against this class of liability, a clause is frequently inserted in policies of accident insurance, specifying that the policy shall not cover injuries fatal or otherwise, intentionally inflicted upon the insured by himself or some other person. Ordinarily, where a policy expressly so provides, it is not necessary that the insured should take part in the intent of such third person, in order to make the exception operative, and relieve the company from its liability. The policy, in such cases, becomes one of limited indemnity as contradistinguished from that of general indemnity. It is shown that the blow sustained by the insured was intentionally inflicted. . . . As we have seen, the insured's death was accidental. The injury which resulted fatally was not intentionally inflicted by Keys. The case differs materially from the great majority of the reported cases. Had Keys had in his hand a deadly weapon, the use of which was reasonably calculated to produce death, and in fact did so, a different question would be presented. No motive for killing the latter is shown to have existed, and the means used indicates only an intention to strike the insured. The result was unforeseen and unusual, and not such as would ordinarily follow a blow of the fist. It was not the logical result of a deliberate act, and could not reasonably have been anticipated by Keys, and he cannot be charged with a design of producing it. It was the result of fortuitous circumstances." [11]

Whether a wound was intentionally self-inflicted or not is a question for the jury.[12] And where there was a limitation of liability to a proportionate amount of that otherwise payable in case of death

[11] Union Accident Co. v. Willis, 44 Okla. 578, L.R.A.1915D, 358, 145 Pac. 812, 45 Ins. L. J. 387, *considering* or *citing* and *relying* upon the following decisions:

*Alabama.*—Orr v. Travelers Ins. Co. 120 Ala. 647, 24 So. 997.

*California.*—Richards v. Travelers' Ins. Co. 89 Cal. 170, 23 Am. St. Rep. 455, 26 Pac. 762.

*Georgia.*—Gaynor v. Travelers Ins. Co. 12 Ga. App. 601, 77 S. E. 1072.

*Indiana.*—Travelers' Protective Assoc. v. Fawcett, 56 Ind. App. 111, 104 N. E. 991.

*Michigan.*—Utter v. Travelers Ins. Co. 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812.

*Nebraska.*—Railway Officials & Employees Accident Assoc. v. Drummond, 56 Neb. 235, 76 N. W. 562.

*Texas.*—Travelers Protective Assoc. v. Weil, 40 Tex. Civ. App. 629, 91 S. W. 886.

[12] Long v. Travelers' Ins. Co. 113 Iowa, 259, 85 N. W. 24.

due to injuries intentionally inflicted by insured, or by any other person, except assaults committed for the sole purpose of burglary or robbery, and assured was stopped in a public street in the evening and started to run and was shot, it was held, that whether he was assaulted for the sole purpose of robbery was a question for the jury.[13] But in the absence of evidence of a crime, the jury are not required to find that an insured person, found dead with a pistol wound in his head, came to his death by the intentional act of another, so as to take the case out of the provisions of a policy insuring against death by accident.[14]

§ 2619. **Dueling or fighting.**—If assured, being unarmed, is shot while engaged in an altercation, this is not within an exception of liability for death resulting from dueling or fighting, or happening while or in consequence of violating law, but the death is accidental.[15] So an altercation, even though it may be called a fight, brought about without premeditation on assured's part and words of another, is not a duel which as ordinarily understood implies a fighting with deadly weapons by previous concert in order to settle some prior or existing quarrel.[16]

The clause of exemption from liability from fighting, etc., contemplates some degree of blame on assured's part, some extent of voluntary participation, some improper conduct, and does not cover assured's act in resisting assault, and inflicting an injury upon the person assaulting him where the altercation is unavoidable and one over which he has no control and which is not occasioned by any improper act on his part.[17] Where the death of the insured is caused by a gunshot wound inflicted by another, and is the direct result of a mutual encounter or combat voluntarily entered into by them, no recovery can be had under a policy excepting the company from liability for death caused by fighting. In such case it is immaterial whether the slayer was sane or insane.[18] And if assured is assaulted and injured he is not aided by the claim that the person committing the assault did not intend to inflict the particular injury sustained, where the injury inflicted

[13] Kennedy v. Ætna Life Ins. Co. 242 Ill. 396, 90 N. E. 292.

[14] Ætna Life Ins. Co. v. Milward, 26 Ky. L. R. 589, 68 L.R.A. 285, 82 S. W. 364.

[15] Robinson v. United States Mutual Accident Assoc. (U. S. C. C.) 68 Fed. 825.

[16] Baker v. Supreme Lodge Knights of Pythias, 103 Miss. 374, 60 So. 333, 42 Ins. L. J. 348.

[17] Coles v. New York Casualty Co. 83 N. Y. Supp. 1063, 87 App. Div. 41. Clause was: "Fighting, wrestling, scuffling, altercation, feud, quarreling or assault."

[18] Gresham v. Equitable Accident Ins. Co. 87 Ga. 497, 27 Am. St. Rep. 263, 13 L.R.A. 838, 13 S. E. 752.

is within the general purpose to injure, and this is so even though the assault was made under a misapprehension of fact and an apology is thereafter made and accepted, and in such case a judgment for assured will be reversed under an exemption of liability clause where assured received injuries in fighting, etc., or for intentional injuries inflicted by assured or any other person.[19] So insured meets his death while "fighting," within a clause limiting the amount of recovery in such case, where he is killed by another whom he is pursuing and shooting at because of being called a vile name by said person.[20] And if assured while fighting receives an injury there can be no recovery under a policy exemption of liability for injuries intentionally inflicted upon assured, or received while violating law or fighting.[1]

§ 2619a. **Death in assault, quarrel, or fight.**—Where one brings on a personal encounter with another, but abandons it, and, while in good faith retreating to avoid further difficulty, and not for the purpose of obtaining a vantage ground to renew it, is killed by his adversary, the death is not within the meaning of a policy, exempting against liability for a death in violation or attempted violation of any criminal law.[2] And where assured was the aggressor and sought out another person with intent to provoke a controversy or assault and succeeded by words and threats in bringing about a fight which resulted in his death, it constitutes death while violating the law and precludes recovery.[3] But a clause in a life policy, providing that "if death occurs from assault provoked by quarreling, no recovery can be had," must have a reasonable construction, and the death of the insured cannot be regarded as coming within its meaning, unless it occurred as the result of a quarrel provoked by himself, and of so serious a nature that he might reasonably have expected that anger be thereby aroused, and injury inflicted. It is not every frivolous controversy that is a quarrel within the meaning of such a clause.[4] And where insured

[19] Travelers' Protective Assoc. v. Weil, 40 Tex. Civ. App. 629, 91 S. W. 886.

[20] Continental Casualty Co. v. Fleming, — Ky. —, 124 S. W. 331.

[1] Washington v. Union Casualty & Surety Co. 115 Mo. App. 627, 91 S. W. 988.

[2] Supreme Lodge Knights of Pythias v. Bradley, 73 Ark. 274, 67 L.R.A. 770, 108 Am. St. Rep. 38, 83 S. W. 1055, 3 Ann. Cas. 872, *cited* in Railway Mail Assoc. v. Moseley, 211 Fed. 1, 127 C. C. A. 427, 43 Ins. L. J. 807, 817.—Hollister, D. J. (fully *considered* elsewhere herein). See Utter v. Travelers Ins. Co. 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812 (under § 2618 herein).

[3] Payne v. Union Life Guards, 136 Mich. 416, 112 Am. St. Rep. 368, 99 N. W. 376.

[4] Insurance Co. v. Bennett, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 8723. See Coles v. New York Casualty Co. 83 N. Y. Supp. 1063, 87 App. Div. 41.

was unarmed and advanced upon another with offensive words in an aggressive manner, constituting in effect a challenge to fight, and he was ignorant of the fact that his adversary carried a deadly weapon, and received no warning from him that he would shoot if the advance continued, and assured had no reason to believe that his opponent was armed and intended upon assured's advance to kill him, and he is killed, his death is accidental as to him, though the act producing it was intentional on the part of the slayer, and in such case it is not error to decline to comply with a special request to charge which omits from the hypothesis presented the elements of knowledge or reasonable apprehension on the part of assured of the fact that his adversary was armed, and, on his continued approach would shoot to kill, when such requested charge if given would have told the jury, upon the case stated, that the death of assured was the result of voluntary exposure to unnecessary danger, although he neither knew, nor could reasonably have apprehended that his adversary was armed and would use his pistol upon him, and this applies where the policy insures against loss of life resulting from bodily injuries sustained through external, violent and accidental means, but the policy also stipulates that it does not cover voluntary exposure to unnecessary danger.[5] So the death of a person who is shot by one whom he is trying to eject by force from a hotel office, is a death by accident, and not a risk voluntarily assumed, where he makes the attempt without knowing that the other person is armed.[6]

The burden of proof is upon insurer to show that assured was the aggressor.[7] And whether or not assured was the aggressor may or may not be a question which should be submitted to the jury as it depends upon the sufficiency of the evidence.[8]

**§ 2619b. Assault: death or injury in self-defense: aggressor: offending party.**[9]—If there is created a reasonable apprehension

[5] Union Casualty & Surety Co. v. Harroll, 98 Tenn. 591, 40 S. W. 1080, 27 Ins. L. J. 176. *Citing* Lovelace v. Travelers' Protective Assoc. of America, 126 Mo. 104, 30 L.R.A. 209, 28 S. W. 877; Accident Ins. Co. of North America v. Bennett, 90 Tenn. 256, 16 S. W. 723. See §§ 2624–2627 herein.

[6] Lovelace v. Travelers' Protective Assoc. 126 Mo. 104, 30 L.R.A. 209, 47 Am. St. Rep. 635, 28 S. W. 877. See Coles v. New York Casualty Co. 83 N. Y. Supp. 1063, 87 App. Div. 41, condition here was voluntary exposure to unnecessary danger.

[7] Sovereign Camp Woodmen of the World v. Jackson, — Tex. Civ. App. —, 138 S. W. 1137.

[8] Sovereign Camp Woodmen of the World v. Jackson, — Tex. Civ. App. —, 138 S. W. 1137 (submitted to jury); Sovereign Camp Woodmen of the World v. Purdom, 147 Ky. 177, 143 S. W. 1021 (not submitted to jury).

[9] See also governing principle in connection with cases of self-defense under § 2618 herein.

of danger to assured by the words and acts of another, and assured defends himself against what appears to be an unlawful assault upon him, and such actual danger is preceded by appearances which justify such self-defense, and if assured in so defending himself is killed and upon the evidence said person is the aggressor, a judgment against assurer will be affirmed. In the case holding as above stated the assurer claimed nonliability on the ground that assured met his death in violation of law. It appeared that assured had heard that a certain person had threatened his life and upon meeting him a short time thereafter said person had picked up his gun and assured had done the same and there was a shooting affray resulting as above stated.[10] So death which is the result of a personal rencontre while the insured is acting in the lawful defense of his person at the time, when he has reasonable ground for believing that his adversary intends him a great personal injury, is not within such clause.[11] And an injury is intentionally inflicted, where an assaulted person, in protecting himself, inflicts an injury upon the aggressor which disables him for some time.[12] Under a Georgia decision it is held not error under the evidence to charge the jury that if it believed that insured did not voluntarily enter into a fight, but became involved by the fault of his adversary, and what he did was in defense of himself then such act on the part of insured would not bar the right to recover the whole amount of the policy. In this case liability was excluded where the accident or disability resulted wholly or partly, directly or indirectly, from voluntary exposure to unnecessary danger; said clause was urged in defense and also that assured lost his life as the result of a felonious assault upon another in violation of law. Assured lost his life as the result of an altercation or fight brought on by words, in which assured used a pistol, but was killed by being knocked down with a piece of scantling by his adversary and beaten to death. It was also held that a verdict for recovery was authorized and that there was no error in refusing a new trial.[13]

But where assured is killed while making an assault in violation of a penal statute, even though it was claimed that assured was acting in self-defense still if the circumstances are such as not to justify the assault in self-defense, there is such a violation of law as to preclude recovery under an exception of liability if assured

[10] Woodmen of the World v. McCoslin, — Tex. Civ. App. —, 126 S. W. 894.

[11] Overton v. St. Louis Mutual Life Ins. Co. 39 Mo. 122, 90 Am. Rep. 455.

[12] Fidelity & Casualty Co. v. Smith, 31 Tex. Civ. App. 111, 71 S. W. 391.

[13] Empire Life Ins. Co. v. Johnson, 142 Ga. 330, 82 S. E. 893, 44 Ins. L. J. 560. The Chief Justice and an associate judge dissented.

should die in violation of law.[14] And if assured brings on the difficulty and is shot by another in self-defense there is such a violation of law as to prevent recovery of the policy amount, otherwise said amount may be recovered. The jury should, however, be instructed concerning what constitutes a violation of law.[15]

The right of recovery under a provision precluding the payment of benefits for death or disability if insured shall be killed in any controversy, quarrel, or fight, in which he was the offending party, and the question whether or not insured was the offending party where he was killed in an altercation, will depend upon the fact whether or not he was the aggressor, and whether his act as such was based upon the reasonable belief on his part, acting in good faith, that he was in danger of his life, or would suffer great bodily harm, and that it was necessary to protect himself from a threatened assault by his opponent.[16]

**§ 2619c. Assault upon officer of the law: resisting arrest.**—A violation of law may be shown by evidence that assured was killed by a marshal upon whom he made an unlawful assault.[17] And where assured enters into an altercation with a policeman, who has stopped him while driving, and is shot and killed, the court may properly refuse to set aside a verdict that assured had not voluntarily exposed himself to unnecessary danger, where the evidence does not clearly show whether or not assured had drawn a pistol threatening to kill the policeman before he himself was shot.[18] And where a deserter was shot, as alleged, in self-defense by the sheriff, who was attempting to arrest him, it was held that it could not be held a matter of law that he was shot while engaged in an unlawful act, so as to avoid a policy providing against liability for death while engaged in or in consequence of any unlawful act.[19] If the officer is shot by a prisoner whom he is attempting to arrest the death has been held within the exception of liability for injuries inflicted by

[14] Woodmen of the World v. Hipp, — Tex. Civ. App. —, 147 S. W. 316.

[15] Sovereign Camp of Woodmen of the World v. Purdom, 147 Ky. 177, 143 S. W. 1021.

[16] Knights of Maccabees of the World v. Shields, 156 Ky. 270, 49 L.R.A.(N.S.) 853, 160 S. W. 1043.

[17] Eminent Household of Columbian Woodmen v. Howle, 109 Ark. 400, 160 S. W. 238. *Compare* Railway Mail Assoc. v. Moseley, 211 Fed. 1, 127 C. C. A. 427, 43 Ins. L. J. 807, fully *considered* elsewhere herein.

[18] De Greayer v. Fidelity & Casualty Co. 126 Cal. 17, 58 Pac. 390.

[19] Utter v. Travelers' Ins. Co. 65 Mich. 545, 8 Am. St. Rep. 913, 32 N. W. 812. *Examine* Railway Mail Assoc. v. Moseley, 211 Fed. 1, 127 C. C. A. 427, 43 Ins. L. J. 807 (*considered* elsewhere herein); Continental Casualty Co. v. Cunningham, 188 Ala. 159, L.R.A.1915A, 538, 66 So. 41, 44 Ins. L. J. 452; Newsome v. Travelers' Ins. Co. 143 Ga. 785, 85 S. E. 1035; Gaynor v. Travelers' Ins. Co. 12 Ga. App. 601, 77 S. E. 1072.

insured or any other person;[20] although under a subsequent decision of the same case it was decided that intentional killing by a third person of insured without the latter's connivance or consent constituted an accident.[1] There is, however, no breach of the exception as to death in violation of law where insured was insane and he was killed while resisting arrest.[2]

**§ 2619d. Injuries while hunting.**—An exception of liability if injuries are received while hunting, does not apply where assured, while on a hunting expedition, is injured in helping bring material for a fire.[3]

**§ 2620. Excepted liability: taking of poison: contact with poisonous substances: inhaling gas.**—A frequent provision in accident policies is that exempting the insurer from liability if death or injury be caused by "the taking of poison." Where a policy contains such a provision it has been held that if the insured takes poison by mistake the insurers are not discharged.[4] But it is also decided that if insurer is exempt, under an accident policy, from liability in case of death by poison, it is not answerable for a death caused by poison accidently administered. To defeat a claim under the policy, it is not necessary that the poison should have been taken with intent to produce death.[5] And if the policy excepts the voluntary or involuntary taking of poison, it would seem that in such a case the insurer would be discharged where poison is taken by mistake.[6] So the accidental taking by assured of an overdose of poison by mistake in place of medicine prescribed by a physician, is within the clause "voluntary or involuntary" taking of poison, as the term "involuntary" does not restrict the application of said clause to an enforced taking.[7] But in Illinois a contrary view has been taken.[8]

See as to underlying governing principle, § 2618 herein.

[20] American Accident Co. v. Carson, — Ky. —, 30 S. W. 879.

[1] American Accident Co. v. Carson, 99 Ky. 441, 18 Ky. L. Rep. 308, 34 L.R.A. 301, 59 Am. St. Rep. 473, 36 S. W. 169.

[2] Woodmen of the World v. Dodd, — Tex. Civ. App. —, 134 S. W. 254.

[3] Wilkinson v. Travelers' Ins. Co. — Tex. Civ. App. —, 72 S. W. 1016.

[4] Pollock v. United States Mutual Accident Assoc. 102 Pa. St. 230, 48 Am. Rep. 204. But see Hill v. Hartford Accident Ins. Co. 22 Hun (N. Y.) 187.

On death from taking poisonous substance as accident or accidental means, see note in L.R.A.1916A, 481.

[5] Early v. Standard Life & Accident Ins. Co. 113 Mich. 58, 67 Am. St. Rep. 445, 71 N. W. 500. See Travelers Ins. Co. v. Dunlap, 160 Ill. 642, 52 Am. St. Rep. 355, 43 N. E. 765.

[6] Cole v. Accident Ins. Co. 61 L. T. N. S. 227.

[7] Kennedy v. Ætna Life Ins. Co. 31 Tex. Civ. App. 509, 72 S. W. 602.

[8] Mutual Accident Assoc. v. Tuggle, 39 Ill. App. 509. *Compare* Travelers Ins. Co. v. Dunlap, 160 Ill. 642, 52 Am. St. Rep. 355, 43 N. E. 765, *considered* under § 2621 herein.

A clause in an accident policy exempting the insurer from liability for death resulting from the "taking of poison or contact with poisonous substance," does not embrace a case where the insured, a physician, while preparing medicine for a syphilitic patient, accidentally cuts his finger by the breaking of a bottle, and the virus from the patient enters the wound causing fatal blood poisoning.[9] So contact with poison or poisonous or infectious substances, is held not to include death resulting from blood poisoning from a bite by a dog which insured was holding and that such bite was the proximate cause of death and could not by such clause be excluded from the accident provision of the policy and included under the health provision.[10] Again, the word "absorbed," in a provision in an accident policy that it does not cover injuries from poison or anything accidentally or otherwise absorbed or inhaled, refers only to the process of absorption by sucking up or imbibing through the pores of the body.[11] But an injury caused by carbolic acid being thrown in insured's face by a woman, is within the clause as to contact with poisonous substances as said clause is not restricted to voluntary contact or to the taking of poison internally.[12] And no recovery can be had for injury resulting from inflammation of the eyes in consequence of accidentally coming in contact with poison ivy, whereby the irritating poison was absorbed into the eye, under a policy against the effects of bodily injury caused solely by external, violent, and accidental means, wherein it is provided that the insurance does not cover injury, fatal or nonfatal, resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled.[13] In cases of this character, however, the exact terms of the exemption clause are important and accordingly the word "taken" is to be construed in connection with the word "administered" and both should be used in connection with the expression "accidental or otherwise" and in such cases the exemption clause does not cover death resulting to assured from contact with poison ivy

[9] Central Accident Ins. Co. v. Rembe, 220 Ill. 151, 5 L.R.A.(N.S.) 933, 110 Am. St. Rep. 235, 77 N. E. 123.

On liability on accident policy for sickness or injury caused by blood poisoning, see notes in 5 L.R.A. (N.S.) 926, and L.R.A. 1917A, 1056.

[10] Farner v. Massachusetts Mutual Accident Assoc. 219 Pa. 71, 123 Am. St. Rep. 621, 67 Atl. 927, aff'g 32 Pa. Co. Ct. Rep. 204.

[11] Fidelity & Casualty Co. v. Waterman, 161 Ill. 632, 32 L.R.A. 654, 44 N. E. 283. See § 2621 herein.

On liability under accident policy for condition caused by external infection without cut or abrasion, see note in 42 L.R.A.(N.S.) 140.

[12] Meehan v. Traders' & Travelers' Accident Co. 68 N. Y. Supp. 821, 34 Misc. 158.

[13] Preferred Accident Ins. Co. v. Robinson, 45 Fla. 525, 61 L.R.A. 145, 33 So. 1005.

while cutting a branch or bush in the woods where he would not ordinarily or reasonably expect to be poisoned and had no knowledge of the existence there of poison ivy. In addition the fact should be considered that such exemption clause was undoubtedly inserted to exclude a death by suicide.[14] The court, per Willard, D. J., distinguishes from other cases, this case where the condition was: "Nor shall any benefit be paid when death or disability results from voluntarily inflicted injuries, by the member sane or insane; nor from poison or other injurious matter taken or administered accidentally or otherwise," and say: "An examination of the authorities cited by the defendant makes it plain that the policies differ in important particulars from the policy here.

"The first case cited is McGlother v. Provident Mutual Accident Company of Philadelphia.[15] The policy there contained the words 'or from poison, contact with poisonous substances.' If that clause had stopped with the word 'poison,' the case would have been stronger than this; but it does not stop there, but says also 'contact with poisonous substances,' which makes it much stronger than this case. If those words had been contained in this policy, it would have been very difficult, in my judgment, for the plaintiff to recover.

"It was entirely within the power of the company to have made this provision plain. If it had intended to exclude any liability on account of death caused by any poison, in any way, it could have used the language that was before the court in the McGlother Case. But it did not do that.

"The same thing may be said of the case cited by defendant from the Supreme Court of Florida, the case of Preferred Accident Insurance Company v. Robinson.[16]

"The word 'absorbed' was not in that case used in connection with the word 'poison.' That policy provided as follows:

" 'Nor injury, fatal or nonfatal, resulting from any poison or infection, nor from anything whatever, accidentally or otherwise taken, administered, absorbed or inhaled.'

"This was a positive provision that the policy did not cover a case which resulted from poison. It went further than this certificate goes in that respect, and also went further than this certificate in another respect; for it provided that it should not apply to a case of injury resulting from anything whatever, accidentally or

[14] Dent v. Railway Mail Assoc. (U. S. C. C.) 183 Fed. 840, 40 Ins. L. J. 828.

[15] 89 Fed. 685, 32 C. C. A. 318.

[16] 45 Fla. 525, reported in 33 So. 1005, 61 L.R.A. 145.

otherwise taken, administered or absorbed. The word 'absorbed' is not found in this policy.

"The case of Bacon v. United States Mutual Accident Association,[17] had to do with a policy which contained the simple phrase 'from poison,' without any qualifying words. It being within the power of the company by the use of those words to exempt it from liability from this particular loss, if there is any doubt as to what the policy means, it must be construed against the company. And although Judge Sanborn says in the opinion first cited that his proposition has been very much abused, yet it must be applied, I think, to a case of this kind where there is a real doubt. In that case there was no doubt, because, the person having been killed from poison, whether he took it accidentally, or not, he must have died from poison.

"But the question here is whether the insured died from poison taken or administered, and I think the construction of these words 'Taken or administered,' excludes the manner in which Dent came to his death."

Where a policy excepted the insurers from liability "where death was caused by taking poison, or by the contact with poisonous substances," and the insured died from the effect of inhaling coal gas, concerning which the testimony was conflicting as to the point whether or not it was a poison or poisonous substance, it was held no error on the part of the trial judge to refuse to instruct that inhaling coal gas was a taking of poison if they believed coal gas to be a poisonous substance, which when inhaled destroyed life.[18] But it has been held that the "breathing of gas" by the insured involuntarily is not an "inhaling of gas." [19] And the exception of liability in case death occurs from the "inhalation of gas" refers to the voluntary inhaling of gas by the insured. A condition against "inhalation of gas" in an accident policy is used to designate the common uses of gas in dentistry and surgery, and contemplates a voluntary and intelligent act on the part of the insured, and not an involuntary and unconscious act; as the inhalation of a deadly gas that has unexpectedly accumulated in a well, and its presence is unsuspected.[20] So in New York the inhaling of gas within the exemptions of insurance policies, means a voluntary and intelligent

[17] 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399.

[18] United States Mutual Accident Assoc. v. Newman, 84 Va. 52, 3 S. E. 805.

On liability for death of insured from asphyxiation, see notes in 2 L.R.A.(N.S.) 168, and L.R.A.1917D, 740.

[19] Paul v. Travelers' Ins. Co. 112 N. Y. 472, 8 Am. St. Rep. 758, 3 L.R.A. 443, 20 N. E. 347.

[20] Pickett v. Pacific Mutual Life Ins. Co. 144 Pa. St. 79, 27 Am. St.

act of the insured and not a voluntary and unconscious act.[1] If, however, the exemption clause precludes recovery in case of death by the "voluntary or involuntary inhalation of gas or any anesthetic" such clause will be enforced in favor of assurer where assured's death results from unconsciously inhaling illuminating gas in his room at a hotel.[2]

§ 2621. **Poison or anything accidentally taken, administered or inhaled.**—A provision in an accident policy that it shall not "extend to poison in any way taken, administered, absorbed, or inhaled" does not relate to the motive of the insured in taking it, but rather to the mode or manner in which the poison is taken, and therefore a death by involuntary poisoning is not excluded from the risks covered by the contract of insurance.[3] An exception of liability in case of death or disablement arising from "anything accidentally taken, administered, or inhaled" does not cover death from accidentally inhaling illuminating gas escaping into the room in which assured is sleeping. Such a clause is clearly intended to exempt the insurer only in case the insured has voluntarily and consciously, but accidentally, taken or inhaled, or where something has been voluntarily administered which was injurious or destructive of life. The controlling idea in such a provision is the performance of a voluntary act which accidentally causes insured's death, nor does it refer to a thing involuntarily and unconsciously administered. The particular accidents intended to be excepted are the accidental taking or inhaling into the system of some injurious or destructive agency under the mistaken belief that it was beneficial or at least harmless.[4] The court also adds:

Rep. 618, 13 L.R.A. 661, 22 Atl. 871, 21 Ins. L. J. 64.

Death from inhaling gas; attempt to rescue; voluntary exposure, etc., see § 2624a herein.

[1] Menneiley v. Employers' Liability Assur. Corp. 148 N. Y. 596, 31 L.R.A. 686, 51 Am. St. Rep. 716, 43 N. E. 54, rev'g 72 Hun, 477, 25 N. Y. Supp. 230.

[2] Porter v. Preferred Accident Co. 109 App. Div. 103, 95 N. Y. Supp. 682.

[3] Metropolitan Accident Assoc. v. Froiland, 161 Ill. 30, 52 Am. St. Rep. 359, 43 N. E. 766, aff'g 59 Ill. App. 522. As to construction of "taken," etc., see Dent v. Railway Mail Assoc. (U. S. C. C.) 183 Fed. 840, 40 Ins. L. J. 828 *considered* under § 2620 herein.

On death from taking poisonous substance as accident or accidental means, see note in 49 L.R.A.(N.S.) 1022; on whether death or injury from substance taken internally may be deemed to have been caused by external means, see note in 30 L.R.A. (N.S.) 1181.

[4] Menneiley v. Employers' Liability Assur. Co. 148 N. Y. 596, 51 Am. St. Rep. 716, 31 L.R.A. 686, 43 N. E. 54, reversing 72 Hun (N. Y.) 477, 25 N. Y. Supp. 230. So much of the above as expresses the reason for the decision are extracts taken from the opinion of the court, per Martin, J. The case of Paul v. Travelers' Ins. Co. 112 N. Y. 472, 8 Am. St. Rep. 758, 3 L.R.A. 443, 20 N. E. 347, is declared to be the same as to the facts

"The inhaling of gas having been specially provided for when taken for surgical and like purposes, it is only when it is inhaled for some other purpose or under other circumstances that the general provision applies. The special provision is applicable when gas is inhaled for surgical and like purposes; the general provision applies when it is inhaled for other purposes."[5] So death caused by unconsciously and unintentionally inhaling gas while asleep, is within an accident policy against injuries "through external, violent, and accidental means," and is not within an exception of "injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled."[6] So a provision in a policy that the insurance does not cover "injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled," does not include in its meaning an accidental asphyxiation by illuminating gas escaping into the room where insured slept, and a recovery may be had.[7] In the case so holding the court said: "It is urged that the exception in the case at bar is broader and more sweeping than the words found in the cases heretofore decided, the words here being 'poison or anything accidentally or otherwise absorbed or inhaled,' and that these words necessarily include every possible way by which irrespirable gases can be got into the human system so as to cause death. The additional word 'absorbed,' found in the language last above quoted, has no application to the case before us, for that word manifestly has reference only to the process of absorption by sucking up or imbibing through the pores of the body. The claim made is not well grounded if the correctness of the point decided in the cases we have mentioned be conceded. That point, as we understand it, is that the word 'inhaling' or 'inhalation,' or 'inhaled,' as used in exceptions contained in these policies of life or accident insurance implies a voluntary and intelligent act, as distinguished from an involuntary and unconscious act. Read in the light of the

as that at bar, and the cases of Bacon v. United States Mutual Accident Assoc. 123 N. Y. 304, 308, 20 Am. St. Rep. 748, 9 L.R.A. 617, 25 N. E. 399, and Pickett v. Pacific Mutual Life Co. 144 Pa. St. 79, 91, 27 Am. Rep. 618, 13 L.R.A. 661, 22 Atl. 87, are cited with approval as following the Paul Case and as recognizing its doctrine as correct.

[5] Menneiley v. Employers' Liability Assur. Co. 148 N. Y. 596, 601, 51 Am. St. Rep. 716, 31 L.R.A. 686, 43 N. E. 54.

[6] Fidelity & Casualty Co. v. Loewenstein, 97 Fed. 17, 38 C. C. A. 29, 46 L.R.A. 450.

Death from inhaling gas; attempt to rescue; voluntary exposure, etc., see § 2624a herein.

[7] Fidelity & Casualty Co. v. Waterman, 161 Ill. 632, 32 L.R.A. 654, 44 N. E. 283, aff'g 59 Ill. App. 297.

decisions, the words now in question do not mean otherwise than if they explicitly read 'poison or anything accidentally or otherwise consciously and by act of volition drawn into the system by inspiration.' This view is fully supported by a late decision of the court of appeals of New York."[8] And death by asphyxiation from the accidental inhalation of gas while asleep is not within the provision of an accident policy exempting the insurer from liability from death resulting directly or indirectly from any gas or vapor.[9]

Death by involuntary poisoning is within an exception of liability against poison "in any way taken," these words referring not to the assured's motive in taking poison, but to the manner of taking it.[10] So blood poisoning by germs in cotton placed on a person's mouth with her consent, by a dentist to stop the flow of blood after extracting a tooth, creates no liability on an accident policy which has a condition against liability for injuries "from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled," notwithstanding the fact that the germs were not known to exist in the cotton, since they were voluntarily, though accidentally, introduced into the system.[11] And death caused by accidentally eating spoiled oysters is within a clause in an accident policy providing that the policy does not cover injuries resulting from poison, or anything accidentally or otherwise taken or absorbed.[12] But an accident policy exempting from liability and injury "resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled" does not exempt the insurer from liability where the assured accidentally falls sustaining an abrasion of the skin, through which bacteria enters, causing blood poisoning, from which he dies. Such exemption clause contemplates only a proximate causation of the injury as specified by its terms.[13] So a clause

[8] Referring to Menneilly v. Employers' Life Assur. Corp. 148 N. Y. 596, 31 L.R.A. 686, 51 Am. St. Rep. 716, 43 N. E. 54. And we may add that this Menneilly Case which had then been just published was cited by this court with approval in Travelers' Ins. Co. v. Dunlap, 160 Ill. 642, 52 Am. St. Rep. 355, 43 N. E. 765.

[9] Travelers' Ins. Co. v. Ayers, 217 Ill. 390, 2 L.R.A.(N.S.) 168, 75 N. E. 506.

On liability for death of insured from asphyxiation, see notes in 2 L.R.A.(N.S.) 168, and L.R.A.1917D, 740.

[10] Metropolitan Accident Assoc. v. Froiland, 161 Ill. 30, 52 Am. St. Rep. 359, 43 N. E. 766.

[11] Kasten v. Interstate Casualty Co. 99 Wis. 73, 40 L.R.A. 651, 74 N. W. 534.

[12] Maryland Casualty Co. v. Hudgins, 97 Tex. 124, 64 L.R.A. 349, 76 S. W. 745, rev'g — Tex. Civ. App. —, 72 S. W. 1047.

[13] Cary v. Preferred Accident Ins. Co. 127 Wis. 67, 5 L.R.A.(N.S.)

which provides that the policy benefit does not cover injuries fatal or otherwise resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled, does not include medicine; even though it contains poison, or anything taken or administered in good faith to alleviate physical pain even though it results in unexpected and unintentional death, and this applies where chloroform was administered by physicians preparatory to an operation on insured and which because of heart defects resulted in death.[14] An exception of liability from death from "taking poison" means the voluntary, intentional taking of poison, and does not include cases of accidental poisoning, and drinking carbolic acid by mistake for peppermint is not within the exemption.[15] The court, per Carter, J., notes the case of Pollock v. United States Mutual Accident Association,[16] which holds that taking poison includes accidental as well as intentional taking. It also considers Healey v. Mutual Accident Association,[17] and says: "While the precise point here at issue was not discussed in the opinion in the Healey Case, yet it was involved in the decision, and is within the reasoning there employed. The leading cases on this subject were reviewed in the Healey case, including Paul v. Travelers' Insurance Company,[18] and Pollock v. United States Mutual Accident Association,[19] and it was then said:[20] 'While we recognize the high ability of the court in which the case (the Pennsylvania case) was decided, we are not disposed to follow the rule there adopted. We think the rule established by the court of appeals of New York one better calculated to carry out the true intention of the parties when the contract of insurance was entered into, and one, too, more nearly in harmony with the current of authority bearing on the question.'[1] We are inclined to the opinion that the term 'taking poison' would also, in common parlance, when used without any qualifying words, be understood to mean an intelligent and

526 (annotated on liability for sickness or death caused by blood poisoning), 106 N. W. 1055, 35 Ins. L. J. 481.

[14] Beile v. Travelers' Protective Assoc. of America, 155 Mo. App. 629, 133 S. W. 497, 40 Ins. L. J. 1028, *following* Dezell v. Fidelity & Casualty Co. 176 Mo. 253, 75 S. W. 1102, 32 Ins. L. J. 905, a case of death caused by taking morphine for medical purposes to allay pain.

[15] Travelers' Ins. Co. v. Dunlap, 160 Ill. 642, 52 Am. St. Rep. 355, 43 N. E. 765, aff'g 59 Ill. App. 515.

[16] 102 Pa. St. 230, 48 Am. Rep. 204.

[17] 133 Ill. 556, 9 L.R.A. 371, 23 Am. St. Rep. 637, 25 N. E. 52.

[18] 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 374.

[19] 102 Pa. St. 230, 48 Am. Rep. 204.

[20] P. 564.

[1] See also Pickett v. Pacific Mutual Life Ins. Co. 144 Pa. St. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871; Menneilly v. Employers' Life Assurance Corp. 148 N. Y. 596, 31 L.R.A. 686, 51 Am. St. Rep. 716, 43 N. E. 54.

conscious act. If, in speaking of the cause of the death of another, we should say, 'he took poison,' we would most commonly be understood to mean that his act in taking poison was intentional, rather than accidental, and it would hardly be deemed necessary to say, 'he intentionally took poison,' and if it were designed to avoid any such understanding, we would naturally say, 'he accidentally took poison,' or would use some other qualifying words indicating that the act was accidental or its cause doubtful or unknown. It must, however, be conceded that the meaning of the term in the respect mentioned is not free from doubt. Able and learned arguments have been made on each side of the question by counsel, and cases are cited showing that courts of high authority do not agree on the subject. It would, therefore, seem to be eminently proper in such a case to apply the well-known rule of construction applicable to such instruments that where there is a doubt or uncertainty as to the meaning of the terms employed, the language, being that of the insurer, must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to indemnity, which in making the insurance it was his object to secure.[2] Counsel for appellant insist that, using their own language, 'an exception from an accident policy can only be of some accident otherwise included within it, for if the cause of injury or death be not accidental it is manifestly not within the scope of the policy at all. Hence, an exception of "taking poison" means ex vi termini the exception of an accidental taking of poison.' It is clear, however, that the so-called exception is something more than a mere exception excluding what would otherwise be included as accidents, for suicide by a sane person could not be said to be an accident, yet it with other causes of death and injury not accidental is embraced in the exception. It is also said that the term 'taking poison' cannot be limited in its meaning to the intentional taking of poison, for the reason that death so caused is covered by the clause relating to suicide, and to so construe it would give no force whatever to the words 'taking poison.' Counsel are mistaken, also, in this contention. When the entire provision in which these words occur is considered, it is too clear for argument that it is recognized that death may result wholly or partly, directly or indirectly, from voluntarily taking poison without any suicidal intent, and that death so caused, while excepted from the risks covered by the policy, would not be so excepted by the suicide clause. Besides, different kinds of accidents and injuries not resulting in death caused by the voluntary taking of poison might be

[2] Niagara Fire Ins. Co. v. Scammon, 100 Ill. 644; Healey v. Mutual Accident Assoc. 133 Ill. 556, 9 L.R.A. 371, 23 Am. St. Rep. 637, 25 N. E. 52. May on Ins. sec. 175.

excluded from such risks by this provision. It would not be difficult for the insurer to use language which, in respect to the question here under consideration, would be free from doubt. A policy of insurance should not be so framed as to be susceptible of one construction in the hands of the soliciting agent and of quite a different one in the hands of the adjuster."[3]

§ 2622. **Entering or leaving moving train or car: riding as passenger: standing or riding on steps or platform.**—No recovery can be had under an accident policy which provides that the company is not liable for accidents received while trying to enter a moving steam vehicle where the insured is killed while attempting to enter a moving train.[4] And the same general rule applies where the car suddenly started while assured was upon the steps and the excepting clause was: "entering or trying to enter a moving conveyance."[5] And where the exception of liability was for injuries sustained while entering or leaving or trying to enter or leave any moving conveyance and said clause was followed by another covering other excepted risks "fatal or otherwise" and it was claimed that by construction said last-mentioned words should attach to the preceding clause as a part thereof so that such clause should read, injuries, fatal or otherwise, it was held that the word "injuries" should be construed in accordance with its ordinary and plain meaning and covered fatal injuries received while assured was trying to enter a moving car and was therefore within the exempting clause.[6] So recovery is precluded where insurer is exempt from liability if death or injury results from a violation of law, and insured is injured in attempting to board a moving train in violation of a law which prohibits anyone other than an officer of the railroad from getting upon a train in motion, or to cling to such train, etc., and this is so even though it is necessary that the act of getting on or off a train should be consummated by a person in order to constitute the unlawful act intended by the statute.[7]

[3] But see cases under § 2620 herein.

[4] Miller v. Travelers' Ins. Co. 39 Minn. 548, 40 N. W. 839. See §§ 2867, 2871 et seq. herein.

On boarding or alighting from moving train as defense under general provisions as to exposure to danger, see note in 10 L.R.A.(N.S.) 957.

As to voluntary exposure to unnecessary danger, etc., see §§ 2624 et seq. herein.

[5] Travellers Ins. Co. v. Brookover, 71 Ark. 123, 71 S. W. 246. *Examine* King v. Travelers Ins. Co. 101 Ga. 64, 28 S. E. 661.

[6] Standard Life & Accident Ins. Co. v. McNulty, 157 Fed. 224, 85 C. C. A. 22.

[7] Flower v. Continental Casualty Co. 140 Iowa, 510, 118 N. W. 761. *Compare* National Life & Accident Ins. Co. v. Lokey, 166 Ala. 174, 52 So. 45; Whalen v. Peerless Casualty Co. 75 N. H. 297, 73 Atl. 642.

So a passenger on a freight train, who, having left the car at a stopping place, attempts to board it after it has started, by means of a ladder on the side of a freight car, and is thrown therefrom by the jerking of the train, and injured, contributes to his injury by his own negligence, within the meaning of an accident policy exempting the insurer from liability for such injuries.[8] So an attempt to board a train of cars running at eight or ten miles an hour, by a young, strong, and active man, with experience as a "traveling man" in boarding and alighting from moving cars, is an exposure to "obvious risk and injury," within the meaning of an accident policy which excepts the insurer from liability for injuries received as a result of "voluntary or unnecessary exposure to danger, or to obvious risk of injury;" and, when made merely for the purpose of avoiding the delay incident to missing the train, will prevent a recovery against the insurer for injuries received in consequence of such attempt.[9] And the fact that commercial travelers were accustomed to run hazardous risks in boarding trains at the time an accident insurance company accepted one as a member does not warrant the inference that it agreed to indemnify him for injury resulting from such conduct, contrary to the terms of the contract.[10] But the attempt of a traveling salesman to get upon a train which is already in motion is not, as matter of law, a voluntary exposure to unnecessary danger, within the meaning of an exception in a policy.[10a]

Jumping from a moving train after it has passed the station is a voluntary, unnecessary exposure to danger.[11] So jumping in the dark from a freight train in rapid motion on which one is riding without permission is an "exposure to unnecessary danger," within the meaning of an exception in an accident policy which does not contain the words "voluntarily," "wantonly," "wilfully," or any equivalent words.[12] And for a man sixty-six years old, weighing one

[8] Garcelon v. Commercial Travelers' Eastern Accident Assoc. 195 Mass. 531, 10 L.R.A.(N.S.) 961, 81 N. E. 201, 36 Ins. L. J. 747. Stipulation here was that insurer should not be liable for any injury "which the member, by the exercise of ordinary care, prudence and foresight, might have averted or prevented or to which the member's own negligence shall have contributed."

[9] Small v. Travelers' Protective Assoc. 118 Ga. 900, 63 L.R.A. 510, 45 S. E. 706.

[10] Garcelon v. Commercial Travelers' Eastern Accident Assoc. 195 Mass. 531, 10 L.R.A.(N.S.) 961, 81 N. E. 201, 36 Ins. L. J. 747.

[10a] Fidelity & Casualty Co. v. Sittig, 181 Ill. 111, 48 L.R.A. 359, 54 N. E. 903.

[11] Smith v. Preferred Mutual Accident Assoc. 104 Mich. 634, 62 N. W. 990.

On exposure to obvious risk of injury or obvious danger within the meaning of accident policy, see note in 50 L.R.A.(N.S.) 1218.

[12] Shevlin v. American Mutual Ac-

hundred and eighty-four pounds and carrying an umbrella under his arm, to attempt to board a train running six or eight miles an hour, is so obviously dangerous as to come within the clause of an accident policy which states that the policy does not cover insurance from voluntary exposure to unnecessary danger.[13] Nor does it, as a matter of law, constitute an exposure to obvious risk or unnecessary danger to step from a moving train in a city regardless of the rate of speed at which it is moving. The point is was assured bound in all reason to know and was he conscious at the time that he was exposed to danger.[14] It would seem, however, that the train's rate of speed might be such that assured in a similar case would be reasonably bound, if he were sane, to know and, therefore, necessarily be conscious of the danger and so would assume the risk at his peril. But leaving a car while in motion is not necessarily "a voluntary exposure to unnecessary danger" which will defeat a recovery on a policy which by its terms is avoided by such exposure.[15] So a recovery by one thrown by a sudden movement, just as he was stepping to the ground, of a train which he was attempting to cross, while it was standing on a street crossing, is not prevented by a provision in the policy that it shall not apply to accidents to persons attempting to leave moving trains, or persons in or on any place on a train not provided for the use of passengers during transit.[16] So a person making preparation to leave a train at a place elsewhere than the depot, if the train should stop, is not guilty of a violation of law and does not break the conditions of a policy exempting the insurer from liability for injuries sustained in acts in violation of law, nor does he violate the condition of the policy exempting the insurer from liability for injuries suffered by the insured while entering or leaving a moving conveyance.[17] And where the insured who, while standing on a platform not intended for use in getting upon trains, is either thrown or falls upon the track, it is held not within the meaning of the provision.[18]

cident Assoc. 94 Wis. 180, 36 L.R.A. 52, 68 N. W. 866.

[13] Rebman v. General Accident Ins. Co. 217 Pa. 518, 10 L.R.A.(N.S.) 597 (annotated on boarding or alighting from moving train as defense under general provision as to exposure to danger), 66 Atl. 859.

[14] So held in National Life & Accident Ins. Co. v. Lokey, 166 Ala. 174, 52 So. 45.

[15] Badenfeld v. Massachusetts Mutual Accident Assoc. 154 Mass. 77, 13 L.R.A. 263, 27 N. E. 769.

[16] Kirkpatrick v. Ætna Life Ins. Co. 141 Iowa, 74, 22 L.R.A.(N.S.) 1255, 117 N. W. 1111.

On applicability of provision in accident insurance policy exempting insurer in case of accident on railroad trains, see note in 22 L.R.A.(N.S.) 1255.

[17] Smith v. Ætna Life Ins. Co. 115 Iowa, 217, 56 L.R.A. 271, 91 Am. St. Rep. 153, 88 N. W. 368.

[18] Boyden v. Massachusetts Mutual Accident Assoc. 153 Mass. 544, 20 Ins. L. J. 716, 27 N. E. 669.

Voluntary exposure to danger is not proved by evidence tending to show that the insured stood on the steps of a moving train, holding on with both hands, and fell or stepped therefrom in the belief that he was stepping on a lower step, which in fact did not exist.[19] So a temporary occupation of the platform of a car by a passenger for a necessary or proper purpose, is not a "riding" thereon, within the meaning of a clause in an accident policy which contains a condition against riding on a car platform.[20] And where the duties of a person as a cattle dealer or broker visiting yards by occupation, require him to ride on cattle cars from place to place in freight yards, recovery is not precluded by a policy clause providing that it shall not cover accidents sustained while being in any part of a car not provided for occupation for passengers.[1] So an exemption of liability clause for injuries received "in or on any such conveyance not provided for the transportation of passengers" does not include injuries sustained by a passenger while on a passenger train locomotive at a railroad official's invitation.[2] If one is riding in a caboose in charge of cattle being transported to market under a live stock shipping contract and is killed in a train collision he is not within an exception of liability for injuries received while riding in a "caboose used for passenger service," as the caboose was not used for passenger service, and it is not the fact that assured may have been a passenger, as it is not the kind of car that controls, but the fact that it was not at the time engaged in passenger service.[3]

Where an accident policy contained the following condition: "This insurance does not cover entering or trying to enter or leave a moving conveyance using steam as a motive power; . . . railroad employees excepted," and assured was baggage-checker of a transfer company, and his business required him to meet and board incoming trains, and check baggage to other railroad lines and to residences in Vicksburg, it was held that the assured was a railroad employee within the meaning of the foregoing exception.[4] Again the risk of getting on and off moving trains by a passenger conductor, is one that is incident to his business, and such as an accident policy delivered to him is intended to cover; and a condi-

[19] Smith v. Ætna Life Ins. Co. 115 Iowa, 217, 56 L.R.A. 271, 91 Am. St. Rep. 153, 88 N. W. 368.

[20] Standard Life & Accident Ins. Co. v. Thornton, 100 Fed. 582, 40 C. C. A. 564, 49 L.R.A. 116.

[1] Richards v. Travelers' Ins. Co. 18 S. Dak. 287, 67 L.R.A. 175, 100 N. W. 428, 33 Ins. L. J. 880.

[2] Berliner v. Travelers' Ins. Co. 121 Cal. 458, 41 L.R.A. 467, 53 Pac. 918.

[3] Standard Accident Ins. Co. v. Hite, 37 Okla. 305, 46 L.R.A.(N.S.) 986, 132 Pac. 333.

[4] Cotten v. Fidelity & Casualty Co. 41 Fed. 506. See Continental Casualty Co. v. Deeg, 59 Tex. Civ. App. 35, 125 S. W. 353.

tion in such a policy against accidents in attempting to enter or leave a moving conveyance cannot be insisted upon by insurer, if action is brought upon a contract of insurance under the application, and not on the contract as written in the policy.[5]

The burden of proof is on the defendant to show that an accident causing death, resulted, in whole or in part, from voluntary exposure to unnecessary danger.[6] So the fact that insured is found dead near the platform crushed by a wheel of a train on which he was a passenger, and at a station short of his destination, throws the burden of proof upon insurer that insured was killed on the platform or in getting on a moving train, within that exception, and the question is one of fact for the jury.[7]

Where there is evidence tending to show such fact it is error to refuse to instruct the jury to the effect that if insured received his injuries while entering or trying to enter a moving conveyance using steam as a motive power he could not recover, or if he received such injuries while riding in or upon such a conveyance not provided for the transportation of passengers, he could not recover, and in such case the court might have instructed the jury that if insured received the injury while he was voluntarily exposing himself to unnecessary danger he could not recover, although it is held not prejudicially erroneous to refuse the last request to instruct, where there is an instruction that if insured had a right to attend to certain duties connected with his business as shipper, and was injured while so doing, his loss was a risk taken by the insurer, "provided he acted with the prudence of a man of ordinary intelligence and prudence placed in like circumstances."[8]

§ 2623. **Rules and regulations of common carriers and employer: violation of "a rule of corporation."**—If the contract exempts insurer from liability, whether death results from violation of a rule of a corporation, or provides for insurance while traveling in or by a public conveyance provided by a common carrier, and stipulates by way of exception only for liability upon compliance with all rules and regulations of such carriers, these words mean that the assured is only bound to observe such rules as a general traveler might reasonably be presumed and ought to know; he is not ob-

[5] Dailey v. Preferred Masonic Mutual Accident Assoc. 102 Mich. 289, 26 L.R.A. 171, 57 N. W. 184, 60 N. W. 694. See Continental Casualty Co. v. Deeg, 59 Tex. Civ. App. 35, 125 S. W. 353.

[6] Smith v. Ætna Life Ins. Co. 115 Iowa, 217, 56 L.R.A. 271, 91 Am. St. Rep. 153, 88 N. W. 368.

[7] Anthony v. Mercantile Mutual Accident Assoc. 162 Mass. 354, 44 Am. St. Rep. 367, 26 L.R.A. 406, 38 N. E. 973.

[8] Travelers' Ins. Co. v. Snowden, 45 Neb. 249, 63 N. W. 392. See as to employee, Continental Casualty Co. v. Deeg, 59 Tex. Civ. App. 35, 125 S. W. 353.

ligated to familiarize himself with and constantly bear in mind all the rules and regulations and details of management of trains or other conveyances of common carriers. Some additional obligations may, however, be imposed, perhaps, upon the traveler where the contract stipulates for the observance of due care or the like on the part of assured. The courts will also consider the circumstance whether rules of this character even if they are known or ought to be known by assured, are nevertheless constantly violated by passengers and employees; in such cases rules cannot fairly be deemed to be in force and necessary to be observed by assured, for the contract, although between assurer and assured, must necessarily have reference to those rules only which are of binding obligation.[9] If the insured be an employee, a greater obligation might reasonably be held to rest upon him to inform himself as to the rules of employment than in case of a traveler by conveyances provided by common carriers. In case, however, of an exemption from liability for violating the rules of employment, no obligation rests upon the assurer to inform assured as to such rules.[10]

§ 2624. **Voluntary exposure to obvious or unnecessary danger.**—Most policies of accident insurance contain either the condition that the insurers will not be liable in case of death or injury resulting from "voluntary exposure to unnecessary danger," or one of similar import. It may be stated at the outset that we have also considered elsewhere, under their proper headings, exemption from liability clauses of this and like character in so far as they are involved in or connected with various other propositions, such as fighting, assault, self-defense;[11] entering or leaving moving trains or cars, riding upon steps or platforms thereof;[12] walking or being upon a railroad bridge or roadbed:[13] and death in attempt to save life;[14] and the reader is referred thereto.

[9] Marx v. Travelers' Ins. Co. 39 Fed. 321, 6 R. R. & Corp. L. J. 322; Tooley v. Railway Passengers' Assur. Co. 3 Biss. (U. S. C. C.) 399, Fed. Cas. No. 1409; Bon v. Railway Passengers Assurance Co. 56 Iowa, 664, 41 Am. Rep. 127, 10 N. W. 223. See Sutherland v. Standard Life & Accident Ins. Co. 87 Iowa, 505, 54 N. W. 453; Whalen v. Peerless Casualty Co. 75 N. H. 297, 73 Atl. 642.

On scope and construction of provision for indemnity in case of injury while riding in or on a public conveyance, see notes in 37 L.R.A.(N.S.) 618, and L.R.A.1915C, 456.

[10] Follette v. United States Mutual Accident Assoc. 110 N. C. 377, 28 Am. St. Rep. 693, 15 L.R.A. 668, 14 S. E. 923; Standard Life & Accident Ins. Co. v. Jones, 94 Ala. 434, 10 So. 530. See Providence Life Insurance & Investment Co. v. Martin, 32 Md. 310. See Bon v. Railway Passengers Assurance Co. 56 Iowa, 664, 41 Am. Rep. 127, 10 N. W. 225.

As to violation of rules of carrier: what is sufficient notice: questions for jury, see Whalen v. Peerless Casualty Co. 75 N. H. 297, 73 Atl. 642.

[11] See §§ 2619–2619c herein.

[12] See § 2622 herein.

[13] See § 2625a herein.

[14] See § 2624b herein.

In determining the meaning and application of these exemption clauses the express wording thereof is necessarily of primary consideration, generally they present the factors or elements of "voluntary exposure," "unnecessary danger," or "obvious risk" or "obvious danger" and in some policies other words such as "perilous adventure" are used, or there may be an exception from the exemption clause itself, as where the risk is taken to save life. These various clauses must therefore be construed accordingly.

In order to entitle an insurer to exemption from liability for the death of the insured, on the ground that he voluntarily exposed himself to unnecessary danger, it must appear that he knew of and realized the danger and with such knowledge voluntarily exposed himself to it.[15] In construing such a provision a Massachusetts court [16] has said: "If a person voluntarily places himself in a position where he is exposed to an obvious danger, and the precise injury happened to him which there is reason to fear, it cannot fairly be held that the language of the policy was not intended and understood to be applicable to such a case." In other words, if the insured voluntarily places himself in such a position where from the surrounding circumstances a person of ordinary prudence and caution would reasonably hesitate to place himself for fear of danger to life or body, then there can be no recovery for injuries or death in consequence of such act. The provision does not refer to exposure to hidden dangers where a person of ordinary prudence would see no reason for fear. So in Iowa in order to constitute voluntary or unnecessary exposure, the danger must either have been known to the insured in fact, or one which in the exercise of his faculties as an ordinarily prudent person should in reason have been known to him.[17] And upon this point the court has also said in a case in Pennsylvania that: [18] "A clear distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist, yet the exposure thereto, without any knowledge of the danger, does not constitute a voluntary exposure to it. The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. The result of the action does not

[15] Travelers' Ins. Co. v. Clark, 109 Ky. 350, 95 Am. St. Rep. 374, 22 Ky. L. Rep. 902, 59 S. W. 7.

On voluntary exposure to unnecessary danger, see note in 40 L.R.A. 432; on exposure to obvious risk of injury or obvious danger within the meaning of accident policy, see note in 50 L.R.A.(N.S.) 1218.

[16] Tuttle v. Travelers' Ins. Co. 134 Mass. 175, 45 Am. Rep. 316.

[17] Correll v. National Accident Soc. 139 Iowa, 36, 130 Am. St. Rep. 294, 116 N. W. 1046.

[18] Burkhard v. Travelers' Ins. Co. 102 Pa. St. 262, 48 Am. Rep. 205.

necessarily determine the motive which prompted the action. The act may be voluntary, yet the exposure involuntary. The danger being unknown, the injury is accidental." And under another decision in that state, the intention of assured to voluntarily expose himself to unnecessary danger, may be inferred from his acting so recklessly and carelessly as to show an utter disregard of known danger, or from his taking a risk of a danger which is so obvious that a prudent man, exercising reasonable forethought, would not have taken it.[19] It is also declared that "voluntary exposure to unnecessary danger," as used in an accident policy, means an act done in obedience to and regulated by the will of the person who does it; that is, an act done designedly and not accidentally.[1] Again, in order to constitute voluntary exposure to unnecessary danger there must be an intentional doing of some act which reason or ordinary prudence would determine to be dangerous, some degree of consciousness, or apprehension or knowledge of the danger must exist together with the intention to take the risk. If the danger is unknown or concealed there can be no voluntary exposure thereto.[2] So the general trend of the decisions is in accord with a Georgia decision which holds that it is not error to charge the jury that in order for the provision which relieves insurer "in case of voluntary exposure to unnecessary danger" to be an excuse from liability three elements are essential: "First, a conscious knowledge of the danger; second, an intentional or wilful exposure to it; and third that the danger shall be unnecessary" and this was so held where recovery was sought by reason of the accidental death of insured in an automobile wreck.[3] And this is so

[19] De Loy v. Travelers' Ins. Co. 171 Pa. St. 1, 50 Am. St. Rep. 787, 32 Atl. 1108.

[1] Lehman v. Great Eastern Casualty & Indemnity Co. 39 N. Y. Supp. 912, 7 App. Div. 424.

[2] Union Casualty & Surety Co. v. Harroll, 98 Tenn. 591, 40 S. W. 1080, 27 Ins. L. J. 176, 179, *citing* the following cases:

*Georgia.* — Travelers' Ins. Co. v. Jones, 80 Ga. 541, 12 Am. St. Rep. 270, 7 S. E. 83.

*Iowa.*—Jones v. United States Mutual Accident Assoc. 29 Iowa, 652, 61 N. W. 485.

*Massachusetts.*—Tuttle v. Travelers' Ins. Co. 134 Mass. 175, 45 Am. Rep. 316.

*Missouri.*—Lovelace v. Travelers' Protective Assoc. 126 Mo. 104, 30 L.R.A. 209, 47 Am. St. Rep. 638, 28 S. W. 877.

*New York.* — Williams v. United States Mutual Accident Assoc. 133 N. Y. 366, 31 N. E. 222.

*Pennsylvania.*—Burkhard v. Travelers' Ins. Co. 102 Pa. St. 262, 48 Am. Rep. 205.

*Tennessee.* — Miller v. American Mutual Accident Ins. Co. 92 Tenn. 167, 20 L.R.A. 765, 21 S. W. 39.

*Wisconsin.*—Scheiderer v. Travelers' Ins. Co. 58 Wis. 13, 46 Am. Rep. 618, 16 N. W. 47; Pierce v. Travelers' Life Ins. Co. 34 Wis. 389.

[3] Empire Life Ins. Co. v. Allen, 141 Ga. 413, 81 S. E. 120.

expressly or substantially held: in New York;[4] in Texas;[5] and in Wisconsin.[6] So in Pennsylvania involuntary exposure to unnecessary danger means intentional exposure to such danger.[7] So in Kentucky the words "voluntary exposure to unnecessary danger," when employed in a contract of life and accidental insurance, relate to dangers of a substantial character which the insured recognizes and to which he, nevertheless consciously and purposely exposes himself, intending at the time to assume the risk of the danger.[8] So in Ohio the words "voluntary exposure to unnecessary danger" do not embrace every exposure that an insured person might have avoided by the exercise of due care, but relate to dangers of a substantial character, which he knew and to which he purposely and consciously exposed himself, intending at the time to assume all risks.[9] So in Illinois a voluntary exposure to unnecessary danger within the meaning of a policy does not mean simply a voluntary performance of the act which results in injury, but also that it is performed with a consciousness of the danger, or that the danger is so apparent that a man of ordinary intelligence would, under the circumstances, necessarily know it.[10] In Michigan an accident policy exempting from liability for injuries resulting from "voluntary or unnecessary exposure to danger," means cases in which there is a realization that an accident will in all probability result, and an injury follow, from the action about to be taken, and the danger of injury must be obvious.[11]

If the exemption clause limits liability for injury resulting from "voluntary exposure to unnecessary danger or obvious risk of injury," then either reckless or deliberate encountering of known danger, or danger so obvious that a reasonably prudent man would have observed and avoided it, if the circumstances were not such as necessitated the encountering thereof, is a "voluntary exposure" within the meaning of said clause.[12] In New Hampshire "voluntary exposure to unnecessary danger or obvious risk," as used in

[4] Cules v. New York Casualty Co. 83 N. Y. Supp. 1063, 87 App. Div. 41.

[5] Continental Casualty Co. v. Deeg, 59 Tex. Civ. App. 35, 125 S. W. 353.

[6] Bakalare v. Continental Casualty Co. 141 Wis. 43, 25 L.R.A.(N.S.) 1241, 122 N. W. 721.

[7] De Loy v. Travelers' Ins. Co. 171 Pa. St. 1, 50 Am. St. Rep. 787, 32 Atl. 1108.

[8] Travelers' Ins. Co. v. Clark, 109 Ky. 350, 95 Am. St. Rep. 374, 22 Ky. L. Rep. 902, 59 S. W. 7.

[9] United States Mutual Accident Assoc. v. Hubbell, 56 Ohio St. 516, 40 L.R.A. 453, 47 N. E. 544.

[10] Fidelity & Casualty Co. v. Sittig, 181 Ill. 111, 48 L.R.A. 359, 54 N. E. 903.

[11] Hunt v. United States Accident Assoc. 146 Mich. 521, 7 L.R.A.(N.S.) 938, 117 Am. St. Rep. 665, 109 N. W. 1042.

[12] Diddle v. Continental Casualty Co. 65 W. Va. 170, 22 L.R.A.(N.S.) 779, 63 S. E. 962.

an accident policy, means a conscious or intentional exposure to a known risk, and not a merely inadvertent or accidental one.[13] If the danger is obvious, and there is nothing in the situation of the insured or the circumstances surrounding him that, in any way, precludes deliberation, freedom of action, or choice of conduct, such as a sudden peril, which he had no reason to expect, or the like, and he encounters it, and is injured, the exposure is "voluntary" within the meaning of a clause in an accident policy limiting the liability of the insurer in case of an injury resulting from vountary exposure to unnecessary danger or obvious risk of injury.[14]

It is decided that the fact that assured was at the moment unconscious of danger does not excuse him except in those cases where he was ignorant of the danger and under no duty from its obviousness to know its existence.[15] But it is also held that exposure to obvious risk or known danger implies an exposure of which assured has knowledge and is conscious of at the time, and that the risk or danger must be so obvious that insured, cannot reasonably be heard to deny knowledge thereof.[16]

And where the clause is "exposure to obvious risk of injury or obvious danger" omitting the word "voluntary" and using the words "obvious danger" instead of "unnecessary danger" and the amount of recovery is limited instead of the policy being avoided, a different construction is called for and the fact that the injury resulted to insured while and because of exposing himself to a risk of danger which was obvious to him at the time is a sufficient defense to a suit on the policy.[17] Under an accident policy insuring a baggageman, who was killed coupling cars, which policy contained an exemption liability clause from voluntary exposure to unnecessary danger it was held that the word "voluntary," conveys the idea of an act of volition. It means "knowingly," "wilful," not that assured is going knowingly to perform an act which for others might be dangerous, but "knowingly," "rashly," and conscious of danger to himself, recklessly, taking the risk, wanton or grossly

[13] Whalen v. Peerless Casualty Co. 75 N. H. 297, 139 Am. St. Rep. 695, 73 Atl. 642.

[14] Diddle v. Continental Casualty Co. 65 W. Va. 170, 22 L.R.A.(N.S.) 779n, 63 S. E. 962.

On voluntary exposure to unnecessary danger as compared with negligence, see notes in 40 L.R.A. 432; 22 L.R.A.(N.S.) 779; 27 L.R.A.(N.S.) 1164; and 40 L.R.A.(N.S.) 135.

[15] Diddle v. Continental Casualty Co. 65 W. Va. 170, 22 L.R.A.(N.S.) 779n, 63 S. E. 962; Combs v. Colonial Casualty Co. 73 W. Va. 473, 50 L.R.A.(N.S.) 1218, 80 S. E. 779, 43 Ins. L. J. 512.

[16] National Life & Accident Ins. Co. v. Loker, 166 Ala. 174, 52 So. 45.

[17] Hickman v. Ohio State Life Ins. Co. 92 Ohio St. 87, 110 N. E. 542, 47 Ins. L. J. 214. See this case near end of § 2624b herein.

imprudent exposure. It is exposure that must be wilful, voluntary. A person cannot be said to have wilfully exposed himself to a danger that was for him certain and ought to have been present to his mind, if he did not know the act was dangerous for him and believed it was not.[18] The voluntary exposure must be the cause of death to bring the case within an exemption of liability for death resulting from such exposure.[19]

As to the meaning of the word "exposure," as used in policies of insurance, it may also indicate danger of destruction or injury to the property insured from external sources not inherent in the property itself.[20]

Whether assured voluntarily exposed himself to unnecessary danger is ordinarily a question for the jury.[1] And where the exemption is "from exposure to obvious risk of injury or obvious

[18] Canadian Railway Accident Ins. Co. v. McNevin, 32 Can. S. C. 194, 5 B. R. C. 870 (annotated on act of coupling cars by one employed by a railroad in some capacity other than that of brakeman, as "voluntary exposure to unnecessary danger" within meaning of accident insurance policy)—Taschereau, J. It was also said: "I am inclined to the belief that the original design of the stipulation was to prevent an act on the part of the assured exhibiting a conscious reckless, wanton, and wicked disregard of personal safety, whether of life or limb,—the doing of a thing that would according to the view of a 'reasonable man,' be madness, except upon the hypothesis of voluntary suicide or self mutilation." Id.—Sedgwick, J.

See as to prohibition against engaging in the employment of railroad switchman or of a car coupler, etc., Batten v. Modern Woodmen of America, 131 Mo. App. 381, 111 S. W. 513. As to prohibited occupation of railroad freight brakeman, see Cook v. Modern Brotherhood of America, 114 Minn. 299, 131 N. W. 334; Snow v. Modern Woodmen of America, 24 Ohio C. Ct. R. 142.

As to prohibited occupations generally, see §§ 2236 et seq. herein.

[19] Employers' Liability Assur. Corp. v. Anderson, 5 Kan. App. 18, 47 Pac. 331.

[20] Davis v. Western Home Ins. Co. 81 Iowa, 496, 25 Am. St. Rep. 509, 10 L.R.A. 359, 46 N. W. 1073.

[1] *Georgia.*—Empire Life Ins. Co. v. Johnson, 142 Ga. 330, 82 S. E. 893, 44 Ins. L. J. 560.

*Iowa.*—Payne v. Fraternal Accident Assoc. of America, 119 Iowa, 342, 93 N. W. 361.

*Kentucky.* — Continental Casualty Co. v. Hagarty, — Ky. —, 90 S. W. 561.

*Michigan.* — Walter v. Peoples' Health & Accident Ins. Co. 173 Mich. 581, 139 N. W. 865; Putnam v. Phoenix Preferred Accident Ins. Co. 155 Mich. 134, 118 N. W. 922.

*Missouri.*—Jamison v. Continental Casualty Co. 104 Mo. App. 306, 78 S. W. 812.

*New Hampshire.*—Whalen v. Peerless Casualty Co. 75 N. H. 297, 73 Atl. 642.

*New York.*—Norwood v. Preferred Accident Ins. Co. 56 Misc. 529, 107 N. Y. Supp. 104.

*Texas.*—Travelers' Ins. Co. v. Harris, — Tex. Civ. App. —, 178 S. W 816, 46 Ins. L. J. 638; Continental Casualty Co. v. Deeg, 59 Tex. Civ. App. 35, 125 S. W. 353.

danger" the question whether the injury was within the exemption is for the jury.[2]

The question may, however, be a matter of law.[3] And where a given state of facts is such that reasonable men may fairly differ upon the question whether or not insured died from injuries resulting from unnecessary exposure to danger, the determination of the matter is for the jury, but where the facts are such that all reasonable men must draw the same conclusion from them such a question is one of law for the court.[4]

**§ 2624a. Same subject: negligence or contributory negligence.**—It is held that voluntary exposure to danger means something more than negligence proximately contributing to the injury. The test seems to be, did the insured appreciate that, by doing the act, he was putting life and limb in hazard.[5] In considering the question, however, of voluntary exposure to obvious or unnecessary danger or exposure to obvious risk and danger, especially in cases such as boarding a moving car, entering or leaving the same, etc., should it not depend somewhat, as a test in determining such question of unnecessary danger, or obvious risk in this connection, upon whether or not and to what extent such act would constitute negligence, or contributory negligence, and ought the time and place to be considered, that is, whether it is an overcrowded city such for example as New York or a place where more time is allowed for entering or leaving cars or where there are in comparison no crowds. In making the above statement it is not intended to assert the principle that negligence or contributory negligence is controlling in cases under the clause as to voluntary exposure, etc.;[6] nor is the distinction between contract law and torts ignored,[7] but such a test

[2] Hickman v. Ohio State Life Ins. Co. 92 Ohio, 87, 110 N. E. 542, 47 Ins. L. J. 214.

[3] Diddle v. Continental Casualty Co. 65 W. Va. 170, 22 L.R.A.(N.S.) 779n, 63 S. E. 962.

[4] Pacific Mutual Life Ins. Co. v. Adams, 27 Okla. 496, 112 Pac. 1026, 40 Ins. L. J. 572.

[5] Smith v. Aetna Life Ins. Co. 115 Iowa, 217, 56 L.R.A. 271, 91 Am. St. Rep. 153, 88 N. W. 368.

On construction of provision as to voluntary exposure to unnecessary danger as compared with negligence, see notes in 40 L.R.A. 432; 22 L.R.A. (N.S.) 779; 27 L.R.A.(N.S.) 1164; and 40 L.R.A.(N.S.) 135.

[6] De Greayer v. Fidelity & Casualty Co. 126 Cal. 17, 58 Pac. 390 (*considered* under § 2624 herein); Combs v. Colonial Casualty Co. 73 W. Va. 473, 50 L.R.A.(N.S.) 1218, 80 S. E. 779, 43 Ins. L. J. 512; Diddle v. Continental Casualty Co. 65 W. Va. 170, 22 L.R.A.(N.S.) 779n, 63 S. E. 962. See note 40 L.R.A. 432, on voluntary exposure to unnecessary danger.

[7] See Banta v. Continental Casualty Co. 134 Mo. App. 222, 113 S. W. 1140, 38 Ins. L. J. 243; Osgood v. United States Health & Accident Ins. Co. 76 N. H. 475, 84 Atl. 50, 41 Ins. L. J. 1663; Diddle v. Continental Casualty Co. 65 W. Va. 170, 22 L.R.A. (N.S.) 779n, 63 S. E. 962. *Compare* Da Rin v. Casualty Co. of America, 41 Mont. 175, 27 L.R.A.(N.S.) 1164n,

is suggested as a comparative test, a factor in determining whether assured ought to have been or was in duty bound, under the circumstances, even though he was not conscious of the danger at the instant, to have known of its existence, and if assured's act could not be considered one of negligence or of contributory negligence it would seem that it ought not to constitute voluntary exposure to obvious or unnecessary danger. Certainly such a comparative test would not conflict with the one above noted, which is: Did assured appreciate that by doing the act, he was putting life and limb in hazard? On the contrary it would be in aid of the proposition that voluntary exposure in such case means a conscious and intentional exposure to a known risk.[8] In the above connection it is held that the words "voluntary exposure," "unnecessary danger," and "hazardous adventure," within the meaning of a policy, do not include such exposure as is incident to the ordinary habits and customs of life, but refer to something beyond the ordinary,—such as wanton or gross carelessness.[9] So under a Michigan decision voluntary exposure to unnecessary danger, within the meaning of an accident policy, is a conscious or intentional exposure involving gross or wanton negligence on the part of the insured.[10] So the words voluntary exposure to obvious risk or danger under a clause limiting the amount of recovery where death is so occasioned are synonymous with gross or wanton negligence.[11]

Again, an obvious danger is one that is plain and apparent to a reasonably observant person, and the fact that insured may not have observed it and been conscious of it at the time of the fatal accident to him is immaterial as he owes to insurer, as well as to himself, the duty to be reasonably careful when in the presence of an obvious danger, and his failure to use reasonable care does not excuse him. The court in a West Virginia case per Williams, J., says: "The word 'obvious' as used in the con-

108 Pac. 649, *considered* under § 2624b herein.

As to negligence in insurance risks, generally, see §§ 2838 et seq. herein.

As to negligence and contributory negligence in boarding or leaving trains, etc., see Joyce on Electric Law (2d ed.) secs. 530 et seq.

[8] See on this last point, Whalen v. Peerless Casualty Co. 75 N. H. 297, 73 Atl. 642; Continental Casualty Co. v. Deeg, 59 Tex. Civ. App. 35, 125 S. W. 353. See §§ 2624 et seq. herein.

[9] Manufacturers' Accident Indemnity Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 16 U. S. App. 290, 22 L.R.A. 620.

[10] Johnson v. London Guarantee & Accident Co. 115 Mich. 86, 40 L.R.A. 440, 69 Am. St. Rep. 549, 72 N. W. 1115.

[11] Walter v. People's Health & Accident Ins. Co. 173 Mich. 581, 130 N. W. 865.

tract of insurance bears its common or generally accepted meaning, one of which, as defined by Webster, is 'easily discovered, seen, or understood; readily perceived by the eye or the intellect; plain; evident; apparent.' It is synonymous with the words 'plain,' 'clear,' and 'evident,' . . . If this action had been against the railroad company by deceased's representative for negligently causing his death, there can be no doubt that in view of the undisputed facts as disclosed by the record, deceased's contributory negligence would preclude recovery. No prudent man would have undertaken to cross the track so close in front of a rapidly approaching engine. It may be that at the time of the accident, deceased's mind was so occupied with thoughts of other matters that he was oblivious to the approaching train and was therefore not conscious of the immediate danger of attempting to cross the track. If that be so, it was his own misfortune, and the law does not excuse his negligence. It was his duty to exercise care in the presence of so great and imminent a danger, and his failure to do so was negligence. The danger to which deceased exposed himself was obvious, within the meaning of the condition of the policy pleaded, whether he was conscious of it at the time or not, and exonerates defendant from payment of any more than one fifth of the amount for which it would otherwise have been liable." [12] Under a clause excepting liability for injuries resulting from "unnecessary exposure to danger or perilous adventure (unless in order to save life)" the words "unnecessary exposure to danger" includes exposure attributable to negligence of assured and requires assured to exercise ordinary care, and they exempt insurer from liability in all cases of injury occurring in whole or in part through insured's failure to exercise such care. Under this clause a judgment against insurer was reversed where insured, a railroad man and car repairer, out of employment, only a few days, was riding in daylight by implied permission upon a freight train and was killed, and when last seen was walking without apparent motive on top of the cars going down grade on a sharp curve.[13] So there is a voluntary exposure to unnecessary danger where the inference is unavoidable that assured's own negligence contributed to the injury for which he sues and the policy expressly provides that no indemnity shall be paid in such case. The court, per Garcelon, J., said: "We have examined all the decisions to which we have been referred by the plaintiff's counsel in their

[12] Combs v. Colonial Casualty Co. 73 W. Va. 473, 50 L.R.A.(N.S.) 1218 (annotated on exposure to obvious risk of injury or obvious danger within the meaning of accident policy), 80 S. E. 779, 43 Ins. L. J. 512.

[13] Pacific Mutual Life Ins. Co. v. Adams, 27 Okla. 496, 112 Pac. 1026, 40 Ins. L. J. 572.

able argument. Most of them are to the point that contributory negligence will not of itself as matter of law prevent a plaintiff from recovering under a policy which stipulates against a recovery for injury caused by 'a voluntary exposure to unnecessary danger,' or requires merely that the insured shall 'use all due diligence for personal safety and protection;'[14] In Keene v. New England Accident Assoc.,[14a] the court says in speaking of such a policy, that 'by taking out a policy of insurance against accidents one naturally understands that he is to be indemnified against accidents resulting in whole or in part from his own inadventence.' In some of the cases most strongly relied on by the plaintiff, the court adverted to the fact that the policy did not exempt the insurer from liability for accidents caused or contributed to by the negligence of the insured,[15] but in the case at bar the express stipulation of the policy is that the defendant shall not be liable for 'any injury which the member, by the exercise of ordinary care, prudence and foresight, might have averted or prevented, or to which the member's own negligence shall have contributed.' "[16]

So the question whether one was exercising proper care while crossing a railroad track is for the jury under the voluntary exposure to unnecessary danger clause.[17] But it is also decided that

[14] *United States.*—Travelers' Ins. Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305; Manufacturers Accident Indemnity Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 16 U. S. App. 290, 22 L.R.A. 620.

*Maryland.*—Providence Life Insurance & Investment Co. v. Martin, 32 Md. 310.

*Massachusetts.* — Keene v. New England Accident Assoc. 161 Mass. 149, 36 N. E. 891; Badenfeld v. Massachusetts Accident Assoc. 154 Mass. 77, 13 L.R.A. 263, 27 N. E. 769; Freeman v. Travelers' Ins. Co. 144 Mass. 572, 12 N. E. 372.

*Michigan.*—Hunt v. United States Mutual Accident Assoc. 146 Mich. 521, 7 L.R.A.(N.S.) 935, 169 N. W. 1042; Johnson v. London Guarantee & Accident Co. 115 Mich. 86, 40 L.R.A. 440, 69 Am. St. Rep. 549, 72 N. W. 1115.

*Nebraska.* — Rustin v. Standard Life & Accident Ins. Co. 58 Neb. 792, 46 L.R.A. 253, 76 Am. St. Rep. 136, 79 N. W. 712.

*New York.*—Duncan v. Preferred Mutual Accident Assoc. 13 N. Y. Supp. 620, 59 N. Y. Super. Ct. 145.

*Ohio.*—United States Mutual Accident Ins. Co. v. Hubbell, 56 Ohio St. 516, 40 L.R.A. 453, 47 N. E. 544.

*Pennsylvania.*—Burkhardt v. Travelers' Ins. Co. 102 Pa. 262, 48 Am. Rep. 205.

*Virginia.*—Fidelity & Casualty Co. v. Chambers, 93 Va. 138, 40 L.R.A. 432, 24 S. E. 896.

[14a] 161 Mass. 149, 36 N. E. 891.

[15] Fidelity & Casualty Co. v. Sittig, 181 Ill. 111, 48 L.R.A. 359, 54 N. E. 903; Lovelace v. Travelers' Protective Assoc. 126 Mo. 104, 30 L.R.A. 209, 47 Am. St. Rep. 638, 28 S. W. 877; Schneider v. Provident Ins. Co. 24 Wis. 28, 1 Am. Rep. 157.

[16] Garcelon v. Commercial Travelers' Eastern Accident Assoc. 195 Mass. 531, 10 L.R.A.(N.S.) 961, 81 N. E. 201, 36 Ins. L. J. 747.

[17] Payne v. Fraternal Accident Assoc. of America, 119 Iowa, 342, 93 N. W. 361.

a charge is not erroneous or misleading which limits the question to one whether insured voluntarily exposed himself to unnecessary danger and expressly excludes the factors of assured's negligence and his exercise of reasonable care and caution in a case where assured was shot and killed in an altercation with a policeman.[18] And where the policy provides for payment of benefits only in case of personal bodily injury "through external, violent, and purely accidental causes," and it also provides that, "where the accidental injury results from unnecessary exposure to danger or to obvious risks of injury," the amount payable shall be but one tenth of the face of the policy, and the policy contains no provision exempting the company from liability for negligence of the insured contributing to his injuries, it will be presumed in the absence of proof to the contrary that the injuries were received through accidental causes.[19]

**§ 2624b. Voluntary exposure to unnecessary danger: death in attempt to save life: negligence.**—Even though negligence might be imputed to insured in doing a certain act, nevertheless negligence ought not to be imputed to him where such act is an attempt to save human life, and if death results therefrom it will not, as matter of law, constitute obvious exposure to unnecessary danger unless the act amounts under the circumstances to that degree of rashness to the minds of reasonably prudent persons that they would not undertake it, and the test is, would a reasonably prudent man obey his impulses in that particular case; and at least the danger is not unnecessary. This applies to a case where the policy excepted injuries resulting from voluntary exposure to unnecessary danger, and insured, who was a miner, while attempting to save another miner, who had been overcome by gas in a mine, and acting under the belief that he could safely go the necessary distance and effect the rescue, was himself overcome by gas and died therefrom, and others who assisted in the rescue were so far affected by the gas that they were compelled to protect themselves by helmets before the rescues were effected.[20] So an attempt to rescue a crew of a ship which has been driven ashore is held not to be within the exception, since it is the duty of a person in such case to extend help and aid.[1] In an Ohio case it was conceded that

[18] De Greayer v. Fidelity & Casualty Co. 126 Cal. 17, 58 Pac. 390.

[19] Kephart v. Continental Casualty Co. 17 N. Dak. 380, 116 N. W. 349, 37 Ins. L. J. 582.

[20] Da Rin v. Casualty Co. of America, 41 Mont. 175, 27 L.R.A.(N.S.) 1164n, 108 Pac. 649.

As to negligence or contributory negligence as test, see § 2624a herein.

As to negligence in insurance, generally, see §§ 2838 et seq. herein.

[1] Tucker v. Mutual Benefit Life Ins. Co. 50 Hun (N. Y.) 50, 4 N. Y. Supp. 505.

the clause voluntary exposure to unnecessary danger does not apply where one under the impulse of the moment rushes to a place of danger in an effort to save life, unless the act is so rash that a prudent man would not take the risk; but, in said case, the clause in question was "exposure to obvious risk of injury or obvious danger" omitting the word "voluntary" and using the words "obvious risk" and "obvious danger" instead of "unnecessary danger," accordingly where insured was killed at an automobile race where he had rushed with others to aid a driver who had fallen from his machine it was held that the question whether assured exposed himself to obvious risk or obvious danger, was a question for the jury, but the court affirmed the judgment of the Court of Appeals in so far as it reversed judgments below for plaintiff but in so far as it finally determined the case said Court of Appeals was reversed.[2] The policy may, however, provide an exception to exemption clauses of liability in cases of exposure to unnecessary danger, etc., where the risk is taken in order to save life.[3]

§ 2624c. **Voluntary exposure to unnecessary danger: waiver.**—These exemptions from liability clauses may as well as other conditions in the policy be waived. So the defense that injury resulted from exposure to unnecessary danger under an accident policy is waived by an offer to confess judgment for an amount less than is claimed, and by a subsequent motion for a verdict in accordance with such offer.[4] But knowledge by the agent of the insurer that the insured occasionally rode in steeple chases, and was riding in an amateur race does not constitute a waiver of a provision in the policy that the insurer shall not be liable for injuries received through voluntary exposure to unnecessary danger.[5]

§ 2625. **Walking or being on railway bridge, track or "roadbed."**—The phrase "walking or being on a railway bridge or roadbed," under an exception in an accident policy of liability for injuries or death caused thereby, is not to be construed with absolute literalness. The condition is a warranty by assured that he will not intrude upon that part of the roadbed which is not also a part of the highway or public thoroughfare; that he will not loiter upon the track, but does not obligate him not to cross a railroad bed at the

[2] Hickman v. Ohio State Life Ins. Co. 92 Ohio St. 87, 110 N. E. 542, 47 Ins. L. J. 214.

[3] Such was the provision in a policy in Pacific Mutual Life Ins. Co. v. Adams, 27 Okla. 496, 112 Pac. 1026, 40 Ins. L. J. 572, where the clause was: "Unnecessary exposure to danger or perilous adventure (unless in order to save life)" but the clause in parenthesis was not in issue nor independently discussed in that case.

[4] Holiday v. American Mutual Accident Assoc. 103 Iowa, 178, 64 Am. St. Rep. 170, 72 N. W. 448.

[5] Smith v. Aetna Life Ins. Co. 185 Mass. 74, 64 L.R.A. 117, 102 Am. St. Rep. 326, 69 N. E. 1059.

place provided for the public to cross at, and if one crosses a track at a station where the public is accustomed to cross, he is not "walking on a railway roadbed" in any such sense as will entitle the insurer to avoid the policy irrespective of proof of such person's negligence in so crossing.[6]

The term "roadbed" does not include a well beaten space or walk of ten feet between the railroad tracks,[7] for such provision or that the policy does not cover being on any railroad right of way, means on the track;[8] nor does the exemption extend to the whole right of way, but only to that space where a person might be injured by cars running along the track.[9] But the space between the tracks of a double-track railroad, which are so close together that the distance between trains passing thereon would be only four feet, constitutes a roadbed within the meaning of that term in such exemption from liability clause.[10] It is declared in a New Hampshire case that the expression "roadbed of any railway" is not used in an insurance contract by engineers or in view of scientific undertakings and that the question as to the meaning of the word is not one of technical terms; that the risk intended to be excepted from those insured against was that of being struck by moving cars or engine, and, therefore, the clause means all that part of the right of way which may be swept by the moving rolling-stock, and that the exception was intended to have force in the event of any injury connected in its origin with the matter of train operation.[11]

Death caused by being struck by an engine and killed while

[6] Traders & Travelers' Accident Co. v. Wagley, 20 U. S. C. C. A. 588, 45 U. S. App. 39, 74 Fed. 457, 458, per Lacombe, C. J., *citing* Duncan v. Preferred Mutual Accident Assoc. 13 N. Y. Supp. 620, 59 N. Y. Supr. Ct. 145, 36 N. Y. St. Rep. 928, aff'd 129 N. Y. 622, 29 N. E. 1029. See Payne v. Fraternal Accident Assoc. of America, 119 Iowa, 342, 93 N. W. 361.

On scope of provision exempting insurer or limiting its liability, when insured is injured on "roadbed" of railroad company, see note in 8 L.R.A.(N.S.) 970.

[7] Meadows v. Pacific Mutual Life Ins. Co. 129 Mo. 76, 50 Am. St. Rep. 427, 24 Ins. L. J. 721, 31 S. W. 578.

[8] Starr v. Ætna Life Ins. Co. 41 Wash. 199, 4 L.R.A.(N.S.) 636, 83 Pac. 113.

[9] De Loy v. Travelers' Ins. Co. 171 Pa. St. 1, 50 Am. St. Rep. 787, 32 Atl. 1108.

[10] McClure v. Great Western Accident Assoc. 133 Iowa, 224, 8 L.R.A. (N.S.) 970n, 119 Am. St. Rep. 598, 110 N. W. 466.

[11] Osgood v. United States Health & Accident Ins. Co. 76 N. H. 475, 84 Atl. 50, 41 Ins. L. J. 1663, *citing* Standard Life & Accident Ins. Co. v. Langston, 60 Ark. 381, 30 S. W. 427; Metropolitan Accident Assoc. v. Taylor, 71 Ill. App. 132; McClure v. Great Western Accident Assoc. 133 Iowa, 224, 8 L.R.A.(N.S.) 970, 119 Am. St. Rep. 598, 12 Ann. Cas. 41, 110 N. W. 466; De Loy v. Travelers Ins. Co. 171 Pa. 1, 50 Am. St. Rep. 787, 32 Atl. 1108.

walking between the tracks of a railway, there being a sidewalk parallel thereto, is within the exception against walking or being on the roadbed of any steam railway, and it is immaterial that other people used the roadbed in the same manner.[12] And it is also held that the fact that other people used the roadbed is immaterial as the question is one of contract and not of tort liability between the injured party and those operating the moving trains.[13] And a provision of an accident policy exempting the insurer from liability when the injury is received while the assured is on the roadbed of a railroad company, applies where he is injured while walking between the double tracks of a railroad used for running trains in opposite directions, the rails being ten feet apart on the inside of the tracks and the distance between passing engines being four feet.[14] So where one is killed while attempting to cross a railroad track at the station which the public commonly crossed only with the company's permission, such death is within the provision "walking or being on the roadbed," and under the stipulation of the policy the beneficiary is entitled only to the death loss provided in the classification of railroad employees.[15] But an exemption from liability for injuries suffered by assured while walking or being on a railroad bridge or roadbed, does not extend to injuries sustained by insured when his business calls him to a track or crossing for a lawful purpose, unless it was in a time of danger, and he wilfully exposes himself to such danger.[16] If an action is brought to recover for death resulting from being upon a railway roadbed under a policy exempting insurer from liability in such case, and insurer proves that insured met his death while on the track of a railroad by being struck by a moving train, the presumption attaches that he went there voluntarily and knowingly and must be met by proof to the contrary.[17] But a person whose death is caused by injury is presumed to have been in the exercise of ordinary care at the time of his death. This presumption is not

[12] Piper v. Mercantile Mutual Accident Assoc. 161 Mass. 589, 37 N. E. 759. *Compare* Payne v. Fraternal Accident Assoc. of America, 119 Iowa, 342, 93 N. W. 361.

[13] Osgood v. United States Health & Accident Ins. Co. 76 N. H. 475, 84 Atl. 50, 41 Ins. L. J. 1663. *Compare* Payne v. Fraternal Accident Assoc. of America, 119 Iowa, 342, 93 N. W. 361.

[14] McClure v. Great Western Accident Assoc. 133 Iowa, 224, 8 L.R.A. (N.S.) 970n, 119 Am. St. Rep. 598, 110 N. W. 466.

[15] Keene v. New England Mutual Accident Assoc. 164 Mass. 170, 24 Ins. L. J. 796, 41 N. E. 203.

[16] De Loy v. Travelers' Ins. Co. 171 Pa. St. 1, 50 Am. St. Rep. 787, 32 Atl. 1108.

[17] Correll v. National Accident Soc. 139 Iowa, 36, 130 Am. St. Rep. 294, 116 N. W. 1046.

rebutted by the unexplained fact that his body was found mangled upon a railroad track.[18]

**§ 2625a. Walking or being upon a railroad track or bridge: voluntary exposure to unnecessary danger.**—Provisions in an accident policy exempting the insurer from liability for an accident resulting from voluntary and unnecessary exposure, or while the insured is on a railway roadbed, present separate exemptions; an instruction which recognizes them as constituting only one and and as therefore presenting but a single defense, and which applies rules of proof thereto which are not applicable to both, is erroneous.[19] But it is also decided that a clause exempting insurer from liability for injury to insured from voluntary exposure to unnecessary danger "or while being upon a railway bridge or roadbed," reasonably construed means that to come within the intent of the parties it must appear that assured unnecessarily, carelessly and voluntarily placed himself in a position to be injured by some one or more of the perils peculiar to the risk of being upon a roadbed.[20]

In an action upon an accident policy which excepted injuries caused by "voluntary exposure to unnecessary danger," it appeared that the insured sat on a bag on the railroad track with his back to the curve, and that a train suddenly came around the curve, and on warning the insured started off, but reached to get his bag, and as he did so the engine struck him. There was no evidence showing that insured knew or had good reason for knowing that any train would be along at that time. It was held that the act of the insured was not within the exception.[1] So where an accident policy excepted death or injury "by voluntary exposure to unnecessary danger," and "while walking on the roadbed or bridge of any railroad," and the insured stepped off a railway train which had stopped at a drawbridge at night, fell through a concealed hole in the bridge, and was killed, it was held not within the exceptions.[2]

[18] Meadows v. Pacific Mutual Life Ins. Co. 129 Mo. 76, 50 Am. St. Rep. 427, 31 S. W. 578.

[19] Correll v. National Accident Soc. 139 Iowa, 36, 130 Am. St. Rep. 294, 116 N. W. 1046.

[20] Travelers Ins. Co. v. Harris, — Tex. Civ. App. —, 178 S. W. 816, 46 Ins. L. J. 638, 643,—Hodges, J., *citing* Equitable Accident Ins. Co. v. Osborn, 90 Ala. 201, 13 L.R.A. 267, 9 So. 869; McClure v. Great Western Accident Assoc. 141 Iowa, 350, 118 N. W. 269; Payne v. Fraternal Accident Assur. Co. 119 Iowa, 342, 93 N. W. 361; Meadows v. Pacific Mutual Life Ins. Co. 129 Mo. 76, 50 Am. St. Rep. 427, 31 S. W. 578; De Loy v. Travelers' Ins. Co. 171 Pa. 1, 50 Am. St. Rep. 787, 32 Atl. 1108. See Beard v. Indemnity Ins. Co. 65 W. Va. 283, 64 S. E. 119.

[1] Fidelity & Casualty Co. v. Chambers, 93 Va. 138, 40 L.R.A. 432, 24 S. E. 896.

[2] Burkhardt v. Travelers' Ins. Co. 102 Pa. St. 262, 48 Am. Rep. 205.

And where there is a limitation of liability to a certain amount in case death results from unnecessary exposure to obvious risk or danger, the death of insured, is not as a matter of law, within the clause where he is killed while walking upon part of a railroad track which has been continuously used as a traveled way for years by persons walking over that part.[3] Where a person stood at a railroad crossing and waited for a train to pass, and then, without taking the precaution to notice the train which was coming toward him from another direction, started to cross the tracks and was killed, it was held not a "voluntary exposure" to danger.[4] Although where the insured attempted in broad daylight to cross a railroad track in front of an approaching train, there being no obstruction to his view, recovery was denied.[5] But a person who crosses railroad tracks by a path generally used, and looks and listens, but sees or hears nothing, before crossing, cannot be said, as a matter of law, to voluntarily expose himself to unnecessary danger.[6] If, however, a person attempts to cross a railroad track immediately in front of a rapidly approaching train, and is run over and killed, exposes himself to an "obvious risk of injury or danger" within the meaning of such a limitation of liability clause.[7] And recovery on a policy containing such a provision has been held to be defeated where the insured on a dark night attempted to cross a trestle which he knew to be dangerous, though this was his customary route to his home.[8] So one who, seeing a track actually occupied by a train in readiness to be moved, undertakes to cross between the cars, because he thinks he has time to do so, but without any inquiry, is guilty of voluntary exposure to unnecessary danger, and if injured cannot recover, though insured against accident, if the policy declares that the insurance does not cover accidents resulting wholly or partly from voluntary exposure to unnecessary danger.[9] Whether crossing a railroad track in front

[3] Walter v. People's Health & Accident Ins. Co. 173 Mich. 581, 139 N. W. 865.

[4] Lehman v. Great Eastern Casualty & Indemnity Co. 39 N. Y. Supp. 912, 7 App. Div. 424.

[5] Cornish v. Accident Ins. Co. 23 Q. B. Div. 453, 58 L. J. Q. B. 591, 38 W. R. 139, 54 J. P. 262, 41 Alb. L. J. 26.

[6] Whalen v. Peerless Casualty Co. 75 N. H. 297, 139 Am. St. Rep. 695, 73 Atl. 642. See Payne v. Fraternal Accident Assoc. of America, 119 Iowa, 342, 93 N. W. 361.

[7] Combs v. Colonial Casualty Co. 73 W. Va. 473, 50 L.R.A.(N.S.) 1218 (annotated on exposure to obvious risk of injury or obvious danger within the meaning of accident policy), 80 S. E. 779, 43 Ins. L. J. 512.

[8] Travelers' Ins. Co. v. Jones, 80 Ga. 541, 12 Am. St. Rep. 270, 7 S. E. 83.

[9] Willard v. Masonic Equitable Accident Assoc. 169 Mass. 288, 61 Am. St. Rep. 285, 47 N. E. 1006.

of an advancing train is or is not "negligence" or "voluntary exposure to unnecessary risk" is a question materially dependent upon the distance to be covered by the individual, the distance to be covered by the train, and the speed at which the latter is approaching, and where the evidence is conflicting upon these points there is no error in leaving the jury to pass upon the conflicting proof.[10] Again, voluntary exposure to obvious risk within the meaning of a policy, is made, as a matter of law, by climbing on the side of an engine which is approaching a standpipe erected in close proximity to the track at a speed of eight or ten miles an hour, where the insured had passed the standpipe frequently, and had done so just before the accident.[11] In another case the insured was killed by a railway train while he was running on the track in front of it in the night to get on a train approaching in the other direction on a parallel track, and it was held that there could be no recovery.[12] But a clause of exemption where death results from unnecessary exposure, has no application to one who meets his death in the perilous occupation of "bridgeman" or one who is sent out to flag trains in order that their speed may be reduced before crossing a railway bridge, for, notwithstanding such clause, insurer under an accident policy assumes the risk of casualties necessarily attendant upon the duties required in such an occupation.[13] If, however, there is an exception of liability for injuries "while walking or being on any railway bridge or roadbed (railway employees excepted)," a traveling salesman, whose duties require him to visit coal dealers and to be in and about railroad yards in connection with his business, cannot be held to be a railroad employee so as not to defeat a recovery for injury sustained by him while walking in a railroad yard on a railroad roadbed, there being no ambiguity in the term "railway employees" nor in the clause in which it is used; nor is recovery for an injury in such case aided by the fact that railway employees are insured at a higher rate of premium by the insurer than that charged persons in insured's class.[14] Walking on a dark night over a railroad trestle where there is no railing is voluntary exposure to unnecessary danger.[15]

[10] Traders' & Travelers' Accident Co. v. Wagley, 20 C. C. A. 588, 45 U. S. App. 39, 74 Fed. 457, 459, per Lacombe, C. J.

[11] Diddle v. Continental Casualty Co. 65 W. Va. 170, 22 L.R.A.(N.S.) 779, 63 S. E. 962.

[12] Tuttle v. Travelers' Ins. Co. 134 Mass. 175, 45 Am. Rep. 316.

[13] Jamison v. Continental Casualty Co. 104 Mo. App. 306, 78 S. W. 812.

[14] Yancey v. Aetna Life Ins. Co. 108 Ga. 349, 33 S. E. 979, 28 Ins. L. J. 920.

[15] Follis v. United States Mutual Accident Assoc. 94 Iowa, 435, 58 Am. St. Rep. 408, 28 L.R.A. 78, 62 N. W. 807.

**§ 2626. Instances within the exception of "voluntary exposure."**—Where the insured died from the result of injuries received in jumping through a window to escape arrest the policy was held to be avoided.[16] So, in the absence of circumstances of peril, a person who places his person in front of the muzzle of his gun, loaded and cocked, as he reaches for it to draw it toward him through a fence, "unnecessarily exposes himself to danger," within the meaning of an accident policy excluding from the risk disability arising from such exposure.[17] And it is a voluntary exposure to unnecessary danger to engage in riding a steeplechase.[18] So where death ensued in consequence of the insured having fallen from the platform of a railway car late at night, while the train was in full motion, the policy was held avoided.[19] In another case where the insured, who was walking along a street through which a railroad ran, in company with two others whom he met, failed to look out for the engine, there being an approaching train, and then turned, went back a short distance, and "squatted down" upon the track, the engine being twenty-five feet distant at the time, and was struck and killed, it was held to be clearly a case of voluntary exposure to unnecessary danger, there being no evidence whatever showing it to be an accident.[20] So an attempt to board a train moving at eight or ten miles an hour may constitute an exposure to obvious risk and injury or a voluntary and unnecessary exposure to danger.[1]

**§ 2627. Instances not within the exception of "voluntary exposure."**—It is not a case of "voluntary exposure" where the insured while asleep involuntarily does some act resulting in injury; as where the insured while traveling by railway, being asleep and unconscious, voluntarily arose and walked to the car platform, from which he fell and received injuries.[2] So one who lies down to sleep on the top of the boilers of a steamboat, and is there injured by steam escaping from a safety valve, is not guilty of voluntary exposure to unnecessary danger, though warned not to sleep there, unless he was conscious of the danger from the escaping steam

[16] Shaffer v. Travelers' Ins. Co. 31 Ill. App. 112, aff'd 22 N. E. 589.

[17] Sargent v. Central Accident Ins. Co. 112 Wis. 29, 88 Am. St. Rep. 946, 87 N. W. 796.

[18] Smith v. Aetna Life Ins. Co. 185 Mass. 74, 64 L.R.A. 117, 102 Am. St. Rep. 326, 69 N. E. 1059.

[19] Sawtelle v. Railway Passengers Assurance Co. 15 Blatch. (U. S. C. C.) 216, Fed. Cas. No. 12,392.

[20] Williams v. United States Mutual Accident Assoc. 133 N. Y. 367, 45 N. Y. St. Rep. 233, 31 N. E. 222, 46 Alb. L. J. 73, 21 Ins. L. J. 609.

[1] Small v. Travelers Protective Assoc. 118 Ga. 900, 63 L.R.A. 510, 45 S. E. 706. See § 2622 herein.

[2] Scheiderer v. Travelers' Ins. Co. 58 Wis. 13, 46 Am. Rep. 618, 16 N. W. 47.

On injury to insured by act of his own while asleep as an accident, see note in 1 L.R.A.(N.S.) 422.

from the safety valve.[3] It is also held not to be "voluntary exposure" where the insured, who is running toward an approaching train in order to get the mailbags, stumbles and falls against the engine.[4] So standing on the steps of a moving train is not, as a matter of law, "voluntary exposure" to unnecessary danger within the meaning of those words as used in an accident policy, if assured did not appreciate that by so doing he was putting life or limb at hazard.[5] Where the train on which deceased was a passenger stopped short of his destination, and after it started he was found crushed by the car-wheels between the station platform and the nearest rail, it was held that this did not show as a matter of law that death resulted from voluntary exposure to unnecessary danger.[6] So an insured, under such an exemption from liability clause is entitled to recover for a broken ankle caused by putting out his foot to prevent his running against a wall while playing indoor baseball.[7] Nor is it within such an exception from liability for a traveling salesman to attempt to cross a slough in a public road, where he has regularly crossed it twice a year for years, and who, acting on his own judgment based on his previous knowledge and the appearance of the place, together with the opinions of others, concludes that there is no danger to his life in making the attempt,[8] nor does the owner of a farm voluntarily expose himself to unnecessary danger by attempting to drive a bull from a calf pasture into which it has broken if he does not believe, and has no reason to believe, that there is any danger to himself in so doing.[9] Nor does it constitute voluntary exposure, so as to prevent recovery, to go out in a boat to fish on a dark night in water that is dangerous because of sunken trees or snags unknown to the fisherman,[10] nor does hunting for game in the ordinary manner with a loaded gun, nor attempting to scale a bank with a loaded gun in hand, constitute a voluntary exposure to unnecessary dan-

[3] Travelers' Ins. Co. v. Clark, 109 Ky. 350, 95 Am. St. Rep. 374, 22 Ky. L. Rep. 902, 59 S. W. 7.

[4] Equitable Accident Ins. Co. v. Osborn. 90 Ala. 201, 13 L.R.A. 267, 9 So. 869, 44 Alb. L. J. 304.

[5] Smith v. Aetna Life Ins. Co. 115 Iowa, 217, 56 L.R.A. 271, 91 Am. St. Rep. 153, 88 N. W. 368.

[6] Anthony v. Mercantile Mutual Accident Assoc. 162 Mass. 354, 44 Am. St. Rep. 367, 26 L.R.A. 406, 38 N. E. 226.

[7] Hunt v. United States Accident Assoc. 146 Mich. 521, 7 L.R.A.(N.S.) 938, 117 Am. St. Rep. 665, 109 N. W. 1042.

[8] United States Mutual Accident Assoc. v. Hubbell, 56 Ohio St. 516, 40 L.R.A. 453, 47 N. E. 544.

[9] Johnson v. London Guarantee & Accident Co. 115 Mich. 86, 40 L.R.A. 440, 69 Am. St. Rep. 549, 72 N. W. 1115.

[10] Collins v. Bankers' Accident Ins. Co. 96 Iowa, 216, 59 Am. St. Rep. 367, 64 N. W. 778.

On death by drowning as voluntary exposure to unnecessary danger, see note in 42 L.R.A.(N.S.) 634.

ger.[11] Nor is the mere act of cleaning a gun, not known to be loaded, a voluntary exposure to unnecessary danger, where an accident results from an unknown defect in the gun.[12] Nor does assured expose himself to obvious and unnecessary danger even though he is killed while advancing upon another in an aggressive manner where he was ignorant of the fact that his adversary was armed and received no warning from him that he would shoot if assured continued his advance and in such case his death is accidental to him.[13] And being shot after leaving a bawdyhouse does not release the insurer as being "unnecessary exposure to danger." [14]

**§ 2628. Death by disease excepted: fits.**—An ordinary provision of accident policies is that excepting the insurer from liability in case injury or death arises from injury or disease. In an action upon a policy containing such a provision it was held that death resulting from malignant pustule, caused by contact with putrid animal matter containing bacteria of the kind known as "bacilli anthrax," is death from disease, and not from accidental means.[15] And likewise, if any impure or poisonous substance or matter enters the body which produces some disease from which death results, it will be within the excepted liability of death by disease.[16] If it is stipulated that insurer shall not be liable in case of death or disability caused "Wholly or in part by any bodily or mental infirmity or disease" and assured dies from chloroform being administered preparatory to a surgical operation, a prima facie case is established for recovery for death by accident where it appears that insured was in apparent good health at the time of administering the chloroform and the attending physician testifies that the direct and immediate cause of death was acute dilatation of the heart caused by administering the chloroform and that in-

[11] Cornwell v. Fraternal Accident Assoc. 6 N. Dak. 201, 40 L.R.A. 437, 69 N. W. 191.

[12] Miller v. American Mutual Accident Ins. Co. 92 Tenn. 167, 20 L.R.A. 765, 21 S. W. 39.

[13] Union Casualty Co. v. Harroll, 98 Tenn. 591, 40 S. W. 1080, 27 Ins. L. J. 176, *considered* also under § 2619a herein.

[14] Jones v. United States Mutual Accident Assoc. 92 Iowa, 652, 61 N. W. 485.

[15] Bacon (Stedman) v. United States Mutual Accident Assoc. 123 N. Y. 304, 20 Am. St. Rep. 748, 9 L.R.A. 617, 25 N. E. 399, rehearing denied 26 N. E. 751. But see § 2878 herein.

As to special risks and loss: accident or disease, etc., cause of death, see §§ 2878 et seq. herein.

[16] Bacon (Stedman) v. United States Mutual Accident Assoc. 8 N. Y. St. Rep. 523, rev'd 123 N. Y. 304, 20 Am. St. Rep. 748, 9 L.R.A. 617, 25 N. E. 399, 44 Hun (N. Y.) 599.

On liability under accident policy for condition caused by external infection without cut or abrasion, see note in 42 L.R.A.(N.S.) 140.

sured's diseased condition did not contribute to his death.[17] The words "disease" and "bodily infirmity," as used in an accident policy excepting liability for injury caused thereby, mean, practically, the same thing; and refer to some ailment or disorder of a somewhat established and settled character, some physical disturbance to which the insured is subject, and of which an attack causing him an injury is, in some measure, a recurrence; and they have no reference to some temporary disorder which is new and unusual and arises from some sudden and unexpected derangement of the system, though it produces or causes unconsciousness.[18] So disease, mental or bodily infirmity within the exception of liability clause must be construed as meaning something more than the disease or infirmity itself and so be held to include such diseases or mental infirmities only which directly or indirectly contribute to the injury or death.[19]

The insurer is liable under an accident policy for death the result of peritonitis, caused by a fall, though the policy excepts death in consequence of disease, and though it may appear that the insured previously had peritonitis and was peculiarly liable to a recurrence of the disease.[20] And an exception from liability for death from pulmonary disease does not include pneumonia as the latter is not an inherent or organic defect.[1] If liability is limited by reason of chronic disease, the question whether insured's illness arises therefrom is for the jury.[2]

Where an accident policy excepted death arising from "fits . . . or any disease whatsoever," and the insured, while at a railway station, was seized with a fit, and, falling across the tracks of the railway, was run over by a passing train and killed, it was held to be death by accident, and not a death within the exception.[3] So also where the policy provided that it should not extend "to any injury caused by or arising from natural disease, or weakness or exhaustion consequent upon disease," and the insured while

[17] Beile v. Travelers' Protective Assoc. of America, 155 Mo. App. 629, 135 S. W. 497, 40 Ins. L. J. 1028.

[18] Meyer v. Fidelity & Casualty Ins. Co. 96 Iowa, 378, 59 Am. St. Rep. 374, 65 N. W. 328.

[19] Vernon v. Iowa State Traveling Men's Assoc. 158 Iowa, 597, 138 N. W. 696.

[20] Freeman v. Mercantile Accident Assoc. 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013.

[1] Metropolitan Life Ins. Co. v. Bergen, 64 Ill. App. 685.

[2] Strickland v. Peerless Casualty Co. 112 Me. 100, 90 Atl. 974. See Kingkade v. Continental Casualty Co. 35 Okla. 99, 128 Pac. 683.

[3] Lawrence v. Accidental Ins. Co. Lim. 50 L. J. Q. B. 522, L. R. 7 Q. B. D. 216, 45 L. T. 29, 29 W. R. 802, 45 J. P. 781.

On previous diseased condition as affecting liability for death or injury from accident, see notes in 34 L.R.A. (N.S.) 445; and 52 L.R.A.(N.S.) 1203.

crossing a stream was seized with an epileptic fit, and falling into the water was drowned, it was held not to be within the exception.[4] But evidence that the insured staggered before he received a fall resulting in an injury, is not conclusive that he had "fits or vertigo," excepted by the policy, if he had been in good health previous to the fall, and expert evidence shows that the staggering might have been produced by other causes.[5]

**§ 2629. Disease caused by accident: death superinduced by other causes not death by excepted disease.**—If a disease is primarily, solely, and directly caused by external violence, and death ensues by reason of a surgical operation for the purpose of relieving the patient, it is a death "accidentally occurring from material and external cause, where such accidental injury is the direct and sole cause of death," and it is not within an exception of liability for death or disability arising from specified diseases "within the system of the insured before or at the time or following such accidental injury, whether causing such death or disability directly or jointly with such accidental injury." Here the policy insures against cuts, stabs, concussions, etc., "accidentally occurring from material and external cause, where such accidental injury is the direct and sole cause of death to the insured or disability to follow his avocation," and then follows this exception: "But it does not insure against death or disability arising from . . . hernia . . . or any other disease arising within the system of the insured before or at the time or following such accidental injury, whether causing such death of disability directly or jointly with such accidental injury." And it was decided that death from hernia, caused solely and directly by external violence, followed by a surgical operation performed for the purpose of relieving the patient, was not within the above exception.[6] If bodily infirmity or disease is caused by or directly results from an injury, and such disease

[4] Winspear v. Accidental Ins. Co. Lim. 6 Q. B. D. 42, 43 L. T. 459, 29 W. R. 116. See also Reynolds v. Accident Ins. Co. 22 L. T. (N. S.) 820, 18 W. R. 1141, where the insured was seized with a fit while bathing and was drowned.

[5] Meyer v. Fidelity & Casualty Co. 96 Iowa, 378, 59 Am. St. Rep. 374, 65 N. W. 328.

[6] Fitton v. Accidental Death Ins. Co. 17 Com. B. (N. S.) 122, 2 Big. L. & A. Ins. Rep. 649, 34 L. J. C. P. 28, *approved* in Smith v. Accident Ins. Co. noted in § 2630.

On applicability of provisions in accident policies exempting insurer or limiting its liability for disability arising from a specified condition when such condition is itself the result of an accident occurring after the issuance of the policy, see notes in 8 L.R.A.(N.S.) 1014; and L.R.A. 1916B, 621.

As to proximate and remote cause, see §§ 2862 et seq. herein.

As to special risks and losses, accident or disease, see §§ 2878 et seq. herein.

contributed wholly or in part to insured's death, it does not preclude recovery, even though liability is excepted where death results wholly or in part from disease.[7] And bodily infirmity or disease resulting from accidental injury is not within a clause of exemption from liability if death results directly or indirectly from bodily infirmity or disease of any kind.[8] And where assured had a heavy fall while hunting, and was wet through and the effect thereof was to lower his vitality so that pneumonia germs multiplied rapidly resulting in his death, such death is directly caused by accident and is not within an exception of liability "where the direct or proximate cause" of death "is disease or other intervening cause, even although the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby."[9] But disease consequent upon lowered vitality, and which, except for an accidental injury would not have been fatal, is held the cause of death. The question as to the cause of death, whether accident or disease, is for the jury, unless the evidence is so clear as that all reasonable men would reach the same conclusion as to said cause.[10]

§ 2629a. **Pre-existing disease: disease and accidental injury concurring.**—If disease develops subsequent to an accident and is the result thereof, a judgment for insured will be affirmed, even though he had had the same disease prior to his application for insurance, but had at that time recovered therefrom.[11] If death is caused by the concurring action of the injury and a pre-existing disease, or in other words, if a disease pre-existing at the time of the accidental injury is aggravated thereby, or the disease aggravates the effects from the accident and actively contributes to the disability or consequent death, recovery is precluded under a clause limiting insurer's liability to disability or death resulting independently of all other causes, from accidental injuries and stipulating that there shall be no recovery if death results wholly or in part, directly or indirectly from disease or bodily infirmity.[12]

[7] Coulter v. Travelers Protective Assoc. of America, 144 Ill. App. 255.

[8] Cary v. Preferred Accident Ins. Co. of N. Y. 127 Wis. 67, 5 L.R.A. (N.S.) 526n, 106 N. W. 1055, 35 Ins. L. J. 481.

[9] Etherington, In re, v. Lancashire & Yorkshire Accident Ins. Co. (1909) 1 K. B. L. R. 591, 126 L. T. 328, 64 L. J. 266.

[10] Ward v. Aetna Life Ins. Co. 82 Neb. 499, 118 N. W. 70.

[11] Jiroch v. Travelers' Ins. Co. 145 Mich. 375, 108 N. W. 728.

[12] Maryland Casualty Co. v. Morrow, 52 L.R.A.(N.S.) 1213, 213 Fed. 599, 130 C. C. A. 179, 44 Ins. L. J. 301, *distinguishing* Preferred Accident Ins. Co. v. Patterson, 213 Fed. 595, 130 C. C. A. 175, 44 Ins. L. J. 297. See notes in 34 L.R.A.(N.S.) 445, and 52 L.R.A.(N.S.) 1203, on previous diseased condition as affecting liability for death or injury from

**§ 2629b. Death from disease as primary, secondary or final cause.**—If liability is excluded for accident or death or disability resulting wholly or partly, directly or indirectly from bodily or mental infirmity or disease in any form, proximate or contributory, as a primary, secondary or final cause of accident, injury or death, death is not within such exception so as to preclude recovery where insured dies from blood poisoning resulting at once from an unintentional, accidental cut on the finger, where insured was not at that time then afflicted with any known physical or mental infirmity.[13]

**§ 2630. Death from disease as a "secondary cause" not death by accident.**—If an injury or disease is primarily caused by accidental means, yet if death is superinduced by a disease enumerated among those excepted as not insured against, it is within an exception of liability for death or disability arising from specified diseases, "or secondary cause or causes arising within the system of the insured before or at the time and following such accidental injury, whether causing such death or disability directly or jointly with such accident or injury."[14]

**§ 2630a. Death by drowning excepted: presumptions.**—If death resulting wholly or in part directly or indirectly from drowning is an excepted risk, no presumption exists that insured died as a result of bodily injuries instead of from drowning when she was aboard a steamer at the time the vessel sank and others aboard the same vessel sustained bodily injuries.[15]

accident. See §§ 2879, 2880 herein.

[13] Rheinheimer v. Aetna Life Ins. Co. 77 Ohio St. 360, 15 L.R.A.(N.S.) 245, 83 N. E. 491.

On liability on accident policy for sickness or death caused by blood poisoning, see notes in 5 L.R.A. (N.S.) 926, and L.R.A.1917A, 1056.

[14] In Smith v. Accident Ins. Co. L. R. 5 Ex. 302, 39 L. J. Ex. 211, 22 L. T. 861, 18 W. R. 1107, although approving the Fitton case (under § 2629 above) it was distinguished by some of the members of the court. In this case the insurance was against accidents from cuts, etc. The insured died from erysipelas caused by an accidental cut, but the condition differs from the Fitton case in that it reads, "When accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured, . . . but it does not insure against death or disability arising from . . . erysipelas or any other disease or secondary cause or causes arising within the system of the insured before or at the time or following such accidental injury, whether causing such death or disability directly or jointly with such accidental injury," etc.

As to proximate or remote cause, see §§ 2862 et seq. herein.

As to accident or disease: special risks and losses, see §§ 2878 et seq. herein.

[15] Lewis v. Continental Casualty Co. 61 Wash. 154, 112 Pac. 91.

On liability for death by drowning, see note in 42 L.R.A.(N.S.) 631.

Evidence of death, see § 3772 herein.

Special risks and losses: asphyxia-

**§ 2631. Death caused by "medical treatment for disease," or "surgical treatment," excepted.**—If the policy provides that the company will not be liable for death "caused wholly or in part by . . . medical treatment for disease," it will not be liable where the insured, by accident or inadvertence, takes a larger quantity of the medicine prescribed for him than is specified, and death results therefrom. Thus, where a specified quantity of opium had been prescribed for a person insured under a policy containing such a condition, and he by mistake took such a quantity as produced death, it was held to be death wholly or in part by medical treatment for disease, and the insurers were held to be released from liability.[16] If death or disability resulting from "surgical treatment" is an excepted risk and assured dies from chloroform being administered preparatory to a surgical operation, the administering chloroform in such case does not, it is decided, constitute "surgical treatment" as these words mean treating a disease or a patient by means of surgery, the meaning of which latter word is the applying manual operations or instrumental appliances to the affected parts for the purpose of curing or relieving the bodily disease or ailment, and where the jury finds that "surgical treatment," does not include the administering of chloroform under the circumstances such finding will stand, where it appears that insured was in apparent good health up to the time of administering the chloroform and the attending physician testifies that the direct and immediate cause of death was acute dilatation of the heart caused by administering the chloroform and that insured's diseased condition did not contribute to his death.[17] An exception of lia-

tion caused by the action of water, see § 2881 herein.

[16] Bayliss v. Travelers' Ins. Co. 14 Blatchf. (U. S. C. C.) 143, Fed. Cas. No. 1,138.

On liability under accident policy for death or injury resulting from surgical operation or medical treatment, see notes in 26 L.R.A.(N.S.) 1004, and L.R.A.1915E, 955.

[17] Beile v. Travelers' Protective Assoc. of America, 155 Mo. App. 629, 135 S. W. 497, 40 Ins. L. J. 1028. The court per Caulfield, J., said: "Respondent next contends that the verdict was rightfully set aside because the death was one 'resulting from surgical treatment,' and is therefore one of the exceptions of the certificate. We are unable to agree that the death did result from 'surgical treatment.' As already said, these associations do business mostly with the common people, and the expressions contained in their certificates should be defined according to the ordinary and usual understanding of their signification, and be construed strictly against the insurer, where they narrow the range and force of the obligation. The Standard Dictionary defines 'surgery' as 'the branch of the healing art that relates to external injuries, deformities and other morbid conditions to be remedied directly by manual operations or instrumental appliances.' 'Surgical' is defined as being 'of, or pertaining to, surgery.' 'Treatment' means the act or manner of treating. To 'treat' means to 'apply remedies

bility if disability or death results from medical or surgical treatment relates rather to the results or consequences of such treatment than to medical or surgical treatment or aid or to give relief in cases of accidental injury.[18]

**§ 2631a. Unnecessary lifting and voluntary overexertion.**—Although a policy contains a stipulation exempting insurers from liability for injuries occasioned by unnecessary lifting and voluntary overexertion still insured's contract right to indemnity is not lost where the injury results from overexertion unless such overexertion is intentional and conscious. And where insured fails to accurately gauge his strength or to correctly estimate the weight of the object, it cannot be said, as a matter of law, that he is aware of the probable result of his act, or that he acted with a reckless disregard of the consequences likely to ensue, and mere contributory negligence in such case constitutes no defense. This applies where a man, accustomed to lifting and being in good physical condition at the time and who suspects that heavy dumb-bells to be used by an athlete are under weight, with a view to protect his company and the public from imposture, but failing to accurately gauge his strength or to correctly estimate their weight and believing that he can lift a greater weight, attempts to lift a three hundred pound dumbbell and is injured thereby, and in such case recovery is not precluded and the question should be submitted to the jury.[19] If

to;' as to treat a disease or a patient. A 'remedy' is something used 'for the cure or relief of bodily disease or ailment.' We gather from reading these definitions that 'surgical treatment' means treating a disease or patient by means of surgery, which in turn means applying manual operations or instrumental appliances to the affected part for the purpose of curing or relieving the bodily disease or ailment. Administering chloroform as was done in this case does not come within any of these definitions or meanings. It was not a manual operation or application of an instrumental appliance, and was not resorted to as a remedy or for the purpose of curing or relieving Beile's ailment. It was administered as preparatory to the surgical operation; but so might have been his bath, and if he had died in his bath it would not be seriously contended that he died as the result of surgical treatment. And the meaning of 'surgical treatment,' as the dictionary indicates it, is in accordance with the usual and ordinary understanding."

[18] Vernon v. Iowa State Travelingmen's Assoc. 158 Iowa, 597, 138 N. W. 696. *Examine* Westmoreland v. Preferred Accident Ins. Co. (U. S. C. C.) 75 Fed. 244.

[19] Rustin v. Standard Life & Accident Ins. Co. 58 Neb. 792, 46 L.R.A. 253, 76 Am. St. Rep. 136, 79 N. W. 712, 28 Ins. L. J. 997, *citing* Manufacturers' Accident Indemnity Co. v. Dorgan, 58 Fed. 945, 7 C. C. A. 581, 16 U. S. App. 290, 22 L.R.A. 620; Johnson v. London Guarantee & Accident Co. 115 Mich. 86, 40 L.R.A. 440, 69 Am. St. Rep. 549, 72 N. W. 1115.

On right to compensation on accident policy for injury resulting from exertion or strain, see note in 2 B. R. C. 367.

As to special risks and losses: in-

a person insured under an accident policy, providing that it shall not cover injuries from "lifting" ruptures a blood vessel of the stomach, causing death, by lifting a heavy cylinder head in the course of his employment, a recovery may be had under the policy, if the application for insurance notified the insurer of the nature of the occupation of the insured.[20]

§ 2632. **Occupation: exception of liability for "wrecking."**—One who is insured as engaged in a particular occupation is nevertheless within the protection of the policy, although he engages in a work of humanity, such as assisting in saving a shipwrecked crew, whereby he comes to an accidental death by drowning, and his humane act does not make his occupation that of "wrecking" or a "wrecker" within an exception of liability while engaged in "wrecking." [1]

§ 2632a. **Employers' liability policy: injuries while making extraordinary repairs.**—If an employers' liability policy stipulates against loss from liability to any person employed in making extraordinary repairs in connection with the construction or demolition of any structure, building, or plant, but permits ordinary repairs by certain employees, recovery from insurer is precluded where the repairs are of such a character as to constitute "extraordinary repairs" within the stipulation, as where after partial destruction of assured's factory by fire, it was found necessary to line an acid chamber with lead and an employee was injured while engaged in that work, and obtained damages therefor from the employer, and it will not be held that the parties have construed the policy so as to cover such accident, where a rider is subsequently attached thereto, which stipulates that operations in connection with the rebuilding, repairing, etc., of said acid tanks or vaults are not covered except on notice, etc.[2]

juries: voluntary act for convenience, pleasure, or in daily routine duties unaccompanied by extraneous accidental causes: rupture strains, etc. see § 2883 herein.

[20] Standard Life & Accident Ins. Co. v. Schmaltz, 66 Ark. 588, 47 Am. St. Rep. 112, 53 S. W. 49.

On rupture of blood vessel as an accident within accident insurance policy, see note in 19 L.R.A.(N.S.) 1206.

[1] Tucker v. Mutual Benefit Life Ins. Co. v. Hartford, 50 Hun (N. Y.) 50, 4 N. Y. Supp. 505, 23 N. Y. St. Rep. 957, aff'd 121 N. Y. 718, 24 N. E. 1102.

As to conditions voiding policy: prohibited occupations, see §§ 2236 et seq. herein.

As to special risks and losses; change of occupation, etc., see § 2870 herein.

As to death in attempt to save life, see § 2624b herein.

[2] Home Mixture Guano Co. v. Ocean Accident & Guarantee Corp. Ltd. of L. E. (U. S. C. C.) 176 Fed. 600. The policy stipulated that it did not cover loss from liability for injuries to any person connected with the making of additions to or alterations in any structure or plant, or in connection with the construction, demolition or extraordinary repairs thereof, or for loss or injury caused

**§ 2632b. Employers' liability policy: violation of law.**—The parties to an employers liability policy or contract of indemnity or insurance may validly limit the insurers liability by exempting him from any claim for indemnity to insured against damages, loss or expense resulting from injuries or death to or caused by any person employed in violation of law and this applies to a violation of the labor law as to employment of minors, so that the insurer is entitled to claim the benefit of such exemption in the absence of waiver or estoppel.[3] Such a statute enters into and becomes a part of the contract of insurance and includes as a child one who is between the ages specified in the statute making it unlawful to employ such child without an age certificate and is also within the policy exemption of liability for injuries sustained by the one so unlawfully employed.[4] And there can be no recovery from insurer where the child employee is under the age of twelve contrary to the statutory prohibition.[5] So a child under sixteen is employed in violation of law as to age under an exemption of liability stipulation in such case where his employment places him, in violation of the statute, in a position where his life or limb is endangered and where he sustains injury thereby, even though it is no part of his duty to do what he is doing when injured and other employees who are adults warn him of the danger, and recovery over against insurer is precluded in such case by said exemption from liability clause.[6] If, however, the insured employer has no knowledge that the child was within the prohibitive age recovery is not precluded.[7] We would suggest, however, that in case of such a claim it ought very clearly to appear that there was actually no knowledge of such child's age to sustain it.

wholly or in part thereby, but that ordinary repairs were permitted when made on the premises mentioned in the schedule by employees whose compensation was regularly included in the estimated payroll.

[3] Mason-Henry Press v. Aetna Life Ins. Co. 211 N. Y. 489, 105 N. E. 826, 44 Ins. L. J. 316, aff'g 139 N. Y. Supp. 1133, 155 App. Div. 876; employers' liability act, Consol. Laws, N. Y. c. 31, secs. 200–204.

On injuries covered by employers indemnity policy, see notes in 30 L.R.A.(N.S.) 1192, and L.R.A.1915C, 155. See §§ 2800–2803 herein.

[4] Louis F. Kleeman Co. v. New Amsterdam Casualty Co. 177 Mo. App. 397, 164 S. W. 167; Rev. Stat. 1909, sec. 1719. See London Guarantee & Accident Co. Ltd. v. Morris, 156 Ill. App. 533, 40 Nat. Corp. Rep. 889 ("child" means under age of puberty). Common and statutory law as part of contract, see §§ 194 et seq. herein.

[5] Mt. Vernon Woodberry Cotton Duck Co v. Frankfort Marine, Accident & Plate Glass Ins. Co. 111 Md. 561, 75 Atl. 105.

[6] Frank Unnewehr Co. v. Standard Life & Accident Ins. Co. 176 Fed. 16, 99 C. C. A. 490, Rev. Stat. Ohio secs. 6986–1.

[7] Morton v. Ontario, 30 Canadian L. T. 192, 14 O. W. R. 1010

Where an employer's liability policy or indemnity insurance contract provides, as it validly may, that it does not cover loss or expense arising on account of or resulting from injuries or death to, or if caused by any person employed in violation of law, and the employee makes his claim for damages against insured basing such claim on various grounds covered by the policy, and also on the alleged violation of law not covered thereby, as above stated, insurer has his choice between two courses of action which would preserve said limitation of liability, that is, it may regard simply the charge of insured's violation of the law and refuse to defend the action, taking its chances that the sole ground of liability, if any, will be established, and for which it would not be liable, or, on the other hand it may proceed with the defense of the action under an agreement with or notice to insured, express or implied, that it will defend against all allegations of fault, and that if in the end it should come out that the only allegation sustained was the one of violation of law, its rights should be preserved, and it should not be liable.[8] If assured under an employer's liability policy neglects to comply with the law as to safeguarding machinery and works, providing efficient safety appliances, etc., but no employee is injured in consequence of such violation of law, insurer is not exempt from liability under an exception of liability for accidents in case of such neglect or violation of the law; and the burden is upon insurer to allege and prove that the loss was one within the policy exceptions.[9]

**§ 2632c. Same subject: waiver.**—In a New York case an employer's liability policy or indemnity insurance contract excepted liability for loss or expense arising on account of or resulting from injuries or death to, or if caused by any person employed in violation of law. Insured's employee, a boy, was injured, by operating a printing press, and insured was served with notice of claim under the Employers' Liability Act,[10] and an action for damages was sub-

[8] Mason-Henry Press v. Aetna Life Ins. Co. 211 N. Y. 489, 105 N. E. 826, 44 Ins. L. J. 316,—Hiscock, J., aff'g 139 N. Y. Supp. 1133, 155 App. Div. 876; employers' liability act, Consol. Laws, N. Y. c. 31, secs. 200–204. See United Waste Manufacturing Co. v. Maryland Casualty Co. 85 Misc. 539, 148 N. Y. Supp. 852, 44 Ins. L. J. 497; Buffalo Steel Co. v. Aetna Life Ins. Co. 141 N. Y. Supp. 1027, 156 App. Div. 453; Gutfreund v. Standard Life & Accident Ins. Co. 98 N. Y. Supp. 699.

[9] Bridal Veil Lumbering Co. v. Pacific Coast Casualty Co. 75 Oreg. 57, 145 Pac. 671; employer's liability act, Laws 1911, p. 61. See Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co. (U. S. C. C.) 130 Fed. 957 (exception of liability for failure to "observe any statute affecting the safety of persons:" statute required that safe passage for men, etc. be maintained by mining companies: employee injured: recovery precluded: question also of waiver).

[10] Consol. Laws, c. 31, secs. 200–204.

sequently brought and both notice and complaint alleged amongst other acts of negligence that at the time of the accident said employee was fifteen years of age and that no certificate, as required by law, had been issued permitting him to work, and that he was employed in violation of law, which violation caused the accident. Assurer at once called insured's attention to the allegation of the employee that he was employed in violation of law, and stated that if such proved to be the fact "this case would not fall to us for attention." There was a subsequent conversation with insurer's officer resulting in insurer's going on under its objection with the conduct of the defense and assured co-operated in the trial, and upon the fact being ascertained that the allegation as to the boy being under age was corroborated, a settlement was advised by insurer but insured refused to consider it. It was decided that insured had done all that was necessary and all that it could do to assert and preserve its rights under the exemption or condition while thus proceeding with the defense of the case, and that it had also fairly and reasonably done all that it could to assert its rights under the policy and in doing so in such a manner as would be notice to assured that it did not intend to waive its rights by proceeding with such defense and therefore it had not waived its rights nor so misled assured as to constitute an estoppel.[11]

§ 2633. **Accident to property: loss by fire excepted.**—If a policy is issued upon property insuring it against accident, but excepting loss or damage by fire, any loss to the property of which fire is the proximate cause will be within the exception. Thus, where a policy upon glass insured "against loss by breakage by accident or causes entirely uncontrolled by the insured, but excepted" loss or damage which may happen by or in consequence of any fire, it was held that the breakage of glass caused by the falling wall of another building, which fell in consequence of a fire, was within the exception, as the fire was the proximate and immediate cause of the loss.[12] In another case a policy which was issued upon a sugar refinery covered loss by "explosion or accidents," and on the back

[11] Mason-Henry Press v. Aetna Life Ins. Co. 211 N. Y. 489, 105 N. E. 826, 44 Ins. L. J. 316, aff'g 139 N. Y. Supp. 1133, 155 App. Div. 876, *distinguishing* Brassie v. Maryland Casualty Co. 210 N. Y. 235, 104 N. E. 622. See Fairbanks Canning Co. v. London Guarantee & Accident Co. 154 Mo. App. 327, 133 S. W. 664; United Waste Manufacturing Co. v. Maryland Casualty Co. 85 Misc. 539, 148 N. Y. Supp. 852, 44 Ins. L. J. 497; Buffalo Steel Co. v. Aetna Life Ins. Co. 141 N. Y. Supp. 1027, 156 App. Div. 453.

[12] Runkel v. Lloyd's Plate Glass Ins. Co. (Parish of Orleans Ct. App. 1892) 21 Ins. L. J. 472.

Proximate cause, see §§ 2862 et seq. herein.

of the policy limited the term "explosion" to "rupture of the skull of the shell or flues of the boiler or boilers, caused by the action of steam." The policy also provided that the insurer should not be liable for any "explosion or loss caused by the burning of the building, . . . or for any loss or damage by fire resulting from any cause whatever." A fire occurred, and while endeavoring to put it out certain inflammable materials which were stored, upon coming in contact with the flames, exploded. In an action to recover it was held that the loss was not by "accident" within the meaning of the policy, and within the exception, and that the insurer was not liable for the loss caused directly by the explosion and from the fire which ensued.[13]

§ 2633a. **Excepted risks: automobiles or motor vehicles: fires: violation of law: collision.**—A fire burning an automobile originates within the vehicle, within the meaning of an exception of fires so originating in a policy on it, where, in consequence of the machine's running into a ditch, gasolene leaks from the tank, and the vapor penetrates the lamp forming the headlight and explodes, causing the fire.[14] Under a Texas decision an exception of liability where an automobile is being operated in violation of law, precludes recovery over against insurer where insured's minor son, while driving his machine within the city limits contrary to the provision of an ordinance, runs over and kills a child; provided, however, such ordinance is valid.[15]

In a Connecticut case, however, the policy agreed to indemnify assured against loss or damage suffered by him on account of bodily injuries accidentally sustained by others by reason of his ownership and maintenance of an automobile. It was also stipulated that the agreement should not apply while any such automobile was driven or manipulated by any person "under the age fixed by law or under the age of sixteen in any event." While insured's machine was being driven in his business by his son, who was at the time between sixteen and seventeen years of age, an accident occurred which resulted in injury to another boy causing his death and insured was compelled to pay damages. Said son was unlicensed and was unaccompanied by a licensed operator. The statute expressly permitted a person sixteen years old or more

[13] Chicago Sugar Refinery Co. v. American Steam Boiler Co. 57 Fed. 294, 6 C. C. A. 336, 21 L.R.A. 572, rev'g 48 Fed. 198, 21 Ins. L. J. 59.

[14] Preston v. Aetna Ins. Co. 193 N. Y. 142, 19 L.R.A.(N.S.) 133, 85 N. E. 1006, 103 N. Y. Supp. 638, 640, 118 App. Div. 784, 788.

On insurance covering automobiles or indemnifying against injury or liability for injury caused thereby, see notes in 44 L.R.A.(N.S.) 70; 51 L.R.A.(N.S.) 583; and L.R.A.1915E, 575.

[15] Royal Indemnity Co. v. Schwartz, — Tex. Civ. App. —, 172 S. W. 581.

even though unlicensed to drive a motor-vehicle if accompanied by a licensed operator. The first part of the statute taken by itself, in effect fixed the age at which a person could operate a motor-vehicle at eighteen years. It was held that the policy exception had reference solely and exclusively to the minimum age, not less than sixteen, at which one might lawfully drive a motor-vehicle, and not at all to the question whether the operator had complied with the other requirements of the law, and also that sixteen was what must be regarded, under the statute, as the minimum age fixed by law; and, therefore, recovery was not precluded, under said proviso, for a loss sustained by insured while his car was driven by an unlicensed person over sixteen, merely because of the non-observance, upon that particular occasion, of the statutory requirement that a licensed operator should accompany the unlicensed driver, as said requirement had no relevancy whatever to the age of the driver. It was also decided that no one under the age of sixteen could operate a motor-vehicle upon the state highways.[16] In this connection and as bearing somewhat upon this point, it is held that to entitle an unlicensed person, driving an automobile to the protection of a statute permitting an unlicensed person, if riding with or accompanied by a licensed chauffeur or operator, there must be a knowledge on the part of both parties of the existence of a relation like that of operator without a license, and licensed chauffeur or operator accompanying him, but if such knowledge exists the operator will be protected, although it was not expected that one would exercise any supervision over the other if the operator was in fact competent.[17]

If damages to an automobile resulting from collision due wholly or in part by upsets are excluded under the policy, a recovery is not precluded where an automobile ran off a highway bridge, was precipitated in the water below, and landed upside down in the bottom of a stream, the collision in such case not being due to the upset, but the latter being the result of the collision. But there is a collision with the water and bed of the stream in such

[16] Brock v. Travelers Ins. Co. 88 Conn. 308, 91 Atl. 279, Pub. acts 1911, c. 85, sec. 5. ("The manifest purpose was to excuse from liability only in case the operator was too young, either in the opinion of the defendant or under the terms of the statute, to operate a motor vehicle upon the public highway."—Thayer, J.).

[17] Bourne v. Whitman, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404.

On operating automobile without a license, see notes in 23 L.R.A.(N.S.) 561; 25 L.R.A.(N.S.) 734; 35 L.R.A. (N.S.) 699; 41 L.R.A.(N.S.) 308; 52 L.R.A.(N.S.) 801; L.R.A.1915D, 628; and L.R.A.1916E, 1225.

case where the policy insures against accidents to the automobile resulting from collision.[18]

§ 2634. **Plate-glass: fire: explosion: tornado insurance.**—Injury to plate-glass as such is declared in Massachusetts to be more particularly within that class of insurance known as "casualty insurance," rather than to belong to what is known in the statutes of that state as "accident insurance."[19] A policy upon plate glass which excludes liability for loss or damage resulting directly or indirectly from fire, whether upon the insured premises or not, does not preclude recovery for breakage occasioned by fire upon other premises which caused an explosion of dynamite by reason of the intense heat consequent upon said fire, which also broke plate glass in various other parts of the city. Such provision has application to a fire policy loss and not to plate glass and was not intended to avoid liability for damage by explosives.[20] But in Wisconsin under a like provision an explosion of dynamite upon other premises caused by fire, precluded recovery under a policy insuring against loss by breakage of glass.[1] Where a policy insured against breakage through accident of plate glass in a certain building and excludes liability for loss or damage which may happen by or in consequence of any fire or by the blowing up of any building and the glass is broken and the loss is caused by an explosion of gasolene used for cleaning clothes and ignited by a match or light in the room, it is held that the breakage of the glass was not occasioned by or in consequence of any fire nor by a blowing up of the building and therefore insurer was liable.[2] The destruction of a plate-glass front which is immovable is a peril within a tornado insurance policy, although the policy exempts the insurers from liability for injury to plate-glass in doors and windows of nine square feet or more unless the same is separately and specifically insured, and this is so even though the plate-glass front in question exceeds the size specified.[3]

[18] Harris v. American Casualty Co. 83 N. J. L. 641, 44 L.R.A.(N.S.) 70n, 85 Atl. 194.

[19] Employers' Liability Ins. Corp. v. Merrill, 155 Mass. 404, 29 N. E. 529, per the court, under acts Mass. 1887, c. 214, sec. 29, cl. 5.

[20] Metropolitan Casualty Ins. Co. v. Bergheim, 21 Colo. App. 527, 122 Pac. 812, 41 Ins. L. J. 1107. See § 2586 herein.

[1] Jones v. Metropolitan Ins. Co. 144 Wis. 66, 128 N. W. 280, 40 Ins. L. J. 53. See Frisbie v. Fidelity & Casualty Co. 133 Mo. App. 30, 112 S. W. 1024.

[2] Vorse v. Jersey Plate Glass Ins. Co. 119 Iowa, 555, 60 L.R.A. 838, 97 Am. St. Rep. 330, 93 N. W. 569, 32 Ins. L. J. 359.

[3] Hale v. Springfield Fire & Marine Ins. Co. 46 Mo. App. 508.

As to risks and losses: wind, tornado, hurricane, see § 2825 herein.

On causes of loss covered by cyclone, hurricane, tornado, or wind-

**§ 2634a. Automatic fire extinguishers: exception of injury from leakage: earthquakes, cyclones, etc.**—An exception in a policy insuring against loss caused by the accidental discharge of an automatic fire extinguisher, of injury from leakage resulting from earthquakes or cyclones, or from blasting or explosions, will include loss from leakage caused by a wind storm resembling more technically a tornado than a cyclone, and causing the injury by its high velocity rather than its circular motion.[4]

storm insurance, see note in L.R.A. 1915B, 1094.

[4] Maryland Casualty Co. v. Finch, 147 Fed. 388, 77 C. C. A. 566, 8 L.R.A.(N.S.) 308 (annotated on meaning of "cyclone," "tornado," or other kind of windstorm in an insurance policy).

# CHAPTER LXXI.

## EXCEPTED RISKS AND LOSSES, CONTINUED—SUICIDE.

§ 2635. Effect of words "sane or insane" in suicide clause.
§ 2635a. Same subject: validity and nature of stipulation.
§ 2635b. Same subject: effect of voluntary starvation.
§ 2636. "Sane or insane:" that suicide committed deliberately or hastily immaterial.
§ 2637. Suicide "felonious or otherwise, sane or insane."
§ 2638. Suicide while intoxicated.
§ 2639. Suicide: accidental or unintentional self-killing.
§ 2640. Doubt as to "suicide" or accidental or unintentional self-killing.
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§ 2642. Suicide as defense in connection with statute.
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§ 2643. Suicide: option reserved to pay amount of insurance or refund premiums: recovery limited to amount of premiums.
§ 2644. Stipulation as to part payment or incontestability after specified time.
§ 2644a. Validity of stipulations limiting amount of recovery or time within which policy void for suicide: incontestability.
§ 2644b. Suicide: incontestability after specified time: substituted policy or new policy.
§ 2644c. Stipulation that liability suspended while insured insane: distinction.
§ 2645. Suicide: by-law as part of contract.
§ 2646. Taking his own life by unlawful act: dies by his own hand, etc.: by-laws.
§ 2647. Amendments or changes in by-laws, etc.: adoption of by-law against suicide after contract made.
§ 2648. Suicide: policy to be void in case of death by violation of law.
§ 2648a. Suicide: external, violent and accidental means.
§ 2649. Suicide: intentional injuries by assured or another.
§ 2650. Suicide in absence of stipulation: contra.
§ 2651. Suicide by insane person in absence of stipulation against suicide.
§ 2652. Suicide where policy obtained with that intent: fraud: creditor.

§ 2653. Suicide for benefit of assured's estate or third person.
§ 2554. Suicide: temporary insanity.
§ 2655. Suicide: temporary insanity: "sane or insane, voluntary or involuntary."
§ 2656. Suicide: temporary insanity, "felonious or otherwise, sane or insane."
§ 2657. Suicide: "self-destruction," "in any form:" "disease:" "voluntary act of insured."
§ 2658. Stipulation as to "suicide:" "death by his own hand," and the like.
§ 2659. "Suicide" and like clauses: rule in United States Supreme Court.
§ 2660. Same subject: English rule.
§ 2661. Same subject: rule in this country.
(a) Same subject: rule and cases in United States courts.
(b) Same subject: English rule and cases.
(c) Same subject: rule in Alabama.
(d) Same subject: rule in Georgia.
(e) Same subject: rule in Illinois.
(f) Same subject: rule in Indiana.
(g) Same subject: rule in Iowa.
(h) Same subject: rule in Kentucky.
(i) Same subject: rule in Louisiana.
(j) Same subject: rule in Maine.
(k) Same subject: rule in Maryland.
(l) Same subject: rule in Massachusetts.
(m) Same subject: rule in Michigan.
(n) Same subject: rule in Minnesota.
(o) Same subject: rule in Missouri.
(p) Same subject: rule in New York.
(q) Same subject: rule in Ohio.
(r) Same subject: rule in Pennsylvania.
(s) Same subject: rule in Tennessee.
(t) Same subject: rule in Texas.
(u) Same subject: rule in Vermont.
§ 2661a. Whether suicide question for court or jury.
§ 2661b. Waiver of defense of suicide.

**§ 2635. Effect of words "sane or insane" in suicide clause.**—In order to avoid any question concerning what is meant by the words "suicide" or "death by his own hand," or by words of like effect, the insurers have generally added the words "sane or insane" to the proviso. Under these words it is held that if the insured kills himself the policy is avoided, though he may have been of unsound mind and wholly unconscious of the moral nature of the

act done;[5] and the degree of insanity is immaterial where one intentionally takes his own life.[6]

Where a policy of life insurance provided that in case of the death of the insured by his own act or intention, whether "sane or insane," the company should be liable only for the net value of the policy at that time, it was held that this provision embraced an intentional self-destruction by a man so far insane that he was conscious at the time of the physical nature and consequences of his act, and intended to destroy his life, even though he was not conscious of the moral quality or consequences of the act.[7] In a Michigan case[8] the proviso was "died by his own hand, sane or insane," and the court, per Champlin, J., approved the opinion of Davis, J., in Bigelow v. Berkshire Life Insurance Company,[9]

[5] *United States.*—Bigelow v. Berkshire Life Ins. Co. 93 U. S. (3 Otto) 284, 23 L. ed. 918, 19 Am. Rep. n. 628; Supreme Tent Knights of Maccabees of the World, 142 Fed. 678, 73 C. C. A. 668, 35 Ins. L. J. 377; Hopkins v. Northwestern Life Assur. Co. 99 Fed. 190, 40 C. C. A. 1, 29 Ins. L. J. 794; Chapman v. Republic Life Ins. Co. 6 Biss. (U. S. C. C.) 238; Fed. Cas. No. 2,606; Salentine v. Mutual Benefit Life Ins. Co 24 Fed. 159, rev'd 136 U. S. 644, 34 L. ed. 550, 10 Sup. Ct. 1071.

*Georgia.*—Mutual Life Ins. Co. of N. Y. v. Durden, 9 Ga. App. 797, 72 S. E. 295 (see Code Ga. 1910, sec. 2500).

*Illinois.* — Seitzinger v. Modern Woodmen of America, 204 Ill. 58, 68 N. E. 478; Dickerson v. Northwestern Mutual Life Ins. Co. 200 Ill. 270, 65 N. E. 694.

*Iowa.*—Tuttle v. Iowa State Traveling Men's Assoc. 132 Iowa, 652, 7 L.R.A.(N.S.) 223, 104 N W. 1131; Searth v. Security Mutual L. Ins. Soc. 75 Iowa, 346, 39 N. W. 658. *Examine* Van Norman v. Modern Brotherhood of America, 143 Iowa, 536, 121 N. W. 1080.

*Kentucky.*—Interstate Business Men's Assoc. v. Atkinson, 165 Ky. 532, L.R.A.1915E. 656, 177 S. W. 254.

*New York.* — De Gorgorza v. Knickerbocker Life Ins. Co. 65 N. Y. 232.

*North Carolina.*—Spruill v. Northwestern Mutual Life Ins. Co. 120 N. Car. 141, 27 S. E. 39, 26 Ins. L. J. 881.

*Wisconsin.*—Pierce v. Travelers' Life Ins. Co. 34 Wis. 389.

See notes 35 L.R.A. 258, on insanity as affecting condition as to suicide, and 17 L.R.A.(N.S.) 260, on effect of words "sane or insane," or other words relating to mental condition in suicide clause in policy.

On construction and effect of provision against liability for injury to or death of insured while or when insane, see note in L.R.A.1915E, 657.

[6] Seitzinger v. Modern Woodmen of America, 204 Ill. 58, 68 N. E. 478; Spruill v. Northwestern Mutual Life Ins. Co. 120 N. Car. 141, 27 S. E. 39, 26 Ins. L. J. 881; Billings v. Accident Ins. Co. 64 Vt. 78, 17 L.R.A. 89, 33 Am. St. Rep. 913, 24 Atl. 656; Blackstone v. Standard Life & Accident Ins Co. 74 Mich. 592, 611, 3 L.R.A. 486, 42 N. W. 156, per Long, J., *quoted* from under this section.

[7] Adkins v. Columbian Life Ins. Co. 70 Mo. 27, 35 Am. Rep. 410; Interstate Business Men's Accident Assoc. v. Atkinson, 165 Ky. 532, L.R.A. 1915E. 656, 177 S. W. 254.

[8] Streeter v. Western Union Mutual Accident Ins. Soc. 65 Mich. 199, 8 Am. St. Rep. 882, 31 N. W. 779.

[9] 93 U. S. 284, 23 L. ed. 918, 19 Am. Rep. note 628.

and declared that "the policy covers all conscious acts of the insured by which death by his own hand is compassed, whether he was at the time sane or insane. If the act was done for the purpose of self-destruction; it matters not that the insured had no conception of the wrong involved in its commission." So also in a subsequent case in this state,[10] under a condition against "suicide . . . whether the member at the time of committing suicide be sane or insane," it was held that if the insured was aware of the physical consequences of his act, the policy was avoided, though he might be insane, and the court declared that if insured had sufficient intelligence to adjust a rope and hang himself, he had enough "'capacity' to understand the physical nature and consequences of his act." Under the added provision "sane or insane," "no kind or degree of insanity will prevent an avoidance, and the courts, not only in England but in this country, have almost universally held that with such provision in policies of life insurance the policies are void if insured comes to his death by his own hand." [11] But if, owing to uncontrollable physical and mental weakness, the assured takes an overdose of whisky, which kills him, this is not dying by his own hand, sane or insane.[12] In a case in Vermont,[13] where an accident policy excepted death from suicide, "sane or insane," it was held that the court would not attempt to measure the degrees of insanity, as the provision referred to suicide without regard to the insured's mental condition when he committed the act, and that a recovery was precluded even though assured acted under an insane impulse overcoming his will: In a New York case [14] the condition "die by his own hand, sane or insane," is held to cover suicide by one utterly bereft of reason.[15] In an Illinois case the condition was, "that death by

[10] Sabin v. Senate of the National Union, 90 Mich. 177, 51 N. W. 202, per Morse, J.

[11] Blackstone v. Standard Life & Accident Ins. Co. 74 Mich. 592, 611, 3 L.R.A. 486, 42 N. W. 156, per Long, J., in opinion.

[12] Northwestern Mutual Life Ins. Co. v. Hazlett, 105 Ind. 212, 55 Am. Rep. 192, 4 N. E. 582.

[13] Billings v. Accident Ins. Co. of North America, 64 Vt. 78, 33 Am. St. Rep. 913, 17 L.R.A. 89, 24 Atl. 656, 21 Ins. L. J. 605, 46 Alb. L. J. 217 (two judges dissenting).

[14] De Gorgorza v. Knickerbocker Life Ins. Co. 65 N. Y. 232. See note 18 below.

[15] In the case of Bigelow v. Berkshire Ins. Co. 93 U. S. 284, 23 L. ed. 918, decided in 1876, and the condition was, "shall die by suicide (sane or insane)," and the court, per Davis, J., said: "For the purposes of this suit, it is enough to say that the policy was rendered void if the insured was conscious of the physical nature of his act and intended by it to cause his death, although at the time he was incapable of judging between right and wrong and of understanding the moral consequences of what he was doing."

self-destruction, whether sane or insane, or death caused or superinduced by drunkenness or by the use of narcotics or opiates within three years from the date of the policy herein applied for, are risks not assumed by the society." The defense that insured intentionally destroyed his own life by poison administered by his own hand was relied on, but the verdict for plaintiff was set aside as against the evidence. The question concerning what constitutes suicide was not discussed; the court, per Boggs, P. J., said: "We content ourselves therefore with the declaration that the evidence established the fact to be that the deceased voluntarily and intentionally ended his own life. Instructions as to the liability of the society under such stipulations in a policy when death is caused by an insane impulse were not asked. There was no evidence on which to base them." [15a] In Massachusetts the words "sane or insane" covers every case of suicide regardless of insured's state of mind.[16] But sanity is presumed and insanity is not established by the fact alone that one takes his own life.[17] Under a New York decision in order to constitute suicide, the person must be of years of discretion and of sound mind.[18]

**§ 2635a. Same subject: validity and nature of stipulation.**—Stipulation voiding the policy where insured commits suicide "sane or insane" and the like, are reasonable, not against public policy, valid and enforceable.[19] So it was early declared in the United States Supreme Court that insurer may limit its liability, if assured is in proper language told of the extent of the limitation, and it is not against public policy; [20] that insurer may stipulate against intentional self-destruction; and also that a stipulation in a life policy that it shall be void if the insured shall die by

[15a] See § 2637 herein.

[16] Moore v. Northwestern Mutual Life Ins. Co. 192 Mass. 468, 7 Am. & Eng. Ann. Cas. 656, 78 N. E. 488, 35 Ins. L. J. 769.

[17] Ledy v. National Council of Knights & Ladies of Security, 129 Minn. 137, 151 N. W. 905, L.R.A. 1915D, 1095n. See also Mutual Life Ins. Co. of N. Y. v. Durden, 9 Ga. App. 797, 72 S. E. 295 (code Ga. 1910, sec. 2500).

As to presumption against insanity, see § 3775 herein.

[18] Weber v. Supreme Tent Knights of Maccabees of the World, 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258. See note 14 above.

[19] Somerville v. Knights Templars & Masons Life Indemnity Co. 11 App. D. C. 417, 25 Wash. L. Rep. 734; De Voney v. Modern Woodmen of America, — Ill. App. —, 38 Nat. Corp. Rep. 408; Northwestern Mutual Ins. Co. v. Churchill, 105 Ill. App. 159, 164; Tuttle v. Iowa State Traveling Men's Assoc. 132 Iowa, 652, 7 L.R.A.(N.S.) 223, 104 N. W. 1131; Robinson v. United Order of Foresters, 93 Minn. 24, 100 N. W. 381, 33 Ins. L. J. 945.

[20] Bigelow v. Berkshire Life Ins. Co. 93 U. S. 284, 23 L. ed. 918. *Cited* in Ætna Life Ins. Co. v. Vandecar, 86 Fed. 282, 289, 30 C. C. A. 48, 55, 57 U. S. App. 446.

suicide, sane or insane, is valid; and even though this was not the exact point decided still it was logically an essential of that point and it has been sanctioned and given force by subsequent citations.[1]

Such stipulations are a condition subsequent,[2] although in Eng-

[1] Bigelow v. Berkshire Life Ins. Co. 93 U. S. 284, 23 L. ed. 918. *Cited* in:

*United States.*—McDowell v. Fraternal Union, 117 Fed. 1006, 53 C. C. A. 674; Mutual Life Ins. Co. v. Kelly, 114 Fed. 268, 280, 52 C. C. A. 156; Tickin v. Fidelity & Casualty Co. 87 Fed. 543, 545; Kelley v. Mutual Life Ins. Co. 75 Fed. 642; Wolf v. Mutual Benefit Life Ins. Co. Fed. Cas. No. 17,935a.

*Alabama.*—Supreme Commandery Knights of Golden Rule v. Ainsworth, 71 Ala. 436, 439, 46 Am. Rep. 332.

*District of Columbia.*—Somerville v. Knights Templars' & Masons' Life Indemnity Assoc. 11 App. D. C. 417, 422.

*Illinois.*—Dickerson v. Northwestern Mutual Life Ins. Co. 200 Ill. 270, 274, 65 N. E. 694; Supreme Lodge Order of Mutual Protection v. Gelbke, 198 Ill. 365, 369, 64 N. E. 1058.

*Indiana.* — Northwestern Mutual Life Ins. Co. v. Hazlett, 105 Ind. 212, 218, 55 Am. Rep. 192, 4 N. E. 582.

*Kansas.*—Hart v. Modern Woodman, 60 Kan. 678, 683, 72 Am. St. Rep. 380, 57 Pac. 936.

*Kentucky.*—Manhattan Life Ins. Co. v. Beard, 112 Ky. 455, 461, 66 S. W. 35; Mutual Benefit Life Ins. Co. v. Daviess, 87 Ky. 541, 553, 9 S. W. 812.

*Michigan.*—Sabin v. Senate National Union, 90 Mich. 177, 180, 51 N. W. 102; Streeter v. Western Union Mutual Life & Accident Society, 65 Mich. 199, 301, 8 Am. St. Rep. 882, 31 N. W. 779.

*Minnesota.*—Robeson v. United Order of Foresters, 93 Minn. 26, 100 N. W. 381.

*Missouri.*—Adkins v. Columbia Life Ins. Co. 70 Mo. 27, 31, 35 Am. Rep. 410; Brower v. Supreme Lodge National Reserve Assoc. 74 Mo. App. 490, 495; Sparks v. Knights Templars' & Masons' Life Indemnity Co. 61 Mo. App. 109, 114.

*Nebraska.*—Scherar v. Prudential Ins. Co. 63 Neb. 530, 535, 56 L.R.A. 611, 614, 88 N. W. 687.

*New York.*—Mauch v. Supreme Tribe of Ben Hur, 91 N. Y. Supp. 367, 11 App. Div. 49, 51.

*North Carolina.*—Spruill v. Northwestern Mutual Life Ins. Co. 120 N. C. 121, 146, 27 S. E. 39.

*Pennsylvania.*—Hall v. Mutual Reserve Fund Life Assoc. 19 Pa. Super. Ct. 31, 34.

*Ohio.*—Schultz v. Insurance Company, 40 Ohio St. 217, 221, 48 Am. Rep. 676.

*Pennsylvania.*—Chambers v. Supreme Tent Knights Maccabees of the World, 200 Pa. 244, 245, 86 Am. St. Rep. 716, 49 Atl. 784; Tritschler v. Keystone Benefit Mutual Assoc. 180 Pa. 205, 207, 36 Atl. 734.

*South Carolina.*—Latimer v. Sovereign Camp Woodmen of the World, 62 S. C. 145, 147, 40 S. E. 155.

*Texas.*—Parish v. Mutual Benefit Life Ins. Co. 19 Tex. Civ. App. 457, 461, 49 S. W. 153.

*Vermont.*—Billings v. Accident Ins. Co. 64 Vt. 78, 82, 17 L.R.A. 92, 33 Am. St. Rep. 913, 24 Atl. 656.

*Wisconsin.*—Johns v. Northwestern Mutual Relief Assoc. 90 Wis. 332, 336, 41 L.R.A. 539, 63 N. W. 276.

*Distinguished* in Kelley v. Mutual Life Ins. Co. 109 Fed. 56, 61.

*Held obiter,* Latimer v. Sovereign Woodmen Camp of the World, 62 S. C. 145, 161, 40 S. E. 155.

See also §§ 2644, 2644a herein.

[2] Ferris v. Court of Honor, 152 Mich. 322, 116 N. W. 448.

land, in a case of a warranty against suicide there has been some discussion upon the point whether such warranty was a condition, and if so whether it was a condition precedent or subsequent, and it was held to be a condition of liability.[2a]

§ 2635b. **Same subject: effect of voluntary starvation.**—If a life policy provides that it shall be void "if the insured should die by self-destruction, whether sane or insane," his beneficiary cannot recover if it is shown that voluntary starvation caused or hastened the insured's death, although he was at the time fatally ill with scurvy, which would have ultimately caused his death.[3]

§ 2636. **"Sane or insane:" that suicide committed deliberately or hastily immaterial.**—If a policy stipulates for exemption from liability on the part of the insurer in case of suicide or self-destruction, sane or insane, it is immaterial whether the act was committed deliberately or hastily.[4] In the case so deciding the policy provided against "self-destruction by the insured whether sane or insane." The court below instructed the jury that if assured died from arsenic poison, such fact would not be sufficient to defeat the policy, "unless you also find from all the evidence in this case by a fair preponderance that said poison was deliberately and wilfully taken by said Koehler with the intent to commit suicide," and the court, per Davis, J., on appeal says: "It was not incumbent on the appellant to prove that the act of self-destruction was with careful consideration. If the poison was hastily taken by him with the intent to commit suicide, the condition of the policy was broken. The provision in the policy is that self-destruction, whether sane or insane, will avoid the policy. All that appellant was required to prove on this question was that said poison was taken by said Koehler with intent to commit suicide. If it was taken hastily or deliberately with such intent, whether sane or insane, there would be no recovery on the policy. The conscious and voluntary act on the part of the assured in taking poison with intent to take his own life, which resulted in death, was sufficient to defeat the claim of insurance, whether such act was committed deliberately or not."

§ 2637. **Suicide "felonious or otherwise, sane or insane."**—Under a provision in a policy that the insurers are "not liable in case the insured shall die by suicide, felonious or otherwise, sane or insane," the insurers will be discharged if the death is caused by the volun-

[2a] Ellinger & Co. v. Mutual Life Ins. Co. of N. Y. [1905] 1 K. B. 31, 74 L. J. K. B. 39, 53 W. R. 134, 21 T. L. 20, aff'g [1904] 1 K. B. 832, 73 L. J. K. B. 546, 90 L. T. 484, 52 W. R. 366, 9 Comm. Cas. 217, 20 T. L. R. 368. See § 1951a herein.

[3] Insurance Co. v. Fox, 106 Tenn. 347, 82 Am. St. Rep. 885, 61 S. W. 62.

[4] Union Central Life Ins. Co. v. Hollowell, 14 Ind. App. 611, 43 N. E. 277.

tary or willful act of the insured, when he is able to understand the physical nature of the act and the consequences thereof. The fact that he does not understand the moral character of the act is not relevant, except in so far as may help to ascertain the extent of his capacity to understand the physical nature of the act. Such clause also includes every case of intentional self-destruction, and every case of suicide which is a voluntary act, and the natural, ordinary, and direct tendency of which is to produce death.[5] So under a federal case if a policy provides that it shall be void in case the assured dies by "self-destruction, felonious or otherwise," the proviso is held to include self-destruction, sane or insane, as equivalent thereto.[6]

§ 2638. **Suicide while intoxicated.**—If the insured, while in an intoxicated condition, takes poison with the intent of destroying his life, the insurers will be discharged, though the intent is only the intent of a drunken person. It is nevertheless suicide or a dying by his own hand.[7]

§ 2639. **Suicide: accidental or unintentional self-killing.**—Accidental or unintentional self-killing is not suicide within the meaning of a clause excepting the insurer from liability in such cases. This has been universally so held and admitted. This rule may be illustrated by those cases where assured has accidentally been killed by his fowling-piece, or by drinking poison by mistake. So assured, while dazed or delirious from pain, or one diseased in mind, might meet with accidental death, he himself by his own act contributing thereto, as where one in the frenzy of delirium tears off a bandage from a wound or artery, causing death; but such acts would not be suicide within a provision against suicide. And even though the policy stipulates against liability of the insurer in case "the assured shall die by suicide, whether the act be voluntary or involuntary," such exception does not extend to death caused by an accident, nor does the fact that assured died under peculiar and suspicious circumstances aid the assurer where the jury finds that he did not commit suicide, even though the precise cause of death is left to conjecture, and there is no evidence concerning whether it

[5] Pierce v. Travelers' Ins. Co. 34 Wis. 389; Suppiger v. Covenant Mutual Benefit Assoc. 20 Ill. App. 595. The condition here was "die by reason of any act of self-destruction whatever, whether at the time of committing the same he be sane or insane, whether felonious or otherwise." The court holds that if at the time of the commission of the act insured was insane to a degree that he was unconscious of the act or was driven thereto by an insane irresistible impulse the condition did not attach.

[6] Riley v. Hartford Life & Annuity Ins. Co. 25 Fed. 315.

[7] Equitable Life Assurance Soc. v. Paterson, 41 Ga. 338, 5 Am. Rep. 535.

arose from poisoning or not.[8] Again, "where the parties insert in the contract 'that if the death is caused by the insured, sane or insane,' then there can be no recovery if he committed the fatal act otherwise than accidentally. Of course if it was accidental it was not his act."[9]

Intentional homicide, however, is an accident within the meaning of an accident policy, if the insured was in no wise responsible for his death;[10] so where one in a fit of delirium or other condition of irresponsibility, without intention to take his own life, does some act from which his death ensues, such death is by accident, not by suicide.[11]

The term "taking poison" is an exception of an accident policy, and is limited to the intentional taking of poison, although death so caused is covered by the clause relating to suicide, where the entire exceptions of the policy recognize that death may result wholly or partly, directly or indirectly, from voluntarily taking poison without suicidal intent.[12] So a policy conditioned to be void if the insured "dies by his own hand or act, voluntary or otherwise," is not avoided by his innocently taking a fatal overdose of medicine while sane.[13] And the death of a person resulting from morphine administered by himself, is in one sense death from his own hand, but it is not necessarily suicide.[14] So a stipulation against liability for death from suicide sane or insane does not defeat recovery on a policy, although the insured died from an overdose of morphine, taken by himself, where the company fails to establish by a preponderance of the evidence that the self-destruction was intention-

[8] Edwards v. Travelers' Life Ins. Co. 20 Fed. 661, aff'd 122 U. S. 457, 30 L. ed. 1137, 7 Sup. Ct. 1249, 22 Blatchf. (U. S. C. C.) 225; Pierce v. Travelers' Ins. Co. 34 Wis. 389. The condition here was "die by suicide, felonious or otherwise, sane or insane."

On intentional injuries as constituting an accident within policy, see notes in 30 L.R.A. 207, and 48 L.R.A. (N.S.) 524.

[9] Riley v. Hartford Life & Annuity Ins. Co. 25 Fed. 315, 316, per Treat, J.

[10] Furbush v. Maryland Casualty Co. 131 Mich. 234, 100 Am. St. Rep. 605, 91 N. W. 435.

[11] Cady v. Fidelity & Casualty Ins. Co. 134 Wis. 322, 17 L.R.A.(N.S.) 260, 113 N. W. 967.

On when death or injury may be deemed to have been caused by accidental means, though the voluntary act of the insured was the primary cause thereof, see notes in 5 L.R.A. (N.S.) 657; L.R.A.1915E, 127, and L.R.A.1916B, 1021.

[12] Travelers' Ins. Co. v. Dunlap, 160 Ill. 642, 52 Am. St. Rep. 355, 43 N. E. 765.

On death from taking poisonous substance as accident or accidental means, see note in L.R.A.1916A, 481.

[13] Penfold v. Universal Life Ins. Co. 85 N. Y. 317, 29 Am. Rep. 660.

[14] Brignac v. Pacific Mutual Life Ins. Co. 112 La. 574, 66 L.R.A. 322, 36 So. 595.

al.[15] And taking an overdose of laudanum, by accident or mistake, while intoxicated is not dying by one's own hand.[16]

Although accident rather than suicide will be presumed—still, where the wound was in the right temple of assured who was found dead with a pistol in his right hand and close by the bed on which the body of his cousin lay, who had also committed suicide, and to whom he was greatly attached if not affianced a verdict that his death was accidental was held not sustained.[17] But accident, and not suicide, may be found to be the cause of death where an insured person, who was sane and right handed, is found dead with a pistol wound behind his left ear, which resulted in instant termination of volition, and the only weapon with which he could have inflicted the injury was on his right side, while there is an absence of such scorching of hair and powder burn as must have resulted had he inflicted the injury.[18] In Keels v. Mutual Reserve Fund Association [19] the condition was "death of a member by his own hand, sane or insane, voluntary or involuntary." The assured was found dead with a bullet-hole in his brain and a pistol in his open hand. He had been suffering from softening of the brain, and showed great and increasing mental aberration. He was found lying inside his pasture fence, the rails of which were ten feet high, and apparently he had climbed over it, and the exception was held not to include death from accident or unintentional self-killing. And a policy providing against the insurer's liability in the case of the death of insured "by his own hand or act, whether voluntary or involuntary, sane or insane, at the time," is deemed to cover death resulting from accidental injury inflicted upon himself by insured.[20] In an Illinois case,[1] the condition was, "shall die in con-

[15] Brown v. Sun Life Ins. Co. — Tenn. —, 51 L.R.A. 252, 57 S. W. 415.

[16] Equitable Life Assurance Soc. v. Paterson, 41 Ga. 338, 5 Am. Rep. 535, per McCay, J.

[17] Sovereign Camp, Woodmen of World v. Hruby, 70 Neb. 5, 96 N. W. 998.

As to presumption against suicide, see §§ 2865, 3773–4 herein.

[18] Ætna Life Ins. Co. v. Milward, 26 Ky. L. Rep. 589, 68 L.R.A. 285, 68 S. W. 364.

[19] 29 Fed. 198.

[20] Home Benefit Assoc. v. Sargent, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. 332. *Cited* in Dickerson v. Northwestern Mutual Life Ins. Co. 200 Ill. 270, 274, 65 N. E. 694; Supreme Lodge Order of Mutual Protection v. Gelbke, 198 Ill. 365, 370, 64 N. E. 1058; Travelers' Ins. Co. v. Nitterhouse, 11 Ind. App. 155, 160, 38 N. E. 1110.

In Sargent v. Home Benefit Assoc. 35 Fed. 711, aff'd 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. 332, the condition was: "Death of the member by his own hand or act, whether voluntary or involuntary, sane or insane, at the time is a risk not assumed by the association." There was a question as to estoppel and evidence, and the evidence was not inconsistent with death by accident. The words of the court, however, bear upon the point in the text. They

sequence of a duel or of the violation of law . . . self-destruction of the person, whether voluntary or involuntary, sane or insane, at the time." Assured died from taking by mistake an overdose of laudanum. The court, per Bailey, P. J., said: "It is only where death results from an express design on the part of the deceased, or from some act which, though performed with no intention of producing death, is of itself culpably negligent, that the deceased can be charged with the responsibility of self-destruction. . . . Voluntary self-destruction obviously can mean nothing more than the taking of one's life purposely and intentionally. Involuntary self-destruction would then include all those cases where a person, without intending to accomplish his own death, carelessly and negligently does acts which may naturally and probably result, and do in fact result, in death. To go beyond this and relieve the insurers from liability in all cases where the acts of the insured, without design or negligence on his part, do in fact contribute to shorten or terminate his life would, in most cases, render life policies of very little value to the insured." In Mutual Life Insurance Company v. Lawrence,[2] it was held that instructions in this case limiting the effect of the condition to cases of gross negligence, and attempting to apply to this case the rules ordinarily applicable to that degree of negligence, were erroneous. Involuntary self-destruction is not "self-destruction."[3] In Connecticut Mutual Life Ins. Co. v. Smith[4] the condition was self-destruction of the insured, whether voluntary or involuntary, and whether he be sane or insane at the time." In this case it was alleged that the insured died by an act of self-destruction by poisoning himself. The replication was that assured did not at the time "purposely or intentionally poison himself and therefrom die by an act of self-destruction in manner and form as in said third plea alleged," etc. A demurrer to this replication was overruled, and was held by the appellate court properly so. The court, per Conger, P. J., said: "It is perversion of language and an absurdity to say that one can

are: "A man while dazed or delirious from pain might meet a self-inflicted but wholly accidental death. He might walk through a window, supposing it to be a door, or drink a poisonous draught, mistaking it for water, or discharge a pistol inadvertently, believing it to be some harmless instrument, or while holding it in hands rendered nerveless by the presence of disease, and yet a death so occasioned would not be within the clause in question:" Id. 714, per Coxe, J., *citing* Penfold v. Ins. Co. 85 N. Y. 317, 39 Am. Rep. 660.

[1] Lawrence v. Mutual Life Ins. Co. 5 Ill. App. 280.

[2] 8 Ill. App. 488.

[3] New Home Life Assoc. v. Hagler, 29 Ill. App. 437, *citing* and *quoting* Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. 99.

[4] 39 Ill. App. 569.

destroy himself by accident and with no intention so to do, unless it should be the direct result of negligence on his part. If a person accidentally fall into the water and is drowned, or take poison supposing it to be a harmless and proper drink and thereby dies, no one would think of saying that such person had died by an act of self-destruction." So an instruction making an accidental act of deceased which resulted in his death a defense is erroneous.[5] So "accident, mistake, or disease" are not included under the proviso "die by his own hand," etc.[6] Again, "all the authorities concur in the view that an unintentional and accidental taking of life is not within the meaning and intention of the clause," "shall die by his own hand or act."[7] So "dying by his own hand" does not cover self-killing through accident or mistake.[8] In Stormont v. Waterloo Life & Casualty Assurance Company,[9] Channell, B., charged the jury: "The question is now for you on the whole evidence whether he (assured) threw himself out of the window voluntarily or fell out of it involuntarily through confusion of the sense or giddiness." Upon the question of accident in such cases the court in Penfold v. Universal Life Insurance Company[10] says: "A purely accidental act committed by a sane person without any idea of injuring himself cannot be regarded as an act of self-destruction within the meaning of such contract." In Mutual Benefit Life Insurance Company v. Daviess,[11] it is declared by the court, per Pryor, J., that the shooting of himself by the insured while insane "must be regarded as the result of an accident, as much so as if the pistol had gone off unexpectedly to the insured and killed him."[12]

Negligence of an assured, resulting in his death, is not, within

[5] Gooding v. United States Life Ins. Co. 46 Ill. App. 307.

[6] Estabrook v. Union Mutual Life Ins. Co. 54 Me. 224–28, per Appleton, C. J.

[7] Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414, per Miller, J.; Blackstone v. Standard Life Ins. Co. 74 Mich. 592, 3 L.R.A. 486.

[8] Scheffer v. National Life Ins. Co. 25 Minn. 534, 537, per Gilfillan, C. J. See further Phillips v. Louisiana Equitable Life Ins. Co. 26 La. Ann. 404, 21 Am. Rep. 549; Scarth v. Security Mutual Life Ins. Co. 75 Iowa, 346, 349, 39 N. W. 658, per Rothrock, C. J.; Northwestern Mutual Life Ins. Co. v. Hazlett, 105 Ind. 212; Michigan Mutual Life Ins. Co. v. Nangle, 130 Ind. 79, 22 Ins. L. J. 434, 29 N. E. 393. See also Dean v. American Mutual Life Ins. Co. 4 Allen (86 Mass.) 102, 1 Big. L. & Acc. Ins. Cas. 195; Cooper v. Massachusetts Mutual Life Ins. Co. 102 Mass. 227, 3 Am. Rep. 451; Pollock v. United States Accident Assoc. 12 Week. Not. Cas. 251, 26 Alb. L. J. 464n, 59 Am. Dec. 489.

[9] 1 Fost. & F. 22.

[10] 85 N. Y. 317, 39 Am. Rep. 660.

[11] 87 Ky. 541, 553, 9 S. W. 812, 10 Ky. Law Rep. 577.

[12] See also Streeter v. Western Union Mutual Life & Accident Ins. Co. 65 Mich. 199, 202, 8 Am. St. Rep. 882, 31 N. W. 779, per Champlin, J.

the provision of a life policy that it does not include assurance against self-destruction or suicide.[13]

**§ 2640. Doubt as to "suicide" or accidental or unintentional self-killing.**—If there be a doubt, the evidence being conflicting and nearly evenly balanced, whether the death was caused by suicide or accident, the presumption is in favor of the accident.[14] So where the evidence points equally or indifferently to accident or suicide, the theory of accident is adopted.[15] As we have stated elsewhere the presumption is against suicide.[16] And when death may have resulted from accident, mistake, or suicide, it should not be presumed to be on account of suicide, but rather from accident or mistake.[17] So the force of the presumption based upon the love of life must, it is decided, be given effect against the defense of suicide unless the evidence discloses no other reasonable hypothesis.[18] And the claim of suicidal intent in stepping in front of a train may be excluded by the evidence.[19] It is also declared that: "The burden was on plaintiff of showing that the injury was accidental, and we think her proof, aided by the presumption of law against suicide, was sufficient to sustain her burden. The instinct of life is the strongest of animate nature, and the presumption against its willful violation is just as strong as the instinct itself, though the presumption is allowed to be overthrown by a mere preponderance of evidence against it." In this case insured was an unmarried man of twenty-two years of age, had spent the evening about town and had gone with one of his companions to the latter's room and while there found a loaded revolver and had it in his hand. An instant later

[13] Courtemanche v. Supreme Court Independent Order of Foresters, 136 Mich. 30, 64 L.R.A. 668, 112 Am. St. Rep. 345, 98 N. W. 749, 33 Ins. L. J. 481.

[14] Ingersoll v. Knights of Golden Rule, 47 Fed. 272. The condition in this case was "suicide whether sane or insane." The court cites the rule laid down by Harlow, J., in Travelers Ins. Co. v. McConkey, 127 U. S. 661, 667, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360, as to presumption against suicide. See also Macdonald v. Refuge Assur. Co. Lim. 17 Sess. Cas. Scot. 4th series (1890) 955; Winspear v. Accident Ins. Co. Lim. 6 Q. B. D. 42, 43 L. T. 459, 29 W. R. 116; Reynolds v. Accidental Ins. Co. 22 L. T. (N. S.) 820, 18 W. W. R. 1141.

On burden of proof as to suicide in action on life insurance policy, see notes in 4 L.R.A.(N.S.) 636, and 50 L.R.A.(N.S.) 1008; on conclusiveness of proof of death as to suicide, see note in 44 L.R.A. 853.

[15] Travelers' Ins. Co. v. Sheppard, 85 Ga. 802, per Bleekley, C. J. See Richardson v. Travelers' Ins. Co. 46 Fed. 843.

[16] See §§ 2865, 3773 herein.

[17] Hale v. Life Indemnity & Investment Co. 61 Minn. 516, 52 Am. St. Rep. 616, 63 N. W. 1108.

[18] Wood v. Sovereign Camp Woodmen of the World, 166 Iowa, 391, 147 N. W. 888; Life Ins. Co. of Virginia v. Hairston, 108 Va. 832, 128 Am. St. Rep. 989, 62 S. E. 1057. But *compare* §§ 3773, 3774 herein.

[19] Knights of Maccabees of the World v. Johnson, — Tex. Civ. App. —, 143 S. W. 718.

the revolver was fired and he was shot in a vital spot in his head. His companion did not see him at the time of the shot, but there were no powder burns and unless insured was then intoxicated nothing appeared to show a motive for suicide, and as above stated it was held that the jury were entitled to infer that the injury was accidental. The certificate provided that it should not cover or extend to any death, disability, or loss resulting from or in consequence of intentional self-inflicted injuries, fatal or otherwise, while sane or insane or while insured was under the influence of any intoxicating liquor or narcotic, whether such injury, loss, disability or death resulted in consequence of such influence or not. A judgment for recovery was affirmed conditionally on remittance of an excessive amount.[20]

**§ 2641. Suicide under clause benefiting third parties acquiring interests prior thereto.**—Insurance companies in England have in many cases qualified the condition in their policies that the policy shall be void if the insured dies by his own hand, by inserting a clause that in case a beneficial interest has become vested in a third party for valuable and pecuniary consideration then the policy shall be valid to the extent of such person's interest, subject to notice having been given to the company of the transaction as specified.[1] If a policy stipulates that the insurer shall not be liable, should assured "die by his or her own hands, . . . except to the extent of any bona fide interest therein which at the time of such death shall be vested in any other person or persons for his, her, or their own benefit, for a sufficient pecuniary or other consideration," such provision applies as well to the insurer as to a third person, and where the insured commits suicide in a temporary fit of insanity while the policy is in the insurer's hands as collateral security for money advanced by said insurer on a mortgage on real security, the policy is valid to the extent of the amount of indebtedness due to it on the mortgage at the time of such death of the insured.[2]

[20] Norman v. Order of Commercial Travelers of America, 163 Mo. App. 175, 145 S. W. 853, 41 Ins. L. J. 1090. See Knights Templars & Masons Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.

[1] White v. British Empire Mutual Life Assur. Co. L. R. 7 Eq. Cas. 394, 38 L. J. Ch. 53, 19 L. T. 306, 17 W. R. 26. See §§ 2643, 2644 herein.

[2] White v. British Empire Mutual Life Assur. Co. L. R. 7 Eq. Cas. 394, 17 Week. Rep. 26, 38 L. J. Ch. 53, 19 L. T. 306, *quoting* from Solicitors & General Life Ins. Soc. v. Lamb, 2 De G. J. & T. 251, 33 L. J. Ch. 426, 10 Jur. (N. S.) 739, 10 L. T. 792, 12 W. R. 941. See Wigan v. English & Scottish Law Life Assur. Assoc. 78 L. J. Ch. 120, [1909] 1 Ch. 291, 100 L. T. 34, 25 T. L. R. 81. *Compare* Ellinger & Co. v. Mutual Life Ins. Co. of N. Y. [1905] 1 K. B. 31, 74 L. J. K. B. 39, 53 W. R. 134, 21 T. L. R. 20, aff'g [1904] 1 K. B. 832, 90 L. T. 484, 53 W. R. 366, 9 Comm. Cas. 217, 20 T. L. R. 368.

So where a policy similarly conditioned as in the last case was deposited by assured with the plaintiffs as collateral for a loan to secure a debt owing by his firm, and also for other advances, and the notice required under the policy stipulation was given assurer, it was held, the assured having committed suicide, that plaintiffs might recover out of the policy the amount of their debt due at assured's death, and even though asssured's estate might be benefited to that extent, assurers were not entitled to payment, either ratably or primarily, out of other securities held by plaintiffs.[3] In the case so holding the condition was: "A policy effected either separately or jointly or with other lives upon the life of any person who shall die by his own hands or act, whether such act be felonious or otherwise, or shall die by duelling, or by the hands of justice, shall become void, and all moneys paid in respect thereof shall be forfeited by the company. But in case the beneficial interest in the policy has been vested in any other person, either originally or by such person having taken a legal or equitable assignment thereof or charge or lien thereon for a valuable and pecuniary consideration, the policy shall remain valid to the extent of the interest of such other party, provided that notice in writing of such assignment, charge, or lien shall have been delivered at the office of the company thirty days before the death of the party on whose life the insurance was effected." And where the condition is "If the lives assured, died by their own hands" the policy should be void "but without prejudice to the bona fide interests of third parties based upon a valuable consideration" a deed of assignment for an existing antecedent debt is not based upon a valuable consideration within the intent of such provision.[4] It has been contended that conditions of this kind are an encouragement to suicide, and were therefore void as against public policy; but this objection was not sustained in the cases where the point was raised, and such conditions were held to be valid.[5] The assignment in such cases is held to refer to an assignment by contract. Therefore, an assignee in bankruptcy, he being an assignee by operation of the law, is held not to be an assignee for a valuable consideration within the meaning of the provision.[6]

[3] City Bank v. Sovereign Life Assur. Co. (L. T. N. S. 1884) 50 L. J. R. 565.

[4] Wigan v. English & Scottish Life Assur. Assoc. (1909) 1 Chan. L. R. 291.

[5] See Moore v. Woolsey, 4 El. & B. 243, s. c. 24 L. J. Q. B. 40, 1 Jur. (N.S.) 468, 3 C. L. R. 207, 3 W. R. 66, 28 Eng. L. & Eq. 248.

That condition upholding suicide void, see § 2532 herein.

[6] Jackson v. Forster, 1 El. & E. 463, 29 L. J. Q. B. 8, 5 Jur. (N.S.) 1247, 7 W. R. 578.

**§ 2642. Suicide as defense in connection with statute.**—In a case in the Federal courts[7] the policy was executed and delivered in a state under a statute providing against suicide, except upon proof that assured contemplated suicide,[8] and it was held that the claim that the legislature used the word "contemplated" to signify a state of mind in which the assured had considered or thought about the subject of suicide, without any well-defined purpose or intent, was not tenable, but that the statute should be construed to mean that thereafter it should be no defense that the insured committed suicide unless it should be proven to the satisfaction of the court or jury that the insured intended or had resolved to commit suicide when he made his application for the policy.[9] Under a decision in the Federal Supreme Court self-destruction while insane is as much within the province of a statute that it shall be no defense to a suit on a life policy that the insured "committed suicide," unless the same was contemplated at the time application was made for the policy, as is the taking of one's own life voluntarily while sane and in the full possession of one's mental faculties,—especially so where another statute declares that words and pharses shall be taken in their plain, ordinary and usual sense.[10]

Notwithstanding a statutory provision estopping the insurer, except on the ground of fraud, from contesting, after the receipt of three annual premiums, any claim arising by reason of errors, omissions, or misstatements in the application other than those as

[7] Ætna Life Ins. Co. v. Florida, 30 L.R.A. 87, 16 U. S. C. C. A. 618, and note 623, 69 Fed. 932, s. c. 163 U. S. 675, 41 L. ed. 311, 16 Sup. Ct. 1198.

[8] "In all suits upon policies of insurance on life hereafter issued by any company doing business in this state it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void:" Rev. Stats. Mo. 1889, sec. 5855; Rev. Stats. Mo. 1879, sec. 5982.

[9] Ætna L. Ins. Co. v. Florida, 30 L.R.A. 87, 69 Fed. 932, 16 U. S. C. C. A. 622, 623, s. c. 163 U. S. 675, 41 L. ed. 311, 16 Sup. Ct. 1198, per Thayer, C. J. See Theobald v. Lodge, 59 Mo. App. 87; Keller v. Travelers' Ins. Co. 58 Mo. App. 557. This statute of Missouri applies to all life insurances except where otherwise provided by statute: Knights Templars' & Masons' Life Indemnity Co. v. Berry. 1 U. S. C. C. A. 561, 50 Fed. 511, aff'g 46 Fed. 439, 4 U. S. App. 353. "Death by suicide or by the hands of justice, either punitive or preventive, releases the insurer from the obligation of his contract:" Lester, Rowell & Hill's Ga. Code, 1882, sec. 2822.

[10] Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108; Mo. Rev. Stat. 1879, sec. 5982; Mo. Rev. Stat. 1889, sec. 6570. *Cited* in Whitfield v. Ætna Life Ins. Co. 205 U. S. 489, 498, 51 L. ed. 895, 899, 27 Sup. Ct. 578, rev'g Whitfield v. Ætna Life Ins. Co. 144 Fed. 356, 360, 75 C. C. A. 362.

to age,[11] the insurer may nevertheless avail itself, by way of defense, of the suicide of insured under a proviso that the policy shall be void if insured dies by his own hand, whether sane or insane. The condition first noted, even though the policy is conditioned to be subject thereto, does not affect the latter one, but relates solely to defenses based on errors, omissions, or misstatements in the application.[12]

The insured can be held to have "contemplated suicide" so as to defeat a life policy, under such a statute, only when he intended or had resolved to commit suicide at the time he made his application for the policy.[13]

A mutual benefit certificate is a life insurance policy within the meaning of a statute withdrawing from life insurance companies the defense of suicide of policy holders in suits upon such policies.[14] A statute precluding suicide as a defense unless it be shown that assured contemplated suicide when he made the application also applies to a foreign company doing business in the state of the enactment although it has not complied with its laws.[15]

**§ 2642a. Same subject: validity of statute: stipulation contrary thereto: statute part of contract.**—A state statute excluding suicide as a defense to a policy is valid.[16] It is a legitimate exercise of the power of a state to enact a statute providing that it shall be no

[11] Rev. Stats. Ohio, sec. 3626. See § 2644 herein.

As to incontestability clauses, fraud etc., see §§ 3733a et seq. herein.

[12] Starck v. Union Central Life Ins. Co. 134 Pa. St. 45, 19 Am. St. Rep. 674, 7 L.R.A. 576, 19 Atl. 703.

[13] Ætna Life Ins. Co. v. Florida, 69 Fed. 932, 16 C. C. A. 618, 32 U. S. App. 753, 30 L.R.A. 87, Mo. Rev. Stat. 1889, sec. 5855.

[14] Head Camp Pacific Jurisdiction v. Sloss, 49 Colo. 177, 31 L.R.A. (N.S.) 831n, 112 Pac. 49. See Modern Brotherhood of America v. Block, 22 Colo. App. 409, 125 Pac. 556, 41 Ins. L. J. 1533 (*considered* under § 2642a herein); Armstrong v. Modern Brotherhood of America, 132 Mo. App. 171, 112 S. W. 24 (what associations exempt under statute); Baltzell v. Modern Woodmen of America, 98 Mo. App. 153, 71 S. W. 1071 (when association not a fraternal benefit society within such suicide nondefense statute).

[15] Brassfield v. Knights of Maccabees, 92 Mo. App. 102. See Kroge v. Modern Brotherhood of America, 126 Mo. App. 693, 105 S. W. 685 (residence of assured as affecting application of statute); Tuttle v. Iowa State Traveling Men's Assoc. 132 Iowa, 652, 7 L.R.A. 223, 104 N. W. 1131 (when statute an Iowa and not Missouri contract).

[16] Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U. S. 197, 47 L. ed. 130, 23 Sup. Ct. 108 (*cited* in Supreme Court of Honor v. Updegraff, 68 Kan. 474, 476, 75 Pac. 477); Modern Brotherhood of America v. Locke, 22 Colo. App. 409, 125 Pac. 556, 41 Ins. L. J. 1533, Acts 1903, p. 257.

On power of legislature to forbid defense of suicide in life insurance, see note in 31 L.R.A. 831; on statute prohibiting defense of suicide, see note in 42 L.R.A. 260.

defense that the insured committed suicide unless it be shown to the satisfaction of the court or jury trying the case, that insured contemplated suicide at the time he made the application for the policy, and that any stipulation in the policy to the contrary shall be void, and, therefore, such a statute is valid, but it cannot lawfully be stipulated that in the event of suicide not contemplated by assured when applying for the policy insurer shall not be bound to pay the principal sum insured, but only a proportionate part thereof; that is, assurer cannot by stipulation make a defense that it is exempt merely because of suicide, from liability for the principal sum, for whatever tends to diminish a plaintiff's cause of action or to defeat recovery in whole or in part, amounts in law to a defense. Accordingly it follows in such case that notwithstanding any such stipulation contrary to the expressed intent of the statute and the defense of suicide, the beneficiary is entitled to recover the whole principal sum in the absence of a showing that insured at the time of his application for the policy contemplated suicide.[17]

[17] Whitfield v. Ætna Life Ins. Co. 205 U. S. 489, 51 L. ed. 895, 27 Sup. Ct. 578, 36 Ins. L. J. 554, rev'g 144 Fed. 356, 75 C. C. A. 358, 35 Ins. L. J. 321, which aff'd 125 Fed. 269, 33 Ins. L. J. 78; Mo. Rev. Stat. 1879, sec. 5982; Id. 1889, sec. 5855; Id. 1899, sec. 7896. The court, per Mr. Justice Harlan, said: "I. That the statute is a legitimate exertion of power by the State cannot be successfully disputed. Indeed, the contrary is not asserted in this case, although it is suggested that the statute 'seemingly encourages suicide and offers a bounty therefor, payable, not out of the public funds of the state, but out of the funds of insurance companies.' There is some foundation for this suggestion in a former decision of this court, in which it was held that public policy, even in the absence of a prohibitory statute, forbade a recovery upon a life policy, silent as to suicide, where the insured, when in sound mind, willfully and deliberately took his own life. Ritter v. Mutual Life Ins. Co. 169 U. S. 139, 154, 42 L. ed. 693, 18 Sup. Ct. 300. But the determination of the present case depends upon other considerations than those involved in the Ritter case. An insurance company is not bound to make a contract which is attended by the results indicated by the statute in question. If it does business at all in the State, it must do so subject to such valid regulations as the state may choose to adopt. Even if the statute in question could be fairly regarded by the court as inconsistent with public policy or sound morality, it cannot, for that reason alone be disregarded; for, it is the province of the state, by its legislature, to adopt such a policy as it deems best, provided it does not, in so doing, come into conflict with the constitution of the state or the Constitution of the United States. There is no such conflict here. The legislative will, within the limits stated, must be respected, if all that can be said is that, in the opinion of the court, the statute expressing that will is unwise from the standpoint of the public interests. See Northwestern National Life Ins. Co. v. Riggs, 203 U. S. 243, 51 L. ed. 168, 27 Sup. Ct. 126.

"2. Did the courts below err in adjudging that the policy in suit was not forbidden by the statute? Can an insurance company and the insured lawfully stipulate that in the

The last above mentioned Federal Supreme Court decision is relied on in a Colorado decision which holds that a statute is valid which

event of suicide, not contemplated by the insured when applying for a policy, the company shall not be bound to pay the principal sum insured but only a given part thereof? Will a statute in a case of suicide allow the company, when sued on its policy, to make a defense that will exempt it, simply *because of such suicide*, from liability for the principal sum?

"We cannot agree with the learned courts below in their interpretation of the statute. The contract between the parties, evidenced by the policy, is, we think, an evasion of the statute and tends to defeat the objects for which it was enacted. In clear, emphatic words the statute declares that in *all* suits on policies of insurance on life it shall be *no* defense that the insured committed suicide, unless it be shown that he contemplated suicide when applying for the policy. Whatever tends to diminish the plaintiff's cause of action or to defeat recovery in whole or in part amounts in law to a defense. When the company denied its liability for the whole of the principal sum, it certainly made a defense as to all of that sum except one-tenth. If, notwithstanding, the statute, an insurance company, may by contract, bind itself, in case of the suicide of the insured, to pay only one-tenth of the principal sum, may it not lawfully contract for exemption as to the whole sum or only a nominal part thereof, and if sued, defeat any action in which a recovery is sought for the entire amount insured? In this way the statute could be annulled or made useless for any practical purpose. Looking at the object of the statute, and giving effect to its words, according to their ordinary, natural meaning, the legislative intent was to cut up by the roots any defense, as to the whole and every part of the sum insured, which was grounded upon the fact of suicide. The manifest purpose of the statute was to make all inquiry as to suicide wholly immaterial, except where the insured contemplated suicide at the time he applied for his policy. Any contract inconsistent with the statute must be held void.

"In Berry v. Knights Templars' & Masons' Life Indemnity Co. 46 Fed. 439, 441, which was an action upon a policy of life insurance, it appears that the policy, among other things, provided that in the case of the self-destruction of the insured, whether voluntary or involuntary, sane *or insane*, the policy should be void, judgment was given for the plaintiff. The circuit court said: 'It is contended that the provision in the policy, declaring that it shall be void if the assured commits suicide, is a waiver or nullification of the statute which declares such a stipulation in a policy "shall be void." The statute is mandatory and obligatory alike on the insurance company and the assured. Its very object was to prohibit and annul such stipulations in policies, and it cannot be waived or abrogated by any form of contract or by any device whatever. The legislative will, when expressed in the peremptory terms of this statute, is paramount and absolute, and cannot be varied or waived by the private conventions of the parties.' Upon writ of error to the Circuit Court of Appeals the judgment was affirmed, that court saying: 'The company refused to pay the full amount named in the policy, claiming that by the express provisions of the policy self-destruction by the insured, whether sane or insane, rendered the contract for the payment of $5,000 void, and the company was only bound to pay the amount which had been paid in assessments by the insured. This action was brought in the circuit court for the Western District of Missouri, to recover the full sum of $5,000.

provides that suicide shall not be a defense against the payment of a life policy whether said suicide was voluntary or involuntary

The case was tried to the court, a jury being waived. The parties stipulated that the company was liable for the full amount claimed by the plaintiffs, unless excused by the clause in the policy providing that the same should be void in case of suicide; . . . Judgment in favor of the plaintiffs having been entered for the full amount of the policy, the case was brought to this court upon writ of error. . . . In our judgment, the court below ruled correctly in holding that the policy sued on was a contract made in Missouri, and, as such that the provisions of sec. 5982 (the same as the statute now in question) are applicable thereto; and therefore the judgment is affirmed, at costs of plaintiff in error.' Knights Templars' & Masons' Life Indemnity Co. v. Berry, 50 Fed. 511, 512, 515, 1 C. C. A. 561.

"In Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108, this court had occasion to consider the scope and effect of the statute here in question. That was an action upon a policy of life insurance for $5,000. A recovery for the whole sum was sought, but the company defended the action upon the ground that the provision in the statute that it should be no defense that the insured committed suicide, related only to cases where he took his own life voluntarily, while sane, and in full possession of his mental faculties; that the provision in the policy that '"in case of the self-destruction of the holder of this policy, whether voluntary or involuntary, sane or *insane*, . . . this policy shall become null and void," applied and exonerated the company from all liability beyond that provided in the policy, "that in case of the suicide of the holder of this policy, then this company will pay to his widow and heirs or devisees such an amount of his policy as the member shall have paid to this company on the policy in assessments on the same without interest."' This view of the statute was not accepted in the Circuit Court, and there was judgment against the company for the whole sum insured. That judgment was affirmed here upon certiorari to the Circuit Court of Appeals.

"A leading case on the general subject is Logan v. Fidelity & Casualty Co. 146 Mo. 114, 119, 122, 123, 47 S. W. 948, which was a suit upon a policy which, according to the answer in the case, contained stipulations and covenants to the effect that in the event of fatal injuries to the assured wantonly inflicted upon himself, or inflicted upon himself while insane, the company's liability under its policy should be a sum equal to the premiums paid, and that sum the policy provided should be in full liquidation of all claims under it. The question before the court was whether or not the statute here in question applied to such a policy as the one there in suit. The trial court instructed the jury to return a verdict for the full amount of the policy with interest. The court said: 'The error into which respondent has fallen is in assuming that sec. 5855 (the statute now in question) was intended to affect a particular line, class or department of insurance, as the same has been classified for legislation. The real object of the section, as the clear terms of its language express, is to affect *all policies of insurance on life* from whatever class, department or line of insurance the policy may be issued or by whatever name of designation the company may be known. It is policies of a given kind, and not companies of a class, that are to be affected by the provisions of sec. 5855. The section was enacted clearly to protect all policy holders of *insurance on life* against

and whether said policy holder was sane or insane. It is also decided that said statute applies to a fraternal beneficiary association cer-

the defense that the insured committed suicide, all provisions in the policies to the contrary notwithstanding, unless as provided in the section, it can be shown that the insured contemplated suicide at the time he made application for the policy. . . . When a policy covers loss of life from external, violent and accidental means alone, why is it not insurance on life? Such a provision incorporated in a general life insurance policy admittedly would be insurance on life, then why less insurance on life because not coupled with provisions covering loss of life from usual or natural causes as well? If one holds a general life policy and an accident policy, and is killed by lightning or commits suicide, so that he may be said to have died by accidental means, both the companies should pay, and the stipulation against liability in the event of suicide in the policies should be no more a defense against the suit upon the accident policy, providing against death from accidental cause, than against the policy which goes further and covers death from other causes as well. No such exception or exemption is found in the plain and comprehensive language of sec. 5855. . . . No rule of construction, short of one applied for distortion and destruction, can relieve accident insurance companies, issuing policies of insurance on life in this state, from the operation and influences of sec. 5855, which in plain and unambiguous terms declares that in all suits upon policies of insurance on life thereafter issued, it shall be no defense that the assured committed suicide, unless it shall have been shown to the satisfaction of the court or judge trying the cause that the insured contemplated suicide at the time of making his application for the policies, all stipulations in the policy to the contrary being void.'

"In Keller v. Travelers' Ins. Co. decided by the St. Louis court of appeals, 58 Mo. App. 557, 560, 561, we have a decision very much in point. That was an action on an insurance policy for $2,500. The company defended upon the ground that by the terms of the policy if the insured died of suicide, whether the act be voluntary or involuntary, it should be liable for the then full net value of said policy per the American Experience Table of Mortality and four and one-half per cent interest and no more, and the same should be paid in manner and form as provided in the policy for the payment thereof in the event of death. The defense was that the insured committed suicide and the full net value of the policy, according to the contract, was only $814.50, and no more. The defense was overruled and judgment given for the principal sum. That judgment was affirmed in the court of appeals, the court saying: 'The plain purpose of the statute supra was to prevent the insertion in policies of life insurance of exceptions to liability on the ground of the suicide of the insured, unless it could be proven "that the insured contemplated suicide at the time he made the application for the policy." This was in effect a legislative declaration of the public policy of this state. That it was intended to limit the power to contract for a lesser liability in cases of death by suicide, not within the limitation expressed in the statute, is also apparent from its terms, to wit: "and any stipulation to the contrary shall be void." . . . The fact that the premium warranted and the policy guaranteed full insurance in case of the death of the insured for any cause not specified in the clause set up in the defendant's answer demonstrates that said clause was designed to modify the liability of the insurance company if the insured com-

tificate and that it not only made void and of no effect such part of a policy stipulation or agreement as was contrary thereto, but that the inhibition of the statute was substituted for such void clause and became an affirmative covenant obligating the parties and excluding under that policy the defense of suicide, and, therefore, said policy with the statute so made a part thereof, was not against sound morals, public policy, justice, or right. It was further decided that the subsequent repeal of said statute did not make the repealing statute retrospective in its operation in the absence of an expressed legislative intent that it should have that effect, and even if it attempted to destroy the obligation of contract under the policy it would be unconstitutional.[18]

**§ 2643. Suicide: option reserved to pay amount of insurance or refund premiums: recovery limited to amount of premiums.**—A stipulation in a life policy is valid which provides that it shall be void if assured shall "die by his own hand," but that if at the time of taking his life he is insane, the company will pay the amount insured or refund the premiums actually received with interest, and which reserves to the insurer the option to pursue either course.[19]

mitted suicide. It necessarily follows, if this stipulation as to a decreased liability in the event of death by suicide is enforced, that it is *some* defense to the otherwise full liability agreed upon in the policy. As the statute in question declares that suicide, not committed as therein set forth, is *"no defense,"* we cannot hold that the present stipulation can be enforced without violating the plain terms of a mandatory statute which the parties have no power to alter or abrogate.'

"Without further discussion, we adjudge that, under the statute in question—anything to the contrary in the policy notwithstanding—where liability upon a life policy is denied simply because of the suicide of the insured, the beneficiary of the policy can recover the whole of the principal sum, unless it be shown that the insured, at the time of his application for the policy, contemplated suicide. The judgment must, therefore, be reversed and the case remanded for further proceedings in conformity with this opinion and consistent with law."

See also Harms v. Fidelity & Casualty Co. of N. Y. 172 Mo. App. 241, 157 S. W. 1046, 42 Ins. L. J. 1357; Dennis v. Modern Brotherhood of America, 231 Mo. 211, 132 S. W. 698 (who may not question constitutionality of statute); Applegate v. Travelers' Ins. Co. 153 Mo. App. 63, 132 S. W. 2, 40 Ins. L. J. 232; Tuttle v. Iowa State Traveling Men's Assoc. 132 Iowa, 652, 7 L.R.A.(N.S.) 223, 104 N. W. 1131 (Mo. stat. part of contract).

As to stipulation contrary to statute, see §§ 176, 194(g), 194(h) herein.

[18] Modern Brotherhood of America v. Block, 22 Colo. App. 409, 125 Pac. 556, 41 Ins. L. J. 1533. Acts 1903, p. 257: acts 1907, p. 431. Benefit certificate included under statute, see § 2642 herein.

Subsequently enacted by-laws: effect of, see §§ 379 et seq., 2647 herein.

[19] Salentine v. Mutual Benefit Life Ins. Co. 24 Fed. 159, rev'd 136 U. S. 644, 34 L. ed. 550, 10 Sup. Ct. 107. See §§ 2532, 2641 herein.

On construction and effect of provision against liability for injury to

In Mutual Benefit Life Insurance Company v. Daviess[20] the condition was, "shall die by his own hands, or in consequence of a duel or by reason of intemperance," the policy should be void, "except that in case he shall die by his own hand while insane," the insurer should repay the premiums with interest. The defense was that insured took his own life with his own hand, by shooting himself, and that he was insane at the time. The court, per Pryor, J., said that "the question of criminal self-destruction is not involved in the controversy, as the contract by its very terms is made to apply to the insanity of the insured. The object in view in inserting such a clause in the policy may have been, and doubtless was, to avoid the effect of the decisions, confining the meaning of the language 'die by his own hand' to criminal self-destruction, or the word 'suicide' to the deliberate purpose of a sane man to take his own life." The conclusion of the court was, "that if the insured fired the fatal shot, and had sufficient mental power at the time to know that it would take his life, and fired the pistol with that intention, the recovery in this case is limited to the premiums paid with the interest; while on the other hand, if the firing of the pistol was not intentional, because of the unconsciousness on the part of the insured that such an act would take his life, the recovery must be had of the principal sum." If the policy stipulates that if insured takes his own life, sane or insane, recovery shall be limited to the amount of the premiums, insurer will be liable where the evidence shows that insured was so insane he did not know that he was taking his own life, or that the act would result in his death.[21] Such a limitation to the amount of premiums paid in case of suicide, sane or insane within a specified time is reasonable and enforceable.[22] So a condition in a life policy, that if the insured should die by suicide, sane or insane, within three years from the date of the policy, the liability of the company should be limited to the amount of the premiums paid, is valid; and it is no answer to such stipulation that the insured was insane, or unconscious of the moral and physical consequences of the act which caused death.[1] And recovery of the amount of the premiums may be had in case of as-

or death of insured while or when insane, see note in L.R.A.1915E, 657.

[20] 87 Ky. 541, 9 S. W. 812, 10 Ky. L. Rep. 577.

[21] Inter-Southern Life Ins. Co. v. Boyd, — Ky. —, 124 S. W. 333.

[22] Silliman v. International Life Ins. Co. 131 Tenn. 303, L.R.A.1915F, 707, 174 S. W. 1131, 45 Ins. L. J. 673.

On date from which the period to which defense of suicide is limited is to be computed, see note in L.R.A. 1915F, 703.

[1] Scherar v. Prudential Ins. Co. 63 Neb. 530, 56 L.R.A. 611, 88 N. W. 687.

sured's suicide within the time limited where the jury finds for said amount.[2]

**§ 2644. Stipulation as to part payment or incontestability after specified time.**—Where the law does not prohibit such a provision, it is held that the insurer may limit the payment on the policy in case of suicide to the legal reserve.[3]

It is decided that if assured had not sufficient mind to know he was committing suicide there might be a recovery under a stipulation voiding the policy for death by assured's own hand within a specified time.[4] But it is also held that death by suicide within the time limited avoids the policy irrespective of whether or not the act be deliberate.[5]

If the suicide occurs after the period limited recovery may be had even though the act was premeditated within said limited time.[6] If a by-law of a benefit society makes a certificate of membership incontestable, after two years, if the member continues "in good standing," obeys the rules and by-laws, and pays his dues and assessments, his death by suicide is not a loss of good standing, especially when action by the society is necessary to deprive him thereof.[7] But a limitation stipulation as to time does not necessarily preclude non-liability after the expiration of said period in case of suicide by insured, sane or insane.[8] And a clause in an insurance policy making it incontestible except for fraud in procuring it, after two years from its date, will control an agreement in the application that death by suicide is not covered by the policy, so that such death after the expiration of that period will not defeat liability on the policy.[9] If the application contains a stipulation excepting the insurer from liability in case of the insured's death by his own hand, and this clause is not carried into the policy, but the latter does provide that claims under it "by death occurring two or more years after its date will be incontestable, except for fraud in obtaining the

[2] Miles v. Penn Mutual Life Ins. Co. 23 S. Dak. 400, 122 N. W. 249.

[3] Frey v. Germania Life Ins. Co. 56 Mich. 29, 22 N. W. 100. See § 2641 herein.

[4] Modern Woodmen of America v. Neeley, 33 Ky. L. Rep. 758, 111 S. W. 282.

As to incontestability, fraud, etc., see §§ 3733a et seq. herein.

[5] Union Central Life Ins. Co. v. Hallowell, 14 Ind. App. 611, 43 N. E. 277. *Examine* Grand Lodge v. I. O. of M. A. v. Wieting, 68 Ill. App. 125, aff'd 168 Ill. 408, 48 N. E. 59.

[6] Harrington v. Mutual Life Ins. Co. of N. Y. 21 N. Dak. 447, 131 N. W. 246, 34 L.R.A.(N.S.) 373, 40 Ins. L. J. 1349, Code sec. 6064.

[7] Royal Circle v. Achterrath, 204 Ill. 549, 63 L.R.A. 452, 98 Am. St. Rep. 224, 68 N. E. 492, 33 Ins. L. J. 20.

[8] Supreme Council of Royal Arcanum v. Wishart, 192 Fed. 453, 112 C. C. A. 591.

[9] Goodwin v. Provident Savings Life Assur. Soc. 97 Iowa, 226, 32 L.R.A. 473, 59 Am. St. Rep. 411, 66 N. W. 157.

policy," the proper construction of the policy in connection with the application is that the policy does not cover death by suicide within two years from the date of its delivery, but that after two years it is incontestable for suicide.[10] If the certificate is stipulated to be incontestable for any cause after two years, suicide is also thereby excluded.[11] So in case a life policy or benefit certificate provides that it shall be incontestable after a certain period, except for certain causes, death by suicide not being one of them, the incontestible clause applies in case of the death of the insured by suicide, although the policy contains another clause, providing that death by suicide is not a risk assumed by the insurer.[12] And where, by reason of the fact that a provision against suicide is found in the constitution of a mutual benefit association, and a separate agreement with regard to it is inserted in the application, which contains a general agreement as to keeping the rules and regulations of the association, it is doubtful whether a clause making the certificate incontestable after a certain time, except for breach of the rules and regulations was intended to cover suicide,—the doubt will be resolved in favor of the beneficiary, and after the lapse of the stipulated period the association will be required to pay the amount of the certificate, notwithstanding the holder came to his death by

[10] Goodwin v. Provident Savings Life Assur. Co. 97 Iowa, 226, 59 Am. St. Rep. 411, 32 L.R.A. 473, 66 N. W. 156. An express contract for an increased premium to pay insurance money in case of suicide of the insured is declared in argument per Brickell, C. J., in Supreme Commandery Knights of the Golden Rule v. Ainsworth, 71 Ala. 436, 447, 46 Am. Rep. 332, to be void as offensive to law and good morals. But in Life Assn. of America v. Waller, 57 Ga. 533, the stipulation was: "If the insured shall die by suicide during the continuance of this policy, said Life Association will pay to the legal holder of this policy its net present value at the date of such death." There was no question raised, however, as to the validity of such a clause. So policies nevertheless frequently stipulate against suicide only within a limited time, as is apparent from the following cases; no question as to the validity thereof was raised, however: Mutual Life Ins. Co. v. Walden, — Ct. Civ. App. Tex. —, 26 S. W. 1012 (the condition in this case was a warranty not to "die by my own act within two years," etc.); Streeter v. Western Union Mutual Life & Accident Ins. Co. 65 Mich. 199, 8 Am. St. Rep. 882, 31 N. W. 779 (the condition in this case provided against suicide, sane or insane, within three years). In Adkins v. Columbia Life Ins. Co. 70 Mo. 27, 35 Am. Rep. 410, the policy stipulated that in case of assured's death "by his own act or intention, whether sane or insane," etc., the company would pay the net value of the policy at the time of death. In Sabin v. National Union, 90 Mich. 177, the condition was against suicide within two years. See § 2532 herein.

[11] Semour v. Mutual Protective League, 155 Ill. App. 21. *Examine* North American Union v. Trenner, 138 Ill. App. 186.

[12] Royal Circle v. Achterrath, 204 Ill. 549, 63 L.R.A. 452, 98 Am. St. Rep. 224, 68 N. E. 492.

suicide.[13] And if a policy is incontestable after two years except for fraud suicide thereafter is covered even though the application excludes the risk of suicide.[14] But it is decided that insurer is not prevented from setting up the suicide of an insured person as a defense to its liability on the policy insuring his life, by a statute providing that "all companies, after having received three annual premiums on any policy . . . are estopped from defending on any other ground than fraud, against any claim arising on such policy by reason of any errors, omissions, or misstatements of the assured in any application made by such assured on which the policy was issued, except as to age." [15] Again, a life association issuing a policy providing that it does not assume the risk of the death of insured if caused by his own hand, but that such conditions may be waived in writing and then providing that after five years from the date of the policy it shall be "incontestable from any cause" except nonpayment of dues or mortuary assessments if the age of the applicant is correctly stated, is liable for the full amount of the policy, if the insured commits suicide or dies by his own hand more than five years after the policy is issued, provided the insured has stated his age correctly, and all dues and mortuary assessments have been paid up to the time of his death.[16]

**§ 2644a. Stipulations limiting amount of recovery or time within which policy void for suicide: incontestability.**—Where there is no law prohibiting the insertion of such a clause,[17] insurer may by stipulation limit the amount of recovery if suicide be committed within a specified time and such a provision is reasonable and should be enforced;[18] nor is it against public policy to stipulate that if insured shall die by his own hand, "sane or insane" within a certain time the policy shall be void, nor is such a stipulation invalid or unreasonable.[19] So by-laws limiting recovery to a proportionate part of the policy amount in case of suicide, are valid and reason-

[13] Royal Circle v. Achterrath, 204 Ill. 549, 68 L.R.A. 452, 98 Am. St. Rep. 224, 68 N. E. 492.

[14] Goodwin v. Providence Savings Life Assur. Soc. 97 Iowa, 226, 82 L.R.A. 473, 66 N. W. 157.

[15] Starck v. Union Central Life Ins. Co. 134 Pa. 45, 7 L.R.A. 576, 19 Am. St. Rep. 674, 19 Atl. 703.

[16] Mareck v. Mutual Reserve Fund Life Assoc. 62 Minn. 39, 54 Am. St. Rep. 613, 64 N. W. 68.

[17] Kunse v. Knights of the Modern Maccabees, 45 Ind. App. 30, 90 N. E. 89.

[18] Silliman v. International Life Ins. Co. 131 Tenn. 303, 174 S. W. 1131. See § 2644 herein.

As to incontestability, fraud, etc., see §§ 3733a et seq. herein.

On incontestability of policy where defense is suicide, see note in 42 L.R.A. 253, 260.

[19] National Union v. Thomas, 10 App. D. C. 277, 25 Wash. L. Rep. 277; Spruill v. Northwestern Mutual Life Ins. Co. 120 N. Car. 141, 27 S. E. 39, 26 Ins. L. J. 881.

able, as where the recovery is limited to a sum only in proportion to the whole amount as the matured life expectancy is to the entire life expectancy at the date of admission.[20] Under a Georgia decision a stipulation for nonliability in case of insured's death by his own act, sane or insane, within one year, waives the statute of that state which provides that the insurer is released in case of suicide by insured when sane, and that there is no public policy which precludes such waiver.[1]

**§ 2644b. Suicide: incontestability after specified time: substituted policy or new policy.**—A resolution of a mutual insurance society lessening the time after inception in which the policy can be contested for suicide, and increasing the premium rates, does not apply to a policy previously issued, unless the insured complies with the new rates.[2] If a term policy stipulates for renewal upon its expiration, and also that it may be exchanged for a new policy without a medical examination and assured makes an application for a "new contract or policy" which is issued and is not a restatement of the contents of the term policy but its terms are essentially different therefrom and it expresses no dependence on or connection therewith, said new policy is an independent contract, and where it provides that it shall be null and void if insured shall commit suicide within one year from the date thereof, sane or insane, and also that the policy and application constitute the entire contract said suicide clause does not relate back to the date of the original contract under which it became inoperative at the time of insured's death by suicide.[3] Under a Tennessee decision, however, the contrary is held, although in that case a rider was attached stating that the new policy was issued in exchange for and in lieu of the original policy.[4]

**§ 2644c. Stipulation that liability suspended while insured insane: distinction.**—It may reasonably and validly be stipulated that the policy shall be suspended during such time as insured may be insane, as a distinction exists between the "suicide clause"

[20] Supreme Lodge Knights of Pythias v. Clement, 113 Tenn. 40, 81 S. W. 1249.

[1] Mutual Life Ins. Co. of N. Y. v. Durden, 9 Ga. App. 797, 72 S. E. 295, Civ. Code, sec. 2500.

[2] Sexton v. National Life Ins. Co. 40 Colo. 60, 12 L.R.A.(N.S.) 504 (annotated on retroactive effect of resolution of mutual insurance company changing period during which policy may be contested for suicide), 90 Pac. 58, 36 Ins. L. J. 861.

[3] Gans v. Ætna Life Ins. Co. 214 N. Y. 326, L.R.A.1915F, 703 (annotated on date from which the period to which defense of suicide is limited is to be computed), 108 N. E. 443, 45 Ins. L. J. 664, s. c. 146 N. Y. Supp. 453, 161 App. Div. 250.

[4] Silliman v. International Life Ins. Co. 131 Tenn. 303, L.R.A.1915F, 707, 174 S. W. 1131, 45 Ins. L. J. 673. See also Semour v. Mutual Protective League, 155 Ill. App. 21.

covering death by assured's own hand, or death by his own hand sane or insane, and a clause which makes no reference to the act of insured but only provides for exemption from liability for injury sustained while insured is insane and not in the present full possession and normal exercise of his faculties; and such a provision differs substantially from one excepting liability where insured commits suicide when insane.[5]

**§ 2645. Suicide: by-law as part of contract.**—It would be a general rule that a by-law excepting liability in case of suicide of the insured would be of binding force upon him where under the terms of the certificate it is included as a part of the contract between the parties, and said certificate is issued upon the condition that insured shall comply with all the by-laws of the society, and especially would this be true where the member has in any manner had his attention particularly called to such excepting by-law.[6] And assured is bound to know the constitution and laws providing such limitation period within which the policy should be avoided by suicide.[7] An anti-suicide clause contained in an application by a Knight of Pythias for insurance in the endowment rank to which he is entitled, is not binding upon him when such provision has not been adopted by the supreme lodge, but only by the board of control.[8]

**§ 2646. Taking his own life by unlawful act: dies by his own hand, etc.: by-laws.**—If a by-law of a society provides that the policy shall be forfeited in case the insured member shall by any unlawful act, take his own life, no forfeiture of the policy can be based upon such exception from the fact that insured while trespassing on a train of cars was thrown under the wheels and killed.[9] And if loss of good standing on the part of a member of a benefit society must be established by action on the part of the society, such loss of good standing does not include the act of the member in committing suicide.[10] Again, a certificate of a benevolent order providing that it shall be void if the member die by his own hand, unless he is insane, though made on an application stating that it is subject to all the provisions of the constitution, is not controlled by a consti-

[5] Interstate Business Men's Assoc. v. Atkinson, 165 Ky. 532, L.R.A. 1915E, 656, 177 S. W. 254.

On construction and effect of provision against liability for injury to or death of insured while or when insane, see note in L.R.A.1915E, 657.

[6] Sabin v. Senate of National Union, 90 Mich. 177, 51 N. W. 202.

[7] Benes v. Supreme Lodge Knights & Ladies of Honor, 231 Ill. 134, 14 L.R.A.(N.S.) 540, 83 N. E. 127.

[8] Supreme Lodge Knights of Pythias v. Stein, 75 Miss. 107, 37 L.R.A. 775, 21 So. 559.

[9] So held in Evans v. Phœnix Mutual Relief Assoc. (Chester Co. Pa. C. P. C. 1892) 9 Lanc. L. Rev. 59, 49 Leg. Int. 15.

[10] Royal Circle v. Achterrath, 204 Ill. 549, 63 L.R.A. 452, 98 Am. St. Rep. 224, 68 N. E. 492.

tutional provision that there shall be a condition in every certificate making it void if the member die by his own hand "whether sane or insane," since this is not a general provision of the constitution or by-laws making all certificates void if the insured shall commit suicide, but specifically relates to those certificates of which that condition shall be made a part, or, if it is a general provision, it will not apply as against one who was misled by the failure of the officers to insert the condition in his contract.[11] A stipulation by an insured that his interest shall revert to the insurer in case his death shall be caused by an illegal act of his own applies to suicide, which is a crime at common law.[12]

**§ 2647. Amendments or changes in by-laws, etc.: adoption of by-law against suicide after contract made.**—In cases of amendments, changes in, or repeal of articles of association, by-laws, rules and regulations whereby the amount payable under the policy or certificate is reduced or the policy is declared forfeited in case of suicide of assured or the member, the question of the effect of such changes, even in case of a reserved power or agreement that changes, etc., in the constitution, etc., may be made, is one in which there is a want of harmony in the decisions. We have, however, considered elsewhere herein the principles governing in cases other than suicide and refer the reader to the conclusions therein reached, briefly considering here only those authorities which particularly relate to suicide.[13] Upon the assumption that suicide, self-destruction, or taking one's own life operates as a forfeiture of the right to recover under a life policy, even in the absence in the contract of an express exception that it shall so operate, an insurance association may, by a by-law enacted after the issuance of a certificate without an exception of suicide, stipulate for forfeiture in case insured should while sane take his own life. Such subsequently enacted by-law, if the premise be true, does not it is held in an Alabama case impair or vary existing contracts, nor does it add any new term or condition to the contract. It relieves the association from no responsibilty, nor does it impose any new or. additional duty upon the member, and works no change in his relations. It is the mere declaration or expression of the implication of the law.[14] If the above premise be not true, then the

[11] Sovereign Camp Woodmen of the World v. Fraley, 94 Tex. 200, 51 L.R.A. 898, 59 S. W. 879.

[12] Shipman v. Protected Home Circle, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83.

[13] See §§ 377 et seq. herein.

On subsequent by-law excluding or reducing liability in case of suicide, see notes in 46 L.R.A.(N.S.) 308, and L.R.A.1915D, 1096.

[14] So held in Supreme Commandery Knights of Golden Rule v. Ainsworth, 71 Ala. 436, 447, 46 Am. Rep. 332.

rule expressed in a case in the appellate court in Illinois ought to govern, which is, that such subsequently enacted by-law excepting suicide from the risks assumed would not be binding upon the assured unless the power to pass such subsequent by-law is expressly reserved in the contract.[15] And, even in case of such a reserved power in the contract the question of vested rights and the impairment of obligation of contracts cannot be ignored.[16] It will be observed from an examination of the condition given in the rule below to the last case that the words "sane or insane, voluntary or involuntary," are included in the exception, and there is nothing in the opinion to show that the clause was not construed in its entirety, and the decision may, therefore, perhaps be distinguished from the Alabama case above noted under this section, where it is held that the addition, however, of the words "sane or insane" in such subsequent by-law as the one considered adds a new term to such a contract, but that under a power reserved in the contract to alter by-laws or add new ones the words "sane or insane" may be added.[17] Under a United States Supreme Court decision if the agreement to abide by subsequently enacted by-laws or changes therein or in the constitution clearly refers to policies thereafter to be issued the consent is limited thereto in its application and this applies to the amount of benefits.[18] In another Federal decision neither the amendment nor the original provision was held applicable as to suicide under the facts.[19] And a provision in assured's certificate, which, contrary to the statute, limits the amount fixed therein and reduces the same so that only a small proportionate sum can be recovered in case of suicide is void.[20] Under an Alabama decision an amendment reducing benefits in

[15] Northwestern Benevolent & Mutual Aid Assoc. v. Warner, 24 Ill. App. 357. The by-law in this case was: "Death executed by the hand, act, or procurement of the member, whether voluntary or involuntary, sane or insane, at the time, is a risk not assumed by the association."

[16] See §§ 379a et seq. herein.

[17] Supreme Commandery Knights of Golden Rule v. Ainsworth, 71 Ala. 435, 449, 46 Am. Rep. 332. In this case the contract under the certificate when issued recited that any violation of the "requirements of the law now in force or hereafter enacted governing the order or this class shall render this certificate null and void." It also stipulated for a "full compliance with all the laws of the order now in force or that may hereafter be enacted," and was also "subject to the laws of the order now in force or which may hereafter be enacted by the supreme commandery."

[18] Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. 108, 32 Ins. L. J. 57.

[19] Supreme Council of Royal Arcanum v. Wishart, 192 Fed. 453, 112 C. C. A. 591.

[20] Whitfield v. Ætna Life Ins. Co. 205 U. S. 489, 51 L. ed. 895, 27 Sup. Ct. 578.

case of suicide does not impair the obligation of contracts where compliance with enacted by-laws, etc., is embraced in terms of certificate.[1] Under a California decision contract obligations cannot be impaired by subsequently enacted by-laws or by changes therein.[2] Under a Colorado decision vested contract rights, under a policy of which the statute as to suicide not being a defense is a part cannot be impaired by a subsequent repealing statute.[3] In Georgia, by-laws even under a reserved right to amend are not retrospective in operation unless the intent to do so is clearly expressed.[4] In Illinois a limitation of the society's liability in case of suicide is provided by a subsequently enacted by-law does not impair vested rights of an assured who also had agreed to be bound by such subsequent laws.[5] And if a by-law reduces the amount recoverable in case of suicide sane or insane it binds as to a contract of a member who becomes such after its enactment and who also agrees to comply with and be subject to existing and thereafter adopted laws, rules and usages.[6] So a board of control of a benevolent society is not empowered to enact a by-law or regulation precluding payment where a member commits suicide notwithstanding a certificate provision for full compliance by a member with by-laws which might thereafter be enacted by said board.[7] In an Indiana case involving suicide and the incontestable clause the court, per Watson, J., said: "No question as to the authority of the society to make or change its by-laws, generally speaking, is involved in this case, but by the terms of the contract the appellant had become absolutely liable for the payment of $2,000, and could not thereafter discharge such liability to the extent of $1,500 by the enactment of a by-law, any more than it could discharge its entire liability by such an act (it admitting liability to the amount of $500). The authorities are to the effect that such a by-law thus amended and applied to the facts before stated is invalid on the ground that it is unreasonable, and impairs the obligation of

[1] Fraternal Union of America v. Zeigler, 145 Ala. 287, 39 So. 751.

[2] Schack v. Supreme Lodge of the Fraternal Brotherhood, 9 Cal. App. 584, 99 Pac. 989.

[3] Modern Brotherhood of America v. Lock, 22 Co. App. 409, 125 Pac. 556, 41 Ins. L. J. 1833.

[4] Fraternal Relief Assoc. v. Edwards, 9 Ga. App. 43, 70 S. E. 265.

[5] Scow v. Supreme Council of Royal League, 223 Ill. 32, 70 N. E. 42. See Supreme Lodge Knights of Pythias v. Trebbe, 74 Ill. App. 545.

[6] Scow v. Supreme Council of the Royal League, 223 Ill. 32, 79 N. E. 42, *cited* in Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224, 39 Ins. L. J. 3.

[7] Supreme Lodge Knights of Pythias v. Kutscher, 72 Ill. App. 462. See Supreme Lodge Knights of Pythias v. Lennan, 171 Ill. 417, 49 N. E. 530. See §§ 379 et seq. herein.

a contract or a vested right.[8] It is also held in the same state that an incontestable clause as to suicide cannot be modified by an amendment or repealed so as to take away vested rights.[9] In Kentucky it is held that a subsequently enacted by-law limiting the amount of recovery in case of suicide does not apply to a member without notice thereof.[10] Under a Louisiana decision a member agreeing to be bound by subsequently enacted amendments is subject to the provisions of a by-law thereafter enacted which provides that policies are avoided if the member dies by his own hand.[11] In Minnesota a by-law limiting the amount of recovery in case of death by suicide within a specified time, may be changed so as to extend said period where the member agrees to be bound by subsequently enacted by-laws.[12] Under a Mississippi case if a member of a beneficial association is entitled to a certificate insuring his life, and a committee of the association, without authority, enacts a by-law imposing a condition against suicide, and he, in his application, assents to this condition, and the certificate purports to be subject thereto, he is not bound by the condition, because it was imposed without authority.[13] Under a Missouri decision if the member agrees to be bound by subsequently enacted by-laws or changes, the association may thereafter limit or reduce the amount payable in case of suicide.[14] But it is also held in that state that a limitation of the amount of recovery in case of suicide cannot be imposed by provisions of a subsequent by-law, where

[8] Court of Honor v. Hutchins, 43 Ind. App. 321, 82 N. E. 89, *citing* Supreme Council Legion of Honor v. Getz, 112 Fed. 119, 50 C. C. A. 153; Royal Circle v. Achterrath, 204 Ill. 549, 63 L.R.A. 452, 98 Am. St. Rep. 224, 68 N. E. 492; Russ v. Legion of Honor, 110 La. 588, 98 Am. St. Rep. 469, 34 So. 697; Newhall v. American Legion of Honor, 181 Mass. 111, 63 N. E. 1; Olson v. Court of Honor, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 110 N. W. 374; Mareck v. Mutual Reserve Fund Life Assoc. 62 Minn. 39, 54 Am. St. Rep. 613, 64 N. W. 68; Langan v. Supreme Council American Legion of Honor, 174 N. Y. 266, 66 N. E. 932; Hale v. Equitable Union, 168 Pa. 377, 31 Atl. 1066.

[9] Court of Honor v. Rausch, 50 Ind. App. 161, 95 N. E. 1018.

[10] Hunziker v. Supreme Lodge Knights of Pythias, 117 Ky. 418, 25 Ky. L. Rep. 1510, 78 S. W. 201.

[11] Dougherty v. Knights of Pythias, 48 La. Ann. 1203, 20 So. 712. See §§ 379 et seq. herein.

[12] Ledy v. National Council of Knights & Ladies of Security, 129 Minn. 137, L.R.A.1915D, 1095, 151 S. W. 905. See Olson v. Court of Honor, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 10 Am. & Eng. Ann. Cas. 622, 110 N. W. 374. See § 379n herein.

[13] Supreme K. of P. v. Stein, 75 Miss. 107, 65 Am. St. Rep. 589, 37 L.R.A. 775, 21 So. 559.

[14] Claudy v. Royal League, 250 Mo. 92, 168 S. W. 593. See Dessauer v. Supreme Tent of Knights of Maccabees of the World, 191 Mo. App. 76, 176 S. W. 461. *Compare* Wilcox v. Court of Honor, 134 Mo. App. 547, 114 S. W. 1155.

neither the constitution nor by-laws imposed such a condition when membership attached and the member did not consent to abide and be bound by subsequent laws.[15] In Nebraska a by-law legally enacted, subsequent to the issuance of a fraternal benefit certificate, and providing for its forfeiture if the death of the member is occasioned by suicide, whether he is sane or insane at the time, is reasonable and will be upheld.[16] And in an action upon a mutual benefit certificate, where the defense interposed is that the deceased committed suicide, whereby the certificate was forfeited under the provisions of a by-law enacted subsequent to the issuance of the certificate, an attack on the by-law on the ground that the governing body was without power to adopt it is not a collateral attack on the right of the society to transact business.[16a] In New Jersey a subsequently enacted by-law precluding payment of benefits if the member committed suicide was held not binding even though the member had agreed to be bound by by-laws subsequently enacted.[17] Under a New York decision an amended by-law which is retrospective in its operation, as to suicide of the insured cannot divest vested rights by adding conditions not in the original contract, even though the member has agreed to comply with by-laws thereafter enacted.[18] This decision was modified and it was subsequently held that the adoption of a by-law by a mutual benefit society relieving itself from liability for death benefits applies to existing members who have agreed to be bound by all rules which may be adopted, since, as it is there held, there is no vested right to insurance covering such a risk and the agreement that insured shall not intentionally cause his own death is a fundamental though unexpressed part of the original contract.[19] This last de-

[15] Lewine v. Supreme Lodge Knights of Pythias of the World, 122 Mo. App. 547, 99 S. W. 821, the court, per Nortoni, J., said: "It is well settled and it is the doctrine of this court that such contracts, in so far as the insurance feature is concerned, cannot be altered or modified without the express assent of the member. This has repeatedly been held in express terms and other cases have proceeded in affirmance of the proposition."

[16] Lange v. Royal Highlanders, 75 Neb. 188, 10 L.R.A.(N.S.) 666, 121 Am. St. Rep. 786, 106 N. W. 224. *Compare* Sebesta v. Supreme Court of Honor, 80 Neb. 760, 115 N. W. 300.

[16a] Lange v. Royal Highlanders, 75 Neb. 188, 10 L.R.A.(N.S.) 666, 121 Am. St. Rep. 786, 106 N. W. 224.

[17] Sautter v. Supreme Conclave Improved Order of Heptasophs, 72 N. J. L. 325, 62 Atl. 529. See §§ 379 et seq. herein.

[18] Shipman v. Protected Home Circle, 73 N. Y. Supp. 594, 66 App. Div. 448. Judgment modified in Shipman v. Protected Home Circle, 174 N. Y. 398, 63 L.R.A. 83, 67 N. E. 83.

[19] Shipman v. Protected Home Circle, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83. See §§ 379a, 380c herein.

cision is considered in another New York case,[20] where the court, per Vann, J., said: "There was no provision in the certificate or by-laws against death by suicide, but acting under a power reserved by express consent an amendment was adopted making the certificate void in case the insured 'died by suicide, felonious or otherwise, sane or insane.' The court speaking through Judge Werner, said: 'As the contract was silent upon the subject of self-destruction by the insured while insane, death from that cause was clearly within its terms. Upon the execution of the contract the insured, therefore, acquired a fixed and vested right to insurance covering that risk. No subsequent amendment of the by-laws could affect that right without the express assent of the insured.'" Under another New York decision vested rights are not impaired by a subsequently enacted by-law reducing death benefits in case of suicide.[1] It is also decided in the same state that if a benefit society has insured a member against unintentional self-destruction after one year, it cannot, by a subsequent amendment of its by-laws, provide that self-destruction, while insane, within five years of the date of the policy shall render the policy void.[2] Under a Pennsylvania decision the period of limitation within which suicide shall be committed to avoid the policy may be extended under an agreement by assured to abide by thereafter enacted by-laws.[3] Under a Tennessee decision the holder of a benefit certificate who agrees to be bound by all laws of the order "now in force or that may hereafter be enacted" will be subject to a subsequent rule regularly passed, destroying liability on certificates in case of the suicide of their holders.[4] In a Texas case it is held that an agreement to be bound by subsequent changes in the by-laws binds the member.[5] In a Virginia case a by-law adopted after issuance of a certificate may preclude recovery thereon in case of suicide where the member has consented to the adoption of subsequent by-laws, and this is so held even though the certificate contains no condition as to suicide.[6] In Washington where a reservation or agree-

[20] Wright v. Knights of Maccabees of the World, 196 N. Y. 391, 31 L.R.A.(N.S.) 423 (annotated on right of mutual benefit society to decrease benefits), 89 N. E. 1078, 39 Ins. L. J. 95.

[1] Bottier v. Supreme Council American Legion of Honor, 37 Misc. 406, 75 N. Y. Supp. 805.

[2] Weber v. Supreme Tent K. of M. 172 N. Y. 490, 92 Am. St. Rep. 753, 65 N. E. 258.

[3] Chambers v. Supreme Tent Knights of the Maccabees of the World, 200 Pa. 244, 86 Am. St. Rep. 716, 49 Atl. 784.

[4] Supreme Lodge Knights of Pythias v. La Malta, 95 Tenn. 157, 30 L.R.A. 838, 31 S. W. 493.

[5] Eversberg v. Supreme Tent Knights of Maccabees, 33 Tex. Civ. App. 549, 77 S. W. 246. *Examine* Sovereign Camp Woodmen of the World v. Fraley, 94 Tex. 200, 51 L.R.A. 898, 59 S. W. 879.

[6] Plunkett v. Supreme Conclave

ment that by-laws might be thereafter enacted is contained in the application, certificate and by-laws an amendment extending the time limitation clause as to suicide does not violate any vested right under a pre-existing policy as the law recognizes no vested right to commit suicide.[7] It is held in a Wisconsin decision that a certificate of membership, and the application therefor, which provides against liability in case of death by suicide, constitute a contract between the parties prevailing over by-laws of the association which do not authorize such limitation upon liability.[8] And where directors are so empowered by the association's charter, they may, where the member agrees to conform to by-laws thereafter adopted by said directors, amend the by-laws and provide for forfeiture in case of a member's suicide and such change is binding.[9]

**§ 2648. Suicide: policy to be void in case of death by violation of law.**—Death by suicide will not avoid a policy which provides that if the insured "die in violation of an attempt to violate any law," the policy shall be void.[10] And where a policy provided that "if the assured shall die in consequence of a violation of any criminal law of any country, state, or territory in which the assured may be this certificate shall be null and void," it was held that suicide committed by an alleged fugitive from justice to avoid and arrest and trial for a crime committed by him is not to be considered as the proximate result of the alleged crime, and that his death by suicide is not, within the proper meaning of the policy, to be considered as the violation of law therein referred to.[11] Unless made so by statute, suicide is not a crime, within the meaning of a mutual benefit certificate, exempting the association from liability in case the holder dies on account of violation of the criminal laws;[12] and although suicide is technically a crime it is not within

Improved Order of Heptasophs, 105 Va. 643, 55 S. E. 9. See §§ 379 et seq. herein.

[7] Klein v. Knights & Ladies of Security, 79 Wash. 173, 140 Pac. 72.

[8] McCoy v. Northwestern Mutual Relief Assoc. 92 Wis. 577, 47 L.R.A. 681, 66 N. W. 697. *Compare* Stirn v. Supreme Lodge of Bohemian Slavonian Benevolent Soc. 150 Wis. 13, 136 N. W. 164, 41 Ins. L. J. 1130.

[9] Hughes v. Wisconsin Odd Fellows Mutual Life Ins. Co. 98 Wis. 292, 73 N. W. 1015.

[10] Darrow v. Family Fund Soc. 116 N. Y. 537, 15 Am. St. Rep. 430, 22 N. E. 1095, 6 L.R.A. 495, 27 N. Y. St. Rep. 474 (one judge dissenting); Patterson v. National Premium Mutual Ins. Co. 100 Wis. 118, 42 L.R.A. 253, 75 N. W. 980. See Patrick v. Excelsior Life Ins. Co. 4 Hun (N. Y.) 263; Freeman v. National Benefit Soc. 42 Hun (N. Y.) 252.

On necessity that suicide be reasonable and legitimate consequence of violation of law in order to relieve insurer, see note in 13 L.R.A.(N.S.) 261.

[11] Kerr v. Minnesota Mutual Benefit Assoc. 39 Minn. 174, 12 Am. St. Rep. 631, 39 N. W. 312.

[12] Royal Circle v. Achterrath, 204 Ill. 549, 63 L.R.A. 452, 98 Am. St. Rep. 224, 68 N. E. 492.

the clause of a policy providing that death in consequence of or in violation of law is not covered by the policy, where the usual suicide clause is omitted and an "absolutely incontestable" clause included.[13] If the attempt to commit suicide is made a criminal offense, such an attempt will, of course, avoid a policy containing such a condition, though if the attempt were successful, it would not avoid the policy.[14] Suicide of an assured does not, however, release from liability the company which has insured his life, and has issued a policy which provided that it was "to be void if the member herein shall die in consequence of a duel or by the hands of justice, or of any violation of, or attempt to violate any criminal law of the United States, or of any state or country in which the member herein named may be," when by the law of the state wherein the assured dies an attempt to commit suicide is not a crime if successful.[15] In the absence of evidence of a crime, the jury are not required to find that an insured person, found dead with a pistol wound in his head, came to his death by the intentional act of another, so as to take the case out of the provisions of a policy against death by accident.[16]

§ 2648a. **Suicide: external, violent, and accidental means.**—Death from suicide which springs from an insane impulse of a disordered or insane mind is, through external, violent, and accidental means, within the meaning of an accident insurance policy.[17] So death caused by the cutting of his own throat by an assured person while insane, without knowing the result of his act and without intending thereby to kill himself, will constitute "death by external, violent, and accidental means," within the terms of a policy providing that death must be occasioned by such means to justify a recovery under the policy.[18] So a death caused by a person hanging himself while temporarily insane is covered by a policy against "bodily injuries effected through external, accidental, and violent means,"

[13] Patterson v. Natural Premium Mutual Life Ins. Co. 100 Wis. 118, 42 L.R.A. 253, 69 Am. St. Rep. 899, 75 N. W. 980.

[14] Meacham v. New York State Mutual Benefit Assoc. 120 N. Y. 237, 30 N. Y. St. Rep. 874, 24 N. E. 283, *citing* Darrow v. Family Fund Soc. 116 N. Y. 537, 15 Am. St. Rep. 430, 22 N. E. 1095, 6 L.R.A. 495, 27 N. Y. St. Rep. 474 and note.

[15] Darrow v. Family Fund Soc. 116 N. Y. 537, 6 L.R.A. 495, 15 Am. St. Rep. 430, 22 N. E. 1093.

[16] Aetna Life Ins. Co. v. Milward, 20 Ky. L. Rep. 589, 68 L.R.A. 285, 82 S. W. 364.

[17] Tuttle v. Iowa State Traveling Men's Assoc. 132 Iowa, 652, 7 L.R.A. (N.S.) 223 (annotated on death from suicide as one caused through external, violent and accidental means), 104 N. W. 1131.

[18] Blackstone v. Standard Life & Accident Ins. Co. 74 Mich. 592, 3 L.R.A. 486, 42 N. W. 156.

and is not within an exception of death caused by "bodily infirmities or disease, or by suicide or self-inflicted injuries." [19]

**§ 2649. Suicide: intentional injuries by assured or another.**—In Travelers' Insurance Company v. McConkey,[20] decided in 1888, the policy insured against bodily injuries "effected through external, violent, and accidental means; . . . provided, always, that this insurance shall not extend . . . to any death or disability . . . caused wholly or in part, or jointly, by bodily infirmities or disease existing prior or subsequent to the date of this contract, . . . and no claims shall be made under this policy when the death or injury may have been caused by . . . suicide (felonious or otherwise, sane or insane) . . . or intentional injuries inflicted by the insured or any other person." The complaint alledged an accidental shooting through the heart by another and consequent death; the defense was suicide, and intentional injuries inflicted by assured or some other person, and it was held that no claim could be sustained if the injuries which caused insured's death were inflicted intentionally upon himself or when insane, or if inflicted upon him by another person.[21]

[19] Accident Ins. Co. v. Crandal, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. 685. *Cited* in:

*United States.* — Riter v. Mutual Life Ins. Co. 169 U. S. 139, 149, 42 L. ed. 696, 18 Sup. Ct. 300; Connecticut Mutual Life Ins. Co. v. Akens, 150 U. S. 468, 473, 37 L. ed. 1148, 1149, 14 Sup. Ct. 155; Clarke v. Equitable Life Assur. Soc. 118 Fed. 374, 377, 55 C. C. A. 200, 203; Berger v. Pacific Mutual Life Ins. Co. 88 Fed. 241, 242; Mutual Life Ins. Co. v. Leubrie, 71 Fed. 843, 844, 18 C. C. A. 332, 333, 38 U. S. App. 37; Manufacturers' Accident Indemnity Co. v. Dorgan, 58 Fed. 945, 955, 7 C. C. A. 581, 591, 16 U. S. App. 290, 22 L.R.A. 626.

*California.*—Berliner v. Travelers Ins. Co. 121 Cal. 451, 561, 41 L.R.A. 467, 468, 66 Am. St. Rep. 49, 53 Pac. 918.

*Colorado.* — Travelers Insurance Co. v. Murray, 16 Colo. 296, 304, 25 Am. St. Rep. 267, 26 Pac. 774.

*Illinois.*—Healey v. Mutual Accident Assoc. 133 Ill. 556, 562, 9 L.R.A. 371, 372, 23 Am. St. Rep. 637, 25 N. E. 52.

*Kansas.*—Hart v. Modern Workman Knights of Maccabees, 60 Kan. 678, 682, 72 Am. St. Rep. 380, 57 Pac. 936.

*Maine.*—McGlinchey v. Fidelity & Casualty Co. 80 Me. 251, 256, 6 Am. St. Rep. 190, 14 Atl. 13.

*Michigan.*—Blackstone v. Standard Life & Accident Ins. Co. 74 Mich. 592, 614, 3 L.R.A. 486, 494, 42 N. W. 156.

*Pennsylvania.*—Pickett v. Pac. Mutual Life Ins. Co. 144 Pa. 79, 93, 13 L.R.A. 661, 663, 27 Am. St. Rep. 618, 22 Atl. 871.

*West Virginia.*—Gerling v. Agricultural Ins. Co. 39 W. Va. 689, 699, 20 S. E. 691.

[20] 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. 1360.

[21] Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. 1360. *Cited* in:

*United States.*—Connecticut Mutual Life Ins. Co. v. Akens, 150 U. S. 468, 475, 37 L. ed. 1148, 1150, 14 Sup. Ct. 155.

*Illinois.* — Seitzinger v. Modern Woodmen of America, 106 Ill. App. 449, 455.

**§ 2650. Suicide in absence of stipulation: contra.**—There seems to be some conflict of opinion as to the effect of suicide where there is no stipulation against it in the policy. In New York the suicide of one whose life is insured constitutes no defense to an action on the policy unless it comes within some condition of the contract of insurance relieving the insurer from liability in such a case.[1] But the rule is subject, as will be noted hereafter, to such exception as arises in cases where at the time of making the application the assured intended to commit suicide, and the intent evidences a legal fraud. As opposed to the New York decision, the court, per Brickell, J., in an Alabama case[2] decided in 1882, declares that voluntary self-destruction or suicide by a sane insured should be implied as an exception of liability, or rather as not within the risks contemplated, even though not expressly excepted in the policy. There is certainly much force in the argument of the court in this last case, but inasmuch as the insurers frame their policies, and may include such valid exceptions as may be agreed upon, it would seem that the courts should be loath to import an exception against liability into the policy which the insurers have neglected to express, but if the failure to expressly except suicide in the policy amounts to an implied agreement to pay the amount of the policy in case the insured while sane commits suicide, then such implied agreement can stand on no better footing than an express agreement to the same effect, and it ought to be held void upon principle and as against public policy. And if the act of suicide were voluntarily committed by a sane person under such

*Kansas.*—Hart v. Modern Woodmen of America, 60 Kan. 678, 683, 72 Am. St. Rep. 380, 57 Pac. 936.

*North Carolina.*—Spruill v. Northwestern Mutual Life Ins. Co. 120 N. Car. 141, 146, 27 S. E. 39.

*Pennsylvania.* — Chambers v. Supreme Tent Knights of Maccabees, 200 Pa. 244, 245, 86 Am. St. Rep. 716, 49 Atl. 784; Tritschler v. Keystone Mutual Benefit Assoc. 180 Pa. 205, 207, 36 Atl. 734; Hall v. Mutual Reserve Fund Life Assoc. 19 Pa. Super. Ct. 31, 34.

*South Carolina.*—Latimer v. Sovereign Camp Woodmen of World, 62 S. Car. 145, 160, 40 S. E. 155.

*Distinguished* in Stephens v. Railway Officials & Employees Accident Assoc. 75 Miss. 84, 89, 21 So. 710.

On conflict of laws as to suicide, see notes in 63 L.R.A. 867; 23 L.R.A. (N.S.) 981; and 52 L.R.A.(N.S.) 284.

[1] Darrow v. Family Fund Soc. 116 N. Y. 537, 6 L.R.A. 495, 15 Am. St. Rep. 430, 22 N. E. 1095. See Borradaile v. Hunter, 5 Man. & G. 639, 658, 5 Scot. (N. R.) 418, 12 L. J. C. P. 225, 7 Jur. 443, per Lord Erskine, *citing* Amicable Life Assur. Co. v. Bolland, Selw. N. P. (10th ed.) 1033, 4 Bligh. N. S. 194, 2 Dow. & C. 1.

On suicide while sane as a defense to an action on a policy or certificate containing no provision as to effect of suicide, see note in 8 L.R.A.(N.S.) 1124.

[2] Supreme Commandery Knights of Golden Rule v. Ainsworth, 71 Ala. 436, 445–47, 46 Am. Rep. 332, 335, 337.

circumstances as clearly evidence a fraud, the fraud itself ought to be a defense.[3] It is held, however, in other jurisdictions that suicide will not defeat a recovery upon a mutual benefit certificate not procured by the insured with the intention of committing suicide, unless the contract so provides in express terms.[4] In Maryland if a life policy does not provide that it shall become void in the event of the suicide of the insured, his suicide while sane is not a defense to an action on the policy by the beneficiary, unless the policy was obtained by the deceased with intent to commit suicide and thus defraud the insurer.[5] So in Illinois if a life policy contains no provision on the subject, the death of the insured by his own act resulting from insanity, is as much insured against as death resulting from any other physical affliction.[6] In Wisconsin intentional suicide while sane does not avoid a life policy, in the absence of any provision therein to that effect, if third persons are beneficiaries.[7] So in Iowa a policy containing no stipulation as to suicide, taken out in good faith by the assured, will not be avoided as against the beneficiary named therein, by the fact that the assured thereafter, while sane, deliberately and purposely took his own life.[8] In Minnesota in the law of insurance, suicide is not, as a rule, recognized as a ground for exemption from liability, or for the forfeiture of a policy issued for the benefit of a third person unless it is expressly so provided in the policy.[9] Under a Federal Supreme Court decision intentional self-destruc-

[3] "If the policy contains no condition against self-destruction, it 'is clear upon principle that a voluntary suicide, the assured being sane at the time, is a fraud upon the insurer and vitiates the insurance:" Note 59 Am. Dec. 487. A charge to the jury is right which instructs that if no condition against suicide exists in the policy, the act of suicide by the assured is a fraud upon the assurer preventing recovery: Hartman v. Keystone Ins. Co. 21 Pa. St. 466. A covenant "to do and perform all such acts, matters, and things as should be requisite for continuing and keeping on foot a policy" cannot be read negatively, and is not broken by the suicide of the covenantor whereby the policy is forfeited: Dormay v. Borrodaile, 10 Beav. 335, s. c. 5 C. B. 380, 11 Jur. 231.

That condition upholding suicide void, see § 2532 herein.

[4] Lange v. Royal Highlanders, 75 Neb. 188, 10. L.R.A.(N.S.) 666, 121 Am. St. Rep. 786, 106 N. W. 224; Campbell v. Supreme Conclave Improved Order Heptasophs, 46 N. J. L. 274, 54 L.R.A. 576, 49 Atl. 550.

[5] Supreme Conclave Improved Order of Heptasophs of Baltimore City v. Miles, 92 Md. 613, 84 Am. St. Rep. 528, 48 Atl. 845.

[6] Grand Lodge Independent Order of Mutual Aid v. Wieting, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59.

[7] Patterson v. Natural Premium Mutual Life Ins. Co. 100 Wis. 118, 42 L.R.A. 253, 69 Am. St. Rep. 899, 75 N. W. 980.

[8] Seiler v. Economic Life Assoc. 105 Iowa, 87, 43 L.R.A. 537, 74 N. W. 941.

[9] Kerr v. Minnesota Mutual Benefit Assoc. 39 Minn. 174, 12 Am. St. Rep. 631, 39 N. W. 312.

tion by the assured when of sound mind is itself a defense to an action on a life policy, even if the policy does not expressly declare that it shall be void in such a case.[10] Under a Massachusetts decision a beneficiary in a mutual benefit certificate, who, under the terms of the contract, can be changed at any time by the insured, cannot recover on the certificate in case the insured takes his own life while sane, although there is no provision in the certificate against suicide.[11]

**§ 2651. Suicide by insane person in absence of stipulation against suicide.**—Going beyond the point of voluntary suicide by a sane person it would be clear that, in the absence of an exception of suicide from the risks, the self-destruction of assured while insane could not avoid the policy,[12] and it is declared that an act in a state of unconsciousness, whether assured be sane or insane, would be merely accidental, and not avoid the policy.[13]

[10] Ritter v. Mutual Life Ins. Co. 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. 300. *Cited* in:

*United States.*—Mutual Life Ins. Co. v. Kelly, 114 Fed. 268, 274, 52 C. C. A. 154, 160; Burt v. Union Central Life Ins. Co. 105 Fed. 419, 421, 44 C. C. A. 548, 550, 59 L.R.A. 395; Hopkins v. Northwestern Life Assur. Co. 94 Fed. 729, 730.

*Illinois.* — Grand Legion, Select Knights of America v. Beatty, 117 Ill. App. 659.

*Iowa.*—Schmidt v. Northern Life Assoc. 112 Iowa, 41, 44, 51 L.R.A. 141, 144, 84 Am. St. Rep. 323, 83 N. W. 800; Seiler v. Economic Life Assoc. 105 Iowa, 87, 92, 43 L.R.A. 537, 539, 74 N. W. 941.

*Kansas.*—Supreme Court of Honor v. Updegraff, 68 Kan. 474, 476, 75 Pac. 477.

*Kentucky.* — Mooney v. Ancient Order of United States Grand Lodge, 114 Ky. 950, 960, 72 S. W. 288; Manhattan Life Ins. Co. v. Beard, 112 Ky. 455, 461, 66 S. W. 35.

*Maryland.* — Supreme Conclave Improved Order Heptasophs v. Miles, 92 Md. 613, 626, 84 Am. St. Rep. 528, 48 Atl. 845.

*Missouri.* — Morton v. Supreme Council Royal League, 100 Mo. App. 76, 86, 73 S. W. 259.

*New York.*—Shipman v. Protected Home Circle, 174 N. Y. 398, 408, 63 L.R.A. 347, 351, 67 N. E. 83; Weber v. Supreme Tent Knights of Maccabees, 172 N. Y. 490, 493, 95 Am. St. Rep. 753, 65 N. E. 258.

*Pennsylvania.* — Hall v. Mutual Reserve Fund Life Assoc. 19 Pa. Super. Ct. 31, 33.

*Wisconsin.*—Patterson v. Natural Premium Mutual Life Ins. Co. 100 Wis. 118, 121, 42 L.R.A. 253, 258, 69 Am. St. Rep. 899, 75 S. W. 980.

*Distinguished* in Kelley v. Mutual Life Ins. Co. 109 Fed. 56, 61; Parker v. Des Moines Life Assoc. 108 Iowa, 117, 123, 78 N. W. 826; Murray v. State Mutual Life Ins. Co. 22 R. I. 524, 527, 53 L.R.A. 742, 744, 48 Atl. 800.

[11] Davis v. Supreme Council Royal Arcanum, 195 Mass. 402, 10 L.R.A. (N.S.) 722, 81 N. E. 294.

On suicide when sane as a defense to an action on a policy or certificate containing no provision as to effect of suicide, see note in 8 L.R.A.(N.S.) 1124.

[12] Horn v. Anglo-Australian & Universal Family Life Ins. Co. 30 L. J. Ch. 511, 7 Jur. (N. S.) 673, 4 L. T. 142, 9 W. R. 359, 2 Big. L. & Acc. Ins. Cas. 602.

[13] Streeter v. Western Union Mutual Life & Accident Ins. Co. 65

**§ 2652. Suicide where policy obtained with that intent: fraud: creditor.**—If the policy is obtained by assured with the intent to take his own life so that the money might be appropriated to the payment of creditors and the support of his family and relations, it is void, even though it contains no condition as to the manner of death, and a creditor who is substituted as a beneficiary stands in no better position than the assured himself, so far as the binding force of the policy is concerned. The ground of defense in such a case is not the suicide, but the legal fraud, suicide being the ultimate agency by which the fraud is accomplished.[14]

**§ 2653. Suicide for benefit of assured's estate or third person.**—Even though there is no condition against suicide, the deliberate killing of himself by insured while sane, and with intent to secure the amount of the insurance to his estate, avoids the policy.[15] And suicide of a sane man for the purpose of giving his estate the benefit of the insurance on his life, will deprive his personal representatives of all right to enforce the policies, although they contain no provision against suicide.[16] So the suicide of the assured will terminate the rights of the beneficiary in a mutual benefit certificate, the same as it would the rights of his legal representative.[17] But if a life policy is taken out by insured not for his own benefit,

Mich. 199, 202, 8 Am. St. Rep. 882, 31 N. W. 779, per Champlin, J.

[14] Smith v. National Benefit Soc. 123 N. Y. 85, 9 L.R.A. 616, 25 N. E. 197, 33 N. Y. St. Rep. 67, aff'g 51 Hun (N. Y.) 575. See also Swift v. Massachusetts Mutual Life Ins. Co. 63 N. Y. 186, 20 Am. Rep. 522.

On evidence of declarations of intent to commit suicide, see note in L.R.A.1916B, 822.

[15] Ritter v. Mutual Life Ins. Co. 17 U. S. C. C. A. 537, 70 Fed. 954, 42 L.R.A. 583, s. c. 69 Fed. 505. In this case insured left a letter to his executor describing his liabilities and his insurance, and directed the application of the proceeds of his policy to his debts. Other letters were also written by assured evidencing a deliberate suicide, although it was not shown by the declarations of assured or by other like positive evidence that he intended to take his own life. He was heavily in debt and insolvent, had unlawfully appropriated trust funds, had engaged in hazardous stock speculations, and was carrying an unusually large amount of insurance grossly disproportionate to that which his income justified. He took out additional insurance and again increased the same by about ninety thousand dollars, and shortly thereafter committed suicide. The court *cites* Moore v. Woolsey, 4 El. & B. 243, 254, s. c. 24 L. J. Q. B. 40, 1 Jur. (N. S.) 468, 3 C. L. R. 207, 3 W. R. 66, per Lord Campbell; Hartman v. Keystone Ins. Co. 21 Pa. St. 466, 479; Supreme Commandery v. Ainsworth, 71 Ala. 436, 447, 46 Am. Rep. 332; New York Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591, 600, 29 L. ed. 997, 6 Sup. Ct. Rep. 877, per Field, J.; Supreme Conclave Independent Order Heptasophs, 92 Md. 613, 628, 84 Am. St. Rep. 528, 48 Atl. 845.

[16] Ritter v. Mutual Life Ins. Co. 70 Fed. 954, 17 C. C. A. 537, 28 U. S. App. 612, 42 L.R.A. 583.

[17] Shipman v. Protected Home Circle, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83.

but for the benefit of a third person, as in case where it is payable to the heirs or widow, and there is no stipulation that it shall be void in case of suicide or self-destruction of assured, then, as a general rule, suicide is no defense, for ordinarily the beneficiary is not bound by acts or declarations of the assured done or made by him after the issue of the policy, unless the same are in violation of some condition in the policy.[18] Nor will suicide of a member of a mutual benefit society defeat a recovery on his benefit certificate, issued in favor of his wife, in the absence of express provision in the contract to that effect, although the beneficiary had not a vested interest which could not be defeated by the member.[19]

§ 2654. **Suicide: temporary insanity.**—In the absence of the clause "sane or insane," if the insured commits suicide in a temporary fit of insanity the policy is not invalidated.[20]

§ 2655. **Suicide: temporary insanity: "sane or insane, voluntary or involuntary."**—If one commits suicide while temporarily insane, and the policy stipulates against self-destruction, sane or insane, voluntary or involuntary, there can be no recovery.[1]

[18] Fitch v. American Popular Life Ins. Co. 59 N. Y. 557, 17 Am. Rep. 372, 11 Alb. L. J. 91, rev'g 2 Thomp. & C. (N. Y.) 247, *followed* in Patrick v. Excelsior Life Ins. Co. 4 Hun (N. Y.) 263, 67 Barb. (N. Y.) 202; Mills v. Rebstock, 29 Minn. 380, 13 N. W. 162. In this case the constitution and by-laws of a mutual benefit association were held to stand in place of a policy, no policy being issued. The society was organized to secure to the heirs of deceased members the benefits of life insurance on the assessment plan. There was no provision qualifying the right of recovery in case of suicide. It was required, however, that the member be in "good standing" at the time of his death. "Good standing" was evidently dependent on the payment of dues as required under the contract: Kerr v. Minnesota Mutual Benefit Assoc. 39 Minn. 174, 12 Am. St. Rep. 631, 39 N. W. 312, where it is said, per Vandeburgh, J.: "In the law of insurance suicide is not as a rule recognized as a ground of exemption from liability or for forfeiture of a policy issued for the benefit of a third person, unless it is expressly so in the policy." See Patterson v. Natural Premium Mutual Life Ins. Co. 100 Wis. 118, 42 L.R.A. 253, 69 Am. St. Rep. 899, 75 N. W. 980, 27 Ins. L. J. 820.

[19] Grand Legion of Illinois Select Knights of America v. Beaty, 224 Ill. 346, 8 L.R.A.(N.S.) 1124 (annotated on suicide while sane as a defense to an action on a policy or certificate containing no provision as to effect of suicide), 79 N. E. 565.

[20] Horn v. Anglo-Australian & Universal Family Life Ins. Co. (1861) 7 Jur. (N. S.) 673, 30 L. J. Ch. 511, 4 L. T. 142, 9 W. R. 359.

On insanity as affecting condition as to suicide, see note in 35 L.R.A. 258.

On liability under accident policy for death during delirium, see note in 46 L.R.A.(N.S.) 543.

[1] Dennis v. Union Mutual Life Ins. Co. 84 Cal. 570, 571, 24 Pac. 120 (points involved were those of pleading and proof merely).

On effect of words "sane or insane," or other words relating to

**§ 2656. Suicide: temporary insanity, "felonious or otherwise, sane or insane."**—In Iowa it is held that a condition that "suicide, felonious or otherwise, sane or insane," prevents a recovery where the act of suicide was committed by insured while temporarily insane from illness, and when he was neither conscious nor responsible. The court, per Rothrock, J., said: "We think, however, that the better rule and the logical conclusion is that the condition in the policy was intended to include self-destruction, no matter what the mental condition of the insured was at the time of the act. . . . It means all suicidal acts, whether such as are denominated as criminal or such as are the offspring of insanity."[2]

**§ 2657. Suicide: "self-destruction," "in any form:" "disease:" "voluntary act of assured."**—The word "self-destruction" is synonymous with the word "suicide" where the insurer is exempted from liability in case of "suicide—the self-destruction of the insured in any form except upon proof that the same is the direct result of disease or accident, occurring without the voluntary act of the insured;" and the words "in any form" in the same clause relate only to the manner of killing; the word "disease" used in the same clause, unrestricted by anything in the context, includes disease of the mind as well as disease of the body, and the concluding words, "voluntary act of the assured," point to the act of a person

mental condition in suicide clause in policy, see note in 17 L.R.A.(N.S.) 260; on construction and effect of provision against liability for injury to or death of insured while or when insane, see note in L.R.A.1915E, 657.

[2] Searth v. Security Mutual Life Soc. 75 Iowa, 346, 39 N. W. 658, *cited* in Moore v. Northwestern Mutual Life Inf. Co. 192 Mass. 468, 7 Am. & Eng. Ann. Cas. 656, 78 N. E. 488, 35 Ins. L. J. 769, 774 (to general point that words "sane or insane" cover every case of suicide); Mutual Life Ins. Co. v. Kelley, 114 Fed. 268, 52 C. C. A. 154, 31 Ins. L. J. 497, 514, rev'g 109 Fed. 56, 30 Ins. L. J. 904 (warranty was not to "die by my own act, whether sane or insane, during said period of two years"); Ticktin v. Fidelity & Casualty Co. (U. S. D. C.) 87 Fed. 543, 27 Ins. L. J. 925 (to point that defense of death resulting from "Act of suicide being good at common law. . . . And this rule not having been changed by statute, the demurrer to the petition on this ground is well taken." The statute referred to being Rev. Stat. Mo. 1889, sec. 5855, providing that it shall be no defense that insured committed suicide unless it shall be shown to the satisfaction of the court or jury that insured contemplated suicide at the time he made his application for the policy and that any stipulation in the policy to the contrary is void. See on this point §§ 2642, 2642a herein, *quoted* from in Spruill v. Northwestern Mutual Life Ins. Co. 120 N. Car. 141, 27 So. 39, 26 Ins. L. J. 881, 884 (a case excepting liability if insured "sane or insane," died by his own hand within two years, and it was held that assured's mental condition at time of killing was entirely immaterial).

On liability under accident policy for death during delirium, see note in 46 L.R.A.(N.S.) 543.

mentally capable of controlling his will.[3] If, however, the condition is "self-destruction, sane or insane," assured's mental condition is immaterial upon the question of what constitutes suicide, "there can be no looking into the condition of the mind of the deceased when he committed the fatal act. The case might be different if . . . his death was due to an accidental cause . . . then it would fall within the rule established by a number of cases which hold that accidental or unintentional self-destruction is not within a condition forfeiting the policy for suicide."[4]

**§ 2658. Stipulation as to "suicide:" death "by his own hand," and the like.**—Provisions that "the policy shall be void in case the insured shall "commit suicide," or "die by his own hand," or "by his own act," or "by his own act or intention," or "take his own life," are by settled authority agreed to have the same meaning, there being no substantial difference between the terms.[5] So under a Kansas decision a condition avoiding a policy of life insurance if the insured shall die "by his own hand" or "by his own act" is equivalent to a proviso against suicide or intentional self-destruction.[6]

The effect of such conditions as these above noted has been much discussed by the courts, and while it is generally agreed that suicide by a sane person avoids the policy, yet beyond that point there has been some difference of opinion, a few courts not adopting the rule declared by the supreme court of the United States, but holding to the English rule. The decisions in and opinions of the several courts are, however, fully considered under the sections next following and while the words "sane or insane" as a part of the proviso, have necessarily avoided successfully raising the question involved in their absence, yet the probability of the point again occurring under policies without these or other like exclusive words justifies the consideration exhaustively of the question and so settling it, at least so far as the weight of authority is concerned.

It may also be stated here that in order to meet the conditions consequent upon the use of clauses of a nature such as we are now

[3] Connecticut Mutual Life Ins. Co. v. Akens, 150 U. S. 468, 474, 475, 37 L. ed. 1148, 14 Sup. Ct. 155, per Gray, J. See § 2659 herein.

[4] Clarke v. Equitable Life Assur. Soc. of U. S. 118 Fed. 374, 55 C. C. A. 200, 32 Ins. L. J. 385.

[5] Mutual Life Ins. Co. v. Wiswell, 56 Kan. 765, 35 L.R.A. 258, 44 Pac. 996; Cooper v. Massachusetts Ins. Co. 102 Mass. 227, 3 Am. Rep. 451; Adkins v. Columbia Life Ins. Co. 70 Mo. 27, 35 Am. Rep. 410; Breasted v. Farmers' Life & Trust Co. 4 Hill (N. Y.) 73, s. c. 8 N. Y. (4 Seld.) 299, 59 Am. Dec. 482; Clift v. Schwabe, 3 Man. G. & S. (3 C. B.) 437, 2 Car. & K. 134, 17 L. J. C. P. 2. See "English Rule" hereinafter stated.

[6] Mutual Life Ins. Co. v. Wiswell, 56 Kan. 765, 35 L.R.A. 258, 44 Pac. 996.

considering the words "sane or insane" were inserted with the evident intent to exclude the risk of suicide with the effect noted under preceding sections herein. Other clauses making the policy incontestable after a specified time but voiding the policy if suicide is committed by assured, sane or insane, within that period have also been substituted in some of the policies, and statutes have also been enacted which preclude the defense of suicide unless it be shown that assured contemplated suicide at the time of taking out the policy. These policy and statutory provisions have also been considered under preceding sections herein. In addition, attention is called to a clause hereinafter considered in this connection which relates to the matter of proof being somewhat dependent upon an adjudication of insanity, etc.[7]

**§ 2659. "Suicide" and like clauses: rule in United States Supreme Court.**[8]—The established rule in the supreme court of the United States is, that if one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he understands its physical nature, consequences, and effect, it is not "suicide," or "self-destruction," or "dying by his own hand," within the meaning of those words or words of like character and construction excepting such risks out of the policy, there being no other words expressly extending the exemption to such a case.[9] The condition in this case was: "Suicide.—The self-destruction of the insured in any form, except upon proof that the same is the direct result of disease or of accident occurring without the voluntary act of the insured." The assured died by taking poison. The court, per Gray, also said: "The clause contains no such significant and decisive words as 'die by suicide, sane or insane,' as in Bigelow v. Berkshire Insurance Company,[10] or 'by

[7] See Illinois and Kentucky cases under subdivs. (e) and (h) herein.

[8] See § 2658 herein.

On conflict of laws as to suicide, see notes in 63 L.R.A. 867; 23 L.R.A. (N.S.) 981; and 52 L.R.A.(N.S.) 284.

[9] Connecticut Life Ins. Co. v. Akens, 150 U. S. 468, 473, 37 L. ed. 1148, 14 Sup. Ct. 155, per Gray, J., *cited* in Clarke v. Equitable Life Assur. Soc. 118 Fed. 374, 377, 55 C. C. A. 200, 203 (clause here was: "self destruction sane or insane"); McGlother v. Provident Mutual Accident Co. 89 Fed. 685, 691, 32 C. C. A. 318, 324, 60 U. S. App. 705; Ritter v. Mutual Life Ins. Co. 42 L.R.A. 583, 70 Fed. 954, 959, 17 C. C. A. 537, 542, 28 U. S. App. 612, case aff'd 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. 300; Seitzinger v. Modern Woodmen of America, 204 Ill. 58, 63, 68 N. E. 478; Grand Lodge Independent Order Mutual Aid v. Wieting, 68 Ill. App. 125, 127; Spruill v. Northwestern Mutual Life Ins. Co. 120 N. Car. 140, 146, 27 S. E. 39, 26 Ins. L. J. 881.

[10] 93 U. S. 284, 23 L. ed. 918.

suicide, felonious or otherwise, sane or insane,' as in" Travelers' Insurance Company v. McConkey.[11]

§ 2660. **Same subject: English rule.**[12]—Under the English rule the responsibility of assured as a moral agent, and his inability to judge between the right and wrong of moral character and consequences of his act, is an immaterial factor, and if the insured knew at the time of committing the act of self-destruction or suicide that his life would be destroyed, and so intended, the policy is avoided thereby.[13]

§ 2661. **Same subject: rule in this country.**[14]—It is conclusively evident from the decisions and opinions considered under the following sections that the rule declared in the United States supreme court is that sustained by the almost overwhelming weight of authority in this country, and is the true rule. It further accords with the rules of construction in insurance law, and with that reason and justice which should ever prevail.[15]

(a) **Same subject: rule and cases in United States courts.**[16]—The case of Connecticut Life Insurance Company v. Akens,[17] establishing the rule above given as that of the United States courts, was decided in 1893, but the court cites and follows several other decisions. Thus in one case decided in 1887,[18] the policy was against "bodily injuries effected through external accidental means," with an exception of liability in case of death or disability "caused wholly or in part by bodily infirmities or disease . . . or by suicide . . . or self-inflicted injuries." The insured died by hanging himself while insane, and this was held not within the exception, but that the death was covered by the policy, Gray, J., saying: "The decisions upon the effect of a policy of life insurance which provides that it shall be void if the assured "shall die by suicide" or "shall die by his own hand" go far toward determining this question. This court, on full consideration of the conflicting authorities upon that subject, has repeatedly and uniformly held that such a provision, not containing the words "sane or insane," does not include a self-killing by an insane person, whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act or only such as to prevent him, while foreseeing and premeditating its

[11] 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. 1360.

[12] See § 2658 herein.

[13] See subd. (b) below.

[14] See § 2658 herein.

[15] As to presumptions and burden of proof, see §§ 2865, 3773–3775 herein.

[16] See § 2658 herein.

[17] 150 U. S. 468, 37 L. ed. 1148, 14 Sup. Ct. 155.

[18] Accident Ins. Co. v. Crandall, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. 685, aff'd 27 Fed. 40.

physical consequences, from understanding its moral nature and aspect:"[19] In another case cited in the decision first noted in this section, decided in 1884,[20] the condition was, "die by his own hand." It was claimed that assured died by his own hand because, with premeditation and deliberation, he shot himself through the head and died in consequence. The points in this case were as to the right of the court to withdraw the case from the jury and the admissibility of certain evidence as to insanity or the admissibility of the opinion of a nonprofessional witness as to sanity or insanity. The opinion is by Harlan, J. The court in the 1893 decision also cites the noted case of Mutual Life Insurance Company v. Terry,[1] decided in 1872. The contract here was between Mrs. Terry and the insurer, the insured, Mr. Terry, not being a party to the contract, but the court said this "made no difference." The condition was: "If the said person whose life is hereby insured . . . shall die by his own hand . . . this policy shall be null and void." The court, Hunt, J., also declares that "the question of sanity has usually been presented upon the validity of an agreement, the capacity to make a will, or upon responsibility for crime. If Terry had made an agreement under the circumstances stated in the charge, a jury or a court would have been justified in pronouncing it invalid. A will, then, made by him would have been rejected by the surrogate if offered for probate. If upon trial for a criminal offense, upon all the authorities he would have been entitled to a charge that upon proof of the facts assumed the jury must acquit him. We think a similar principle must control the present case, although the standard may be different:"[2] Continuing the court also says: "We hold the rule on the question before us to be this: If the assured, being in possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape the ills of life, intentionally takes his own life, the proviso attaches and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequence, and

[19] Id. 531. Both of these cases are discussed in Clarke v. Equitable Life Assur. Soc. of U. S. 118 Fed. 374, 55 C. C. A. 200, 32 Ins. L. J. 385, 390 (but the condition here was: "self destruction, sane or insane").

[20] Connecticut Ins. Co. v. Lathrop, 111 U. S. 612, 28 L. ed. 536, 4 Sup. Ct. 533.

[1] 15 Wall. (82 U. S.) 580.

[2] Id. 590, *citing* upon this point Freeman v. People, 4 Denio (N. Y.) 9; Willis v. People, 32 N. Y. 715, 719; Seamen's Friend Soc. v. Hopper, 33 N. Y. 619; The Marquis of Winchester's Case, 6 Reports, 23; Combe's Case, Moore, 759.

effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract and the insurer is liable." [3] In Charter Oak Life Insurance Company v. Rodel,[4] decided in 1877 and cited in the case first above noted under this section, the condition was "die by his own hand" the charge of the court was in the very words sanctioned and approved in the Terry case,[5] and the instruction was held not erroneous, the court, per Bradley, J., saying: "We see no reason to modify the views expressed by us on that occasion."[6] Another case

[3] Id. 590, 591.

[4] 95 U. S. 232, 24 L. ed. 433.

[5] Mutual Life Ins. Co. v. Terry, 15 Wall. (82 U. S.) 580, 21 L. ed. 236.

[6] *Cited* in Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 187 U. S. 197, 200, 47 L. ed. 139, 143, 23 Sup. Ct. 108; Ritter v. Mutual Life Ins. Co. 169 U. S. 139, 149, 42 L. ed. 696, 18 Sup. Ct. 300; Connecticut Mutual Life Ins. Co. v. Akens, 150 U. S. 468, 473, 37 L. ed. 1148, 1149; Accident Ins. Co. v. Crandal, 120 U. S. 527, 531, 30 L. ed. 740, 742, 7 Sup. Ct. 685; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 127, 27 L. ed. 878, 880, 3 Sup. Ct. 99; Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 241, 24 L. ed. 433, 435; Bigelow v. Berkshire Life Ins. Co. 93 U. S. 284, 286, 23 L. ed. 918, 919; Mutual Life Ins. Co. v. Kelly, 114 Fed. 268, 280, 52 C. C. A. 154, 166; Kelley v. Mutual Life Ins. Co. 109 Fed. 61; Knights Templars' & Masons' Life Indemnity Co. v. Jorman, 104 Fed. 638, 646, 44 C. C. A. 93, 101; McGlother v. Provident Mutual Accident Co. 89 Fed. 685, 691, 32 C. C. A. 318, 324, 60 U. S. App. 705; Berger v. Pacific Mutual Life Ins. Co. 88 Fed. 241, 242; Kelley v. Mutual Life Ins. Co. 75 Fed. 637, 642; Mutual Life Ins. Co. v. Lubrie, 71 Fed. 843, 844, 18 C. C. A. 332, 333, 38 U. S. App. 37; Ritter v. Mutual Life Ins. Co. 70 Fed. 954, 959, 17 C. C. A. 537, 542, 28 U. S. App. 612, 42 L.R.A. 587; Riley v. Hartford Life & Annuity Ins. Co. 25 Fed. 316; Water v. Connecticut Mutual Life Ins. Co. 2 Fed. 892, 894; Wolf v. Mutual Benefit Life Ins. Co. Fed. Cas. No. 17,925a; More v. Connecticut Mutual Life Ins. Co. 1 Flipp. 363, 364, Fed. Cas. No. 9,755; Chapman v. Republic Life Ins. Co. 6 Biss. 238, 240, Fed. Cas. No. 2,606.

*Alabama.*—Supreme Commandery Knights of Golden Rule v. Ainsworth, 71 Ala. 436, 446, 46 Am. Rep. 332.

*Georgia.* — Life Association of America v. Waller, 57 Ga. 535, 537.

*Illinois.* — Seitzenger v. Modern Woodmen of America, 204 Ill. 58, 61, 68 N. E. 478; Dickerson v. Northwestern Mutual Life Ins. Co. 200 Ill. 270, 274, 65 N. E. 694; Supreme Lodge Order of Mutual Protection v. Gelvke, 198 Ill. 365, 368, 64 N. E. 1058; Grand Lodge Independent Order of Mutual Aid v. Wieting, 168 Ill. 408, 419, 61 Am. St. Rep. 123, 48 N. E. 59; Seitzenger v. Modern Woodmen of America, 106 Ill. App. 449, 453; Northwestern Mutual Ins. Co. v. Churchill, 105 Ill. App. 159, 162; Supreme Lodge Knights of Pythias v. Clarke, 88 Ill. App. 605; Nelson v. Equitable Life Assurance Society, 73 Ill. 133, 144; Connecticut Mutual Life Ins. Co. v. Smith, 39 Ill. App. 569, 573; Suppiger v. Covenant Mutual Benefit Assoc. 20 Ill. App. 595, 601; Lawrence v. Mutual Life Ins. Co. 5 Ill. App. 280, 287.

*Indiana.* — Michigan Mutual Life Ins. Co. v. Naugle, 130 Ind. 79, 85, 29 Me. 393.

*Iowa.*—Searth v. Security Mutual

cited and relied on as establishing the rule was decided in 1883.[7] The stipulation therein was in case assured "shall die by suicide, or by the hands of justice or in consequence of a duel or of a violation of a law of these states or of the United States" or of any other country which he might under the policy be permitted to visit or reside in, then the policy should be void. The experts for plaintiff testified that assured was suffering from that kind of unsoundness of mind called melancholia, and there was clearly some evidence of insanity for the jury. The instructions were in exact accordance with the rule in the Terry case, and the court, per Gray, J., said: "Upon consideration, we are unanimously of opinion that the rule so established is sounder in principle, as well as simpler in application, than that which makes the effect of the act of self-destruction upon the interest of those for whose benefit the policy was made to depend upon the very subtle and difficult question how far any exercise of will can be attributed to a man

Life Society, 75 Iowa, 346, 347, 39 N. W. 658.

*Kansas.*—Mutual Life Ins. Co. v. Wiswell, 56 Kan. 765, 768, 35 L.R.A. 258, 266, 44 Pac. 996.

*Kentucky.* — Manhattan Life Ins. Co. v. Beard, 112 Ky. 455, 460, 66 S. W. 35; Mutual Benefit Life Ins. Co. v. Daviess, 87 Ky. 541, 550, 9 S. W. 812.

*Massachusetts.* — Daniels v. New York, New Haven & Hartford Railway Co. 183 Mass. 393, 398, 62 L.R.A. 753, 67 N. E. 424.

*Michigan.* — Blackstone v. Standard Life & Accident Ins. Co. 74 Mich. 592, 609, 3 L.R.A. 486, 493, 42 N. W. 156.

*Minnesota.* — Scheffer v. National Life Ins. Co. 25 Minn. 534, 537.

*Missouri.* — Brower v. Supreme Lodge National Reserve Assoc. 74 Mo. App. 490, 495; Adkins v. Columbia Life Ins. Co. 70 Mo. 27, 29, 35 Am. Rep. 410; Sparks v. Knights Templars' & Masons' Life Indemnity Co. 61 Mo. App. 109, 113.

*Nebraska.* — Scherar v. Credential Ins. Co. 63 Neb. 530, 534, 56 L.R.A. 611, 613, 88 N. W. 687.

*New York.*—Gogorza v. Knickerbocker Life Ins. Co.. 65 N. Y. 232, 235.

*North Carolina.*—Spruill v. Northwestern Mutual Life Ins. Co. 120 N. Car. 141, 143, 27 S. E. 39.

*Ohio.*—Schultz v. Insurance Co. 40 Ohio St. 217, 233, 48 Am. Rep. 276.

*Pennsylvania.*—Tritschler v. Keystone Mutual Benefit Assoc. 180 Pa. 205, 207, 36 Atl. 734; Connecticut Mutual Life Ins. Co. v. Groon, 86 Pa. 92, 96, 27 Am. Rep. 689; Hall v. Mutual Reserve Fund Life Assoc. 19 Pa. Super. Ct. 33; Ritter v. Mutual Life Ins. Co. 5 Pa. Dist. R. 29.

*South Carolina.*—Latimer v. Sovereign Camp Woodmen of the World, 62 So. Car. 145, 160, 40 S. E. 155.

*Texas.*—Leache v. State, 22 Tex. App. 279, 309, 58 Am. Rep. 638, 3 S. W. 539.

*Vermont.* — Hathaway v. National Life Ins. Co. 48 Vt. 335, 354.

*Wisconsin.* — Patterson v. Natural Premium Mutual Life Ins. Co. 100 Wis. 118, 123, 42 L.R.A. 253, 258, 69 Am. St. Rep. 899, 75 N. W. 980; Pierce v. Travelers' Life Ins. Co. 34 Wis. 389, 395, *distinguished* in Clarke v. Equitable Life Assur. Soc. of U. S., 118 Fed. 374, 55 C. C. A. 200, 32 Ins. L. J. 385, 388, 389; Van Zandt v. Mutual Benefit Life Ins. Co. 55 N. Y. 169, 178, 14 Am. Rep. 215.

[7] Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. 99.

who is so unsound of mind, that while he foresees the physical consequences which will directly result from his act, he cannot understand its moral nature and character, or in any just sense be said to know what he is doing." And it was held accordingly that where the reasoning faculties of the assured are so far impaired that he cannot fairly estimate the moral consequences "the moral complexion" of his act, even though he can reason sufficiently well to prepare with great deliberation and execute his design with success, he is, nevertheless, so far insane that his death thus caused is not "suicide," such as will avoid his policy of life insurance under a condition exempting from liability for death from suicide.[8]

The rule declared by the supreme court differs, however, from that stated in certain decisions in the circuit courts. In Gay v. Union Mutual Life Insurance Company,[9] decided in 1871, the provision was "die by suicide." The insured killed himself by firing a pistol at his head, and the point whether he was capable of understanding the moral aspects of the act or of distinguishing between right and wrong was held immaterial if insured was conscious of the act he was committing and intended to take his own life, but that if he was not thus conscious, but was impelled by insane delusion overpowering his understanding and will, or was

[8] Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. 99. *Cited* in:

*United States.*—Ritter v. Mutual Life Ins. Co. 169 U. S. 139, 149, 42 L. ed. 693, 696, 18 Sup. Ct. 300; Connecticut Mutual Life Ins. Co. v. Akens, 150 U. S. 468, 473, 37 L. ed. 1148, 1149, 14 Sup. Ct. 155; Accident Ins. Co. v. Crandall, 120 U. S. 527, 531, 30 L. ed. 740, 742, 7 Sup. Ct. 685; Berger v. Pacific Mutual Life Ins. Co. 88 Fed. 241, 242; Mutual Life Ins. Co. v. Lebrie, 71 Fed. 843, 844, 18 C. C. A. 333, 38 U. S. App. 37; Ritter v. Mutual Life Ins. Co. 42 L.R.A. 583, 70 Fed. 954, 959, 17 C. C. A. 537, 542, 28 U. S. App. 612; Riley v. Hartford Life & Annuity Ins. Co. 25 Fed. 316.

*Illinois.* — Seitzinger v. Modern Woodmen, 204 Ill. 58, 61, 68 N. E. 478; Grand Lodge Independent Order Mutual Order v. Wieting, 168 Ill. 408, 420, 61 Am. St. Rep. 123, 48 N. E. 59; Seitzinger v. Modern Woodmen of the World, 106 Ill. App. 449, 453; Nelson v. Equitable Life Assurance Society, 73 Ill. App. 133, 144; Connecticut Mutual Life Ins. Co. v. Smith, 30 Ill. App. 569, 573; New Home Life Assoc. v. Hagler, 29 Ill. App. 437, 440; Suppiger v. Covenant Mutual Benefit Assoc. 20 Ill. App. 595, 601.

*Indiana.* — Michigan Mutual Life Ins Co. v. Naugle, 130 Ind. 79, 85, 29 N. E. 393.

*Kentucky.* — Manhattan Life Ins. Co. v. Beard, 112 Ky. 455, 461, 66 S. W. 35; Mutual Benefit Life Ins. Co. v. Daviess, 87 Ky. 541, 551, 9 S. W. 812.

*Massachusetts.* — Daniels v. New York, New Haven & Hartford Ry. Co. 183 Mass. 393, 398, 62 L.R.A. 753, 67 N. E. 424.

*Michigan.*—Blackstone v. Standard Life & Accident Co. 74 Mich. 592, 609, 3 L.R.A. 486, 493, 42 N. W. 156.

*Pennsylvania.* — Tritchler v. Keystone Mutual Benefit Assoc. 180 Pa. 205, 207, 36 Atl. 734.

[9] 9 Blatchf. (U. S. C. C.) 142, Fed. Cas. No. 5,282.

impelled by an uncontrollable impulse, which neither his understanding or will could resist, the insurers were liable. In Nimick v. Mutual Life Insurance Company,[10] decided 1871, the condition was "die by his own hand." It was held that the moral responsibility does not affect the nature of the hazard, and that the causa causans affecting assured's will in committing suicide was immaterial. The court adopts the language of Erskine, J., in Borradaile v. Hunter,[11] to the effect that the moral nature and quality of the act is not relevant, and also the words of Bigelow, C. J., in Dean v. American Mutual Life Insurance Company.[12] And necessarily these circuit court decisions must be deemed overruled. Again upon this point of what constitutes that degree of mental unsoundness which will relieve against what otherwise would be the consequence of self-destruction, the court in a case in the United States circuit court of appeals approved the following charge to the jury: "If one whose life is insured, intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequence, and effect, such self-destruction will not of itself prevent recovery upon the policies. This is affirmed. I will say, however, that we must understand what is meant and intended by the term 'moral character of his act.' It is a term which has been used by the courts, and is correctly inserted in the point; but it is a term which might be misunderstood We are not to enter into the domain of metaphysics in determining what constitutes insanity. . . . If Mr. Runk understood what he was doing and the consequences of his act or acts to himself as well as to others—in other words, if he understood as a man of sound mind would the consequences to follow from his contemplated suicide to himself, his character, his family, and others, and was able to comprehend the wrongfulness of what he was about to do as a sane man would—then he is to be regarded by you as sane; otherwise he is not." And Acheson, circuit judge, says: "Upon the question of insanity, the jury was plainly informed that to prevent a recovery it was not enough that Mr. Runk understood the physical nature, consequence, and effect of his act of self-destruction, but that he must also have understood the moral character and consequence of the act, and that if he did not comprehend its wrongfulness he was to be regarded by the jury as insane. . . . We do not perceive that in the instructions com-

[10] 3 Brewst. (Pa.) 502, 10 Am. L. 418, 12 L. J. C. App. 225, 7 Jur. Reg. (N. S.) 101, 18 Fed. Cas. 247, 443.
Fed. Cas. No. 10,266.

[11] 5 Man. & G. 639, 5 Scott (N. R.)

[12] 4 Allen (86 Mass.) 98.

plained of there was any departure from the principles approved by the supreme court:"[13]

**(b) Same subject: English rule and cases.**[14]—In Clift v. Schwabe,[15] it was stipulated that "every policy effected by a person on his or her own life should be void if such person should commit suicide or die by duelling or the hands of justice." The insured, who had effected a policy on his own life, died from voluntarily taking poison, for the purpose of killing himself, but the circumstances showed that at the time he was of unsound mind. The defense of suicide was relied on, and the trial judge directed the jury, "that in order to find the issue for the defendants, it was necessary that they, the jury, should be satisfied that A died by his own voluntary act, being then able to distinguish between right and wrong and to appreciate the nature and quality of the act that he was doing so as to be a responsible moral agent; that the burden of proof as to his dying by his own voluntary act was on the defendants; but that being established, the jury must assume that he was of sane mind and a responsible moral agent, unless the contrary should appear in evidence." And it was held, two judges dissenting, that the instruction was erroneous, since all acts of voluntary self-destruction were included under the stipulation, and that the insured having voluntarily committed suicide, the fact whether he was or not at the time a responsible moral agent was immaterial. In Borradaile v. Hunter[16] the stipulation was, that if "the assured should die by his own hands or by the hands of justice or in consequence of a duel" the policy should be void. The assured threw himself into the Thames from Vauxhall bridge and was drowned. The issue was raised whether the assured died by his own hands, and the jury found that he "voluntarily threw himself into the water, knowing at the time that he should thereby destroy his own life and intending thereby so to do; but that at the time of committing the act he was not capable of judging be-

[13] Ritter v. Mutual Life Ins. Co. 42 L.R.A. 583, 70 Fed. 954, 17 C. C. A. 537, aff'g 69 Fed. 505, aff'd 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. 300, *citing* Connecticut Mutual Life Ins. Co. v. Akens, 150 U. S. 468, 37 L. ed. 1148, 14 Sup. Ct. 155; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. 99; Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. ed. 433; Mutual Life Ins. Co. v. Terry, 15 Wall. (82 U. S.) 580, 21 L. ed. 236. For other Federal cases see Waters v. Connecticut Mutual Life Ins. Co. 2 Fed. 892, 9 Ins. L. J. 837; Moore v. Connecticut Mutual Life Ins. Co. 3 Fed. 144, 4 Big. L. & Acc. Ins. Co. 138; Hiatt v. Mutual Life Ins. Co. 2 Dill. (U. S. C. C.) 572, Fed. Cas. No. 6,449a.

[14] See § 2658 herein.

[15] (1846) 3 Com. B. 436–8, 2 Car. & K. 134, 17 L. J. C. P. 2.

[16] (Decided 1843) 5 Man. & G. 639, 5 Scott (N. R.) 418, 12 L. J. C. P. 225, 7 Jur. 443.

tween right and wrong." It was decided that the stipulation or proviso was not limited by the accompanying provisos to acts of felonious suicide, but included all acts of voluntary self-destruction, and the policy was avoided. Tindal, C. J., dissented, however.[17] In Stormont v. Waterloo Life & Casualty Assurance Company,[18] Channell, B., concluded a charge to the jury as follows: "The defendants plead that it was a voluntary act" (the assured having been found falling out of a window). "Did he know that he was throwing himself out?"

**(c) Same subject: rule in Alabama.**[19]—"There is a contrariety of decision as to the effect of the exception, 'against suicide or self-destruction,' whether it embraces any and every act of intentional self-destruction or only suicide, criminal self-destruction. The preponderance of authority points to the conclusion that it refers solely to suicide."[20] The condition in the principal case was for forfeiture if the member should take his own life, whether sane or insane.

**(d) Same subject: rule in Georgia.**[1]—In this state the policy is void if insured dies by his own hand, except where it is clearly shown that at the time the act was done the mental condition of assured was such as to render him incapable of distinguishing right from wrong to such an extent as to render him legally and morally responsible for his acts and conduct, but the fact that

[17] See also Dufaur v. Professional Life Ins. Co. (1858) 25 Beav. 559, 27 L. J. Ch. 817, *cited* in Ritter v. Mutual Life Ins. Co. of N. Y. 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. 300, 27 Ins. L. J. 804, 816, 817 (warranty was that assured would not die by his own act whether sane or insane for the period of two years. See on this point, §§ 2644–2644b herein), *cited* and *quoted* from with approval in Cady v. Fidelity & Casualty Co. of N. Y. 134 Wis. 322, 17 L.R.A. (N.S.) 260, 113 N. W. 967, 37 Ins. L. J. 162, 169 (but clause was: "suicide sane or insane not included"), *cited* in Clarke v. Equitable Life Assur. Soc. of U. S. 118 Fed. 374, 55 C. C. A. 200, 32 Ins. L. J. 385, 388 (but condition here was "Self-destruction, sane or insane"), *distinguished* in Shipman v. Protected Home Circle, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83, case modifies 73 N. Y. Supp. 594, 66 App. Div. 448, 32 Ins. L. J. 705, 711 (there was no exception of liability in case of suicide in original certificate, but subsequent amendment to by-laws excepted suicide, sane or insane, and policy was held void as distinguished from like circumstances in case of straight life policy. See on point of right to amend, §§ 377 et seq., 2647 herein).

[18] 1 Fost. & F. 22, 23.

[19] See § 2658 herein.

[20] Supreme Commandery Knights of Golden Rule v. Ainsworth, 71 Ala. 435, 449, 46 Am. Rep. 332, per Brickell, C. J., *citing* Mutual Life Ins. Co. v. Terry, 15 Wall. (82 U. S.) 580, 21 L. ed. 236; De Gogorza v. Knickerbocker Life Ins. Co. 65 N. Y. 232; Phadenhauer v. Germania Life Ins. Co. 7 Heisk. (Tenn.) 567, 19 Am. Rep. 623; Bliss on Life Ins. secs. 225–38.

[1] See § 2658 herein.

insured committed suicide is not of itself evidence of insanity.[2] The condition was, "die by his own hand." The above rule is that stated by Warner, C. J. In a case decided in 1876, in the state of Georgia,[3] the condition was, "shall die by suicide" the court, per Bleekley, J., defines suicide as "something more than self-sought and self-inflicted death. It is a species of crime or wickedness—something wrong; a kind of self-murder. . . . In suicide there must be a moral element, and the presence of that depends upon whether the man is so far rational as to be able to discern the difference between right and wrong. If, from disease or misfortune, he is so utterly irrational as to be equally innocent with or without attempting the forbidden violence, he is not a moral agent, and his act is that of a mere animal which has lost the instinct of self-preservation. . . . We are aware that there is a strong current of modern decision, both English and American, against applying any moral test whatever to cases of alleged suicide in the law of life insurance, but we believe that the true doctrine was announced by the Supreme Court of the United States in Mutual Life Insurance Company v. Terry." [4] It is also held, in that state, under the code provision that death by suicide releases insurer from the obligation of his contract, that suicide is intentional self-destruction by one who is sane, and also that if insane or accidental it is not legally suicide.[5]

**(e) Same subject: rule in Illinois.**[6]—In a case in the Illinois appellate court decided in 1888,[7] the condition was, "shall die by reason of any act of self-destruction whatever"—the court adopted the ruling in Mutual Life Insurance Company v. Terry,[8] in the United States Supreme Court, and held that an intent to commit suicide and knowledge that the act would so result is not sufficient, where the insured is impelled by an irresistable impulse or is unable to understand the moral nature of the act.[9] In Suppinger v. Covenant Mutual Benefit Association,[10] the condition was, "die by reason of any act of self-destruction, whether at the

[2] Merritt v. Cotton States Life Ins. Co. 55 Ga. 103.

[3] Life Assoc. of America v. Waller, 57 Ga. 533.

[4] 15 Wall. (82 U. S.) 580, 21 L. ed. 236.

[5] Mutual Life Ins. Co. of N. Y. v. Durden, 9 Ga. App. 797, 72 S. E. 295, Civ. Code, 1910, sec. 2500.

[6] See § 2658 herein.

[7] New Home Life Ins. Co. v. Hagler, 29 Ill. App. 437.

[8] 15 Wall. (82 U. S.) 580, 21 L. ed. 236.

[9] Approved in Grand Lodge Independent Order of Mutual Aid, 68 Ill. App. 125, *cited* in Travelers Ins. Co. v. Dunlap, 59 Ill. App. 517. See also Hammers v. Supreme Tent Knights of Maccabees of the World, 78 Ill. App. 162, 164, s. c. 81 Ill. App. 560, 565.

[10] 20 Bradw. (Ill.) 595.

time of committing the same he be sane or insane, whether felonious or otherwise," and the court, per Wilkin, P. J., says: "The irreconcilable conflict of authorities is on the question as to whether the unconsciousness must extend to the moral right or wrong of the act, thus bringing the subject within the legal definition of suicide or whether any voluntary self-killing is sufficient to discharge the insurer. The Supreme Court of the United States is committed to the former doctrine and holds that there must be an act of criminal self-destruction.[11] The courts of last resort in many of the states adopt the same rule, while in others and in England it is held that a voluntary self-destruction is within the terms of the condition, although at the time of the act there was not sufficient mental understanding to appreciate its moral turpitude.[12] The decision, however, turned upon the degree of insanity and insane irresistable impulse. In Northwestern Benefit Mutual Aid Association v. Bloom,[13] the condition was, "If death shall result from suicide . . . this agreement shall be null and void." The decision was, that the allegations, "did then and there immorally, wrongfully, and wickedly," and did "wrongfully, wickedly, and fraudulently, and of his own volition commit suicide," amounted substantially to an allegation that insured committed suicide when sane and in his right mind, and was such a violation of the contract as to avoid it. In still another case in that state decided in 1897, the application for the certificate stipulated that: "Should I commit suicide, then and in that case only the amount paid by me into the mutual aid fund on my certificate shall be paid to the beneficiaries" and it was held that the words "commit suicide" were synonymous with other phrases such as "die by his own hand," "take his own life," "die by his own act," etc., and were employed to convey the idea of voluntary, intentional self-destruction, and the rule was adopted that in order to relieve insurer from liability under the above provisions there must have been sufficient mental understanding to realize the moral turpitude of the act of self-destruction, and, therefore, as the evidence in said case tended to show that the moral perceptions of assured were overpowered by his insanity, the court had no further jurisdiction over the matter, and the court said: "It is believed there is a substantial concur-

[11] Mutual Life Ins. Co. v. Terry, 15 Wall. (82 U. S.) 580, 21 L. ed. 236; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. 99; Bigelow v. Berkshire Life Ins. Co. 93 U. S. 284, 23 L. ed. 918.

[12] Borradaile v. Hunter, 5 Man. & G. 693, 5 Scott (N. R.) 418, 12 L. J. C. P. 225, 7 Jur. 443; Clift v. Schwabe, 3 Com. B. 3 Man. G. & S. 437, 2 Car. & K. 134, 17 L. J. C. P. 2.

[13] 21 Ill. App. 159.

rence of judicial decision in America on the proposition that if, at the time of the suicidal act, the assured was so affected with insanity as to be unconscious of the act or of the physical effect thereof, or was driven to its commission by an insane impulse which he had not the power to resist, the act of self-destruction is regarded as though it were the result of accident or some irresistible, external force, and the proviso of a policy framed as the one at bar, or where other phrases denoting self-destruction are used will not attach, but the insurer will be held liable."[14] This 1897 decision is approved in a case decided in that state in 1904, where the stipulation was: "no benefit shall be paid upon the death of a member who shall commit suicide within five years from and including the date of his initiation . . . unless the person or persons claiming under such certificate or membership shall establish and prove affirmatively that prior to suicide the member shall have been judicially declared insane, or was under treatment for insanity at the time the act was committed, or was then in the delirium of some other illness." It was also determined that the construction by the trial court of the word "suicide" as meaning "voluntary, intentional self-destruction" was not error and therefore said by-law did not exonerate insurer from liability if the assured member's death was occasioned by his own act at a time when such assured was incapable by reason of unsoundness of mind, to resist an insane impulse to take his own life, and to understand the moral character, general nature, consequences and effect of the fatal act. But, owing to the wording of this condition in this case proof that assured had been judicially declared insane, or was under treatment for insanity, or was in a delirium resulting from some other illness at the time he took his life would effectually determine and fix assurer's liability and, therefore, under the qualifying provision the beneficiaries were relieved from the duty of establishing the degree of insanity with which assured was affected in all cases where assured had been judicially declared to be insane, etc., as provided in said stipulation, but said beneficiaries were not by said by-law precluded from availing themselves of the privilege of assuming the greater burden of showing the degree of insanity of assured.[15]

**(f) Same subject: rule in Indiana.**[16]—In Indiana a condition avoiding the policy if assured shall die by his own hand does not

[14] Grand Lodge Independent Order of Mutual Aid v. Wieting, 168 Ill. 408, 48 N. E. 59, aff'g 68 Ill. App. 125. As to like condition in Kentucky case, see subdiv. (h) post, herein.

[15] Supreme Council Royal Arcanum v. Pels, 209 Ill. 33, 70 N. E. 697.

[16] See § 2658 herein.

apply where assured kills himself while of unsound mind, where disease has so impaired his mind, that although he may have sufficient mental capacity to know the physical consequences of his act, yet he is unable to comprehend its moral character.[17]

(g) **Same subject: rule in Iowa.**[18]—In Iowa, in a case decided in 1888, the court, per Rothrock, J., declares that: "It has been held quite generally by the courts of this country that this general condition (suicide or die by his own hand without more) referred to an act of criminal self-destruction, and did not apply to an insane person who took his own life."[19] The condition in this case, however, was "suicide, felonious or otherwise, sane or insane."

(h) **Same subject: rule in Kentucky.**[20]—A case arose in this state in 1869,[1] wherein the condition was, if assured "shall die by his own hands, by delirium tremens, or the use of opium, or in consequence of a duel or the laws of any nation, state, or province," the policy shall be void. The assured shot himself, causing his death. The court, per Robinson, J., said: "All these terms alike, being ejusdem generis, imply a death as a natural consequence of some voluntary act of the assured which he had the moral power to avoid;" that is, that death by any of the enumerated means had reference alone to a voluntary act of assured which he had the moral power to avoid. That the inevitable act of an insane man who is in that respect morally dead is not within the proviso his voluntary act. Mental insanity is a disease, and the policy insures death by disease of any sort which ordinary prudence could not avoid. Death by insanity is death by disease and is so considered in medical jurisprudence. . . . Death 'by his own hand' means suicide, not accidental or coerced, but premeditated by a sound mind and perpetrated by a free will, and a voluntary act of the will necessarily implies liberty and self-control, and consequently the act of an insane mind or subjugated will is not voluntary. . . . The conditions as to death 'by his own hand' reasonably imports, therefore, that if the insured should commit suicide voluntarily, when he had the moral power to forbear, just as he might commit it by the habitual use of opium or intoxicating liquor, should be thereby avoided. The death in each case alike must be the voluntary act of a sane mind and a responsible will. . . . There is some apparent conflict . . . on the construction of

[17] Michigan Mutual Life Ins. Co. v. Nangle, 130 Ind. 79, 29 N. E. 393, 45 Alb. L. J. 175, per McBride, J.

[18] See § 2658 herein.

[19] Searth v. Security Mutual Life Soc. 75 Iowa, 346, 347, 39 N. W. 658.

[20] See § 2658 herein.

[1] St. Louis Mutual Life Ins. Co. v. Graves, 6 Bush (69 Ky.) 268.

just such a condition of avoidance in a life policy as that which we are considering; but there is no very essential diversity in principle; all that is judicial, with perhaps one exception, concurring in the principle that to avoid the policy the death must be 'voluntary' and no mind itself rational can contemplate any act as voluntary unless it be the offspring of a free volition unconstrained by inevitable duress, physical or moral." The opinion in Dean v. American Insurance Company,[2] is criticised as "elaborate, self-contradictory, and inconclusive." The above Kentucky case is followed in a decision rendered in that state in 1904, where it is declared that: "However the courts may differ as to the correct construction of such clauses" as "suicide" or "self-destruction," "in this state we are committed to what appears to be the most universal rule, and the one applied by the United States Supreme Court, which is that self-destruction in such provisions means such destruction by a sane person." The condition here was, however, that if insured "die by his own act, sane or insane" within two years the policy should be void.[3] This last decision was cited in 1905 in a case which held that if an insured person intentionally takes his own life at a time when his mind is so far gone that he is unconscious that he is taking his life, the act is not deemed his but in law is regarded as an accidental killing; conversely, although his mind may be deranged, still if he has mind enough to know the act will probably result in death, and if he inflicts it with that intention, it is his act and absolves the insurance company from liability. The condition in this case, however, was: "The order will not pay the benefits of those members who commit suicide, whether sane or insane, except it be committed in a delirium resulting from illness, or while the member is under treatment for insanity, or after the member has been judicially declared to be insane." [4] Both of the above cases of 1869 and 1904 are approved in another case decided in 1904 upon the point that there can be no recovery in case of suicide, unless the mind of assured was sufficiently gone when he took his life as to render him unconscious that he was taking his life at the time he committed the act.[5]

[2] 4 Allen (86 Mass.) 96.

[3] Manhattan Life Ins. Co. v. Beard, 112 Ky. 455, 23 Ky. L. Rep. 1747, 66 S. W. 35.

[4] Masonic Life Assoc. of Western N. Y. v. Pollard, 121 Ky. 349, 123 Am. St. Rep. 198, 28 Ky. L. Rep. 301, 303, 89 S. W. 219. See like conditions under Illinois decision, noted under subdiv. (e) ante herein.

[5] Supreme Council Knights of Equity of the World v. Heineman, 25 Ky. L. Rep. 1604, 78 S. W. 406 (condition here was "die by his own act, sane or insane").

(i) **Same subject: rule in Louisiana.**[6]—In Louisiana[7] it is held that the words "die by his own hands" should not be literally interpreted, but that the intention of the contracting parties should be looked to to explain the latent ambiguity, and the common intent would apply only to the voluntary self-destruction, by whatever means accomplished; that self-destruction when insane is not within the exception, and the test of responsibility in civil, as well as in criminal cases is in the state of the actor's reason or mental faculties.

(j) **Same subject: rule in Maine.**[8]—The rule established in Maine in 1866, as declared by Appleton, C. J., is that the condition, "die by his own hand or in consequence of a duel or the violation of any state, national, or provincial law or by the hands of justice," does not cover the act of suicide while insane, but the clauses should all be construed together, and referred to a "felonious death, to the case of felo de se, not to the case of death without legal or moral blame—the result of accidental mistake or disease."[9]

(k) **Same subject: rule in Maryland.**[10]—In Maryland,[11] the proviso "die by his own hand or act," does not include within its meaning a self-killing in a fit of insanity which overpowered assured's consciousness, reason, and will, so that he is impelled by an insane impulse which he cannot resist. The court in this case, however, refused to express an opinion upon the points of the moral character of the act or the inability to distinguish between right and wrong as a point not involved in the case before it.[12]

(l) **Same subject: rule in Massachusetts.**[13]—In a case decided in this state in 1862, under the proviso "die by his own hand," it is held that suicide, even though committed while insane, avoids the policy where the act is understood and assured intended to take his own life.[14] In a case decided in 1869,[15] under the proviso, "die by suicide," it is held that there could be no recovery, although the act of self-destruction was committed under the influence of insanity, in the absence of evidence proving delirium or madness, or that the act was involuntary. Both the above cases are cited and the distinction noticed between them and those where the con-

[6] See § 2658 herein.

[7] Phillips v. Louisiana Equitable Life Ins. Co. 26 La. Ann. 401, 21 Am. Rep. 549.

[8] See § 2658 herein.

[9] Eastabrook v. Union Mutual Life Ins. Co. 54 Me. 224.

[10] See § 2658 herein.

[11] Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414.

[12] See Supreme Conclave Improved Order Heptasophs of Balt. v. Miles, 92 Md. 613, 84 Am. St. Rep. 528, 48 Atl. 845.

[13] See § 2658 herein.

[14] Dean v. American Mutual Ins. Co. 4 Allen (86 Mass.) 96.

[15] Cooper v. Massachusetts Ins. Co. 102 Mass. 227, 3 Am. Rep. 451n, 454.

dition includes the additional words "sane or insane" and they are considered in a case decided in said state in 1906, and it is there declared that: "On reason and on the authorities we can have no doubt that the old rule is done away with, and that the words 'sane or insane,' cover every case of suicide. . . . The evidence clearly shows a case of suicide, and it makes no difference what the state of mind of the person committing suicide was."[16] Both the first above mentioned decisions are followed upon this point on a case decided in 1903, where the question of suicide is fully discussed and the court per Knowleton, J., said: "We are of opinion that the liability of a defendant for a death by suicide exists only when the death is the result of an uncontrollable impulse or is accomplished in delirium or frenzy . . . and without conscious volition to produce death, having knowledge of the physical nature and consequence of the act. An act of suicide resulting from a moderately intelligent power of choice, even though the choice is determined by a disordered mind, should be deemed a new and independent efficient cause of the death that immediately ensues." In this 1903 case, however, the facts differed in that the action was brought against a railroad company to recover for injuries and also for death consequent thereon, it appearing that deceased sustained an accident from collision at a railroad crossing which resulted in insanity, and about two months thereafter he died by his own hand.[17] This last case is important in that it appears therefrom that the meaning of suicide as determined in 1862, and 1869 cases, is still adhered to except in so far as the words "sane" or "insane" are used in the contract of excepted liability.

**(m) Same subject: rule in Michigan.**[18]—In a Michigan case decided in 1889,[19] the condition was "suicide . . . or intentional injuries inflicted by or through the connivance of insured" the court per Long, J., approves as reasonable the rule declared by Hunt, J., in Mutual Life Insurance Company v. Terry,[20] and says:

[16] Moore v. Northwestern Mutual Life Ins. Co. 192 Mass. 468, 7 Am. & Eng. Ann. Cas. 656, 78 N. E. 488, 35 Ins. L. J. 769.

[17] Daniels v. New York, New Haven & Hartford Rd. Co. 183 Mass. 393, 67 N. E. 424, *followed* in Sponatski's Case, 220 Mass. 526, L.R.A. 1916A, 333, where an employee was injured and said injury caused insanity and consequent death by suicide, and it was held that the rule in the Daniels case, ante, was to be followed under the workmen's compensation act, not so much, however, upon the question of degree in cases of suicide, as upon the point of claim of causation between the injury and death.

[18] See § 2658 herein.

[19] Blackstone v. Standard Life & Accident Ins. Co. 74 Mich. 592, 605, 3 L.R.A. 486, 42 N. W. 156 et seq.

[20] 15 Wall. (82 U. S.) 580, 21 L. ed. 236.

"The effect of this doctrine is, that in order to work a forfeiture under such a policy on the ground of self-destruction the insured must have had sufficient mental capacity, not only to understand that the act will destroy his life, but also to distinguish its moral quality and consequences—the right and wrong of it—and must perform the act, not under any uncontrolled impulse resulting from insanity, but voluntarily with the intent to end his life; in other words, that it must be an act done with an evil motive. We think that this doctrine is supported by the great preponderance of authority in this country, and must be conceded to be the prevailing American doctrine, and it seems to us to be the safer and more reasonable and consistent doctrine. It agrees with the general rule as to the excusatory feature of insanity in civil as well as in criminal cases. It also operates to prevent forfeiture which is a favorite principle of an enlightened jurisprudence." In another case in this state, decided in 1887,[1] it is declared by Champlin, J., that "if a person does an act in a state of unconsciousness, whether he be sane or insane, such act is nothing more or less than accidental, and would not operate to forfeit the policy." Again, under another decision, given in 1876,[2] the condition was, "shall die by his own hand," and it was declared by the court, per Campbell, J., that the term "suicide" has no such restricted meaning as a wrongful act of self-murder. "It means self-killing just as 'homicide' means killing anyone else. . . . Suicide was only cognizable at law when the person was felo de se or guilty of a felonious act. If non compos mentis, the actor in homicide or suicide commits no crime. In one sense, a man dies by his own hands who kills himself, whether sound or frenzied. But the condition in this policy cannot be construed to cause a forfeiture for acts involving no evil will." The court also held that the clause, being with others which involved voluntary wrongdoing, such as death by dueling, or by the hands of justice, etc., it was "fairly to be inferred that it is regarded as ejusdem generis and depending on the same reasons;" that "death by his own hands in the case of one non compos mentis is as much the result of disease as death by fever or consumption. The act of an insane man is morally no more his act than if it were mechanical."

**(n) Same subject: rule in Minnesota.**[3]—In Minnesota[4] the proviso was, "dying by his own hand," and a charge was upheld that

[1] Streeter v. Western Union Mutual Life & Accident Soc. 65 Mich. 199, 202, 8 Am. St. Rep. 882, 31 N. W. 779.

[2] John Hancock Mutual Life Ins. Co. v. Moore, 34 Mich. 912.

[3] See § 2658 herein.

[4] Scheffer v. National Life Ins. Co. 25 Minn. 534.

"if his (Scheffer's) reason was so far overthrown that he had not the power or capacity to exercise it upon the act he was about to commit; if he did not understand and appreciate the effect of the act, but was driven to it by an uncontrollable impulse caused by insanity, then it is not to be considered as the act of his own hand within the meaning of the policy."

**(o) Same subject: rule in Missouri.**[5]—A case in Missouri [6] has been cited as establishing a rule on the point under consideration. But the condition here was against death of insured "by his own act or intention, whether sane or insane," and necessarily the words, "sane or insane," controlled the decision, but the opinion of the court, per Hough, J., notes the conflict of opinion in cases of suicide or under provisos, "die by his own hand," etc., speaks of such conflict as irreconcilable, and adopts the words of Rapallo, J., in the Van Zandt case [7] criticizing the language of Hunt, J., in the Terry case [8] for "a want of perspicuity" and inconsistent with itself. Upon the whole, however, the opinion in this Missouri case can hardly be said to indicate in any way what the rule is in that state under the words "die by his own hand," or some like expression used alone.

**(p) Same subject: rule in New York.**[9]—In 1881, in a case where the condition was, "die by his own hand or act voluntary or otherwise" [10] a charge was upheld that the jury must find that the overdose of medicine taken by assured was taken for the purpose of destroying his life voluntarily, knowingly, and intentionally. In 1879, under the proviso, "die by his own hand" [11] the court, per Rapallo, J., said: "Our conclusion is, that although it (the evidence) might have required the jury to find that Ross was aware when he took laudanum that it would terminate his life, yet it would also have justified a finding that he acted under the control of an insane impulse caused by disease and derangement of his intellect which deprived him of the capacity of governing his own conduct in accordance with reason. An act committed under such circumstances cannot be regarded as voluntary or within the proviso of the policy." [12] Again, in 1877, under the same proviso [13] the court, per Allen, J., said: "That the insured died 'by his own

[5] See § 2658 herein.

[6] Adkins v. Columbia Life Ins. Co. 70 Mo. 27, 35 Am. Rep. 410.

[7] Van Zandt v. Mutual Benefit Life Ins. Co. 55 N. Y. 169, 14 Am. Rep. 215.

[8] Mutual Life Ins. Co. v. Terry, 15 Wall. (82 U. S.) 580, 21 L. ed. 236.

[9] See § 2658 herein.

[10] Penfold v. Universal Life Ins. Co. 85 N. Y. 317, 39 Am. Rep. 660.

[11] Newton v. Mutual Benefit Life Ins. Co. 76 N. Y. 426, 32 Am. Rep. 335.

[12] Id. 429.

[13] Weed v. Mutual Benefit Life Ins. Co. 70 N. Y. 561.

hand' is not disputed, and by this act the policy is avoided, unless his mind was so impaired that he did not understand the consequences of his action and that death would ensue. If he exercised volition, was capable of forming an intention, and that with full knowledge that death would follow his action, his mind concurring in the act, he voluntarily destroyed his own life, the policy by its terms became 'null and void and of no effect.'" In 1843 the oft-cited case of Breasted v. Farmers' Loan & Trust Company,[14] was decided. It appeared from the evidence that the insured drowned himself. The plaintiffs claimed that he was insane at the time of committing the act, and that therefore the policy was not avoided. The proviso was against death of the insured "by his own hand, or in consequence of a duel or by the hands of justice." In giving the opinion of the supreme court[15] Nelson, J., said: "The question arising upon demurrer is whether self-destruction in a fit of insanity can be deemed a death by his own hand within the meaning of the policy. I am of opinion that it cannot. . . . The drowning of Comfort was no more his own act in the sense of the law than if he had been impelled by irresistable physical power, nor is there any reason for exempting the company from the risk assumed in the policy than if his death had been occasioned by such means." Millard, J., also distinguishes this case from that of Borradaile v. Hunter.[16] Speaking of that case the learned judge says: "Upon an issue whether the assured died by his own hands, the jury found that he voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life and intending thereby to do so, but at the time of committing the act he was not capable of judging between right and wrong. It was held by the majority of the court, Tindall, C. J., dissenting, that the policy was avoided, as the proviso included all acts of voluntary self-destruction, and was not limited by the accompanying proviso to acts of felonious suicide. The three judges who formed the majority laid the main stress upon the fact that the jury found the acts of self-destruction to be voluntary, that he knew when he threw himself into the river he should thereby destroy his life, and that he intended thereby to do so. The referees in the present case have not found that the intestate acted voluntarily, or that he knew the consequences of his act. They merely find that while insane, for the purpose of drowning himself, he threw himself into the river, not being mentally capable of distinguishing between right and wrong. If Borradaile v. Hunter,[17] be an authority which we ought

[14] 4 Seld. (8 N. Y.) 299, 59 Am. Dec. 482, s. c. 4 Hill (N. Y.) 73.

[15] 4 Hill (N. Y.) 73.

[16] 5 Man. & G. 639, 5 Scott (N. R.) 418, 12 L. J. C. P. 225, 7 Jur. 443.

[17] 5 Man. & G. 639, 5 Scott (N.

to follow, it differs so much from the case before us that we are at liberty to decide it upon principle." In both the opinion of the supreme court and that of the court of appeals, which contains a full discussion of the principles quoted [18] the court seemed to consider that the connection in which the words were used was an indication of an intent to refer to an act of self-destruction felo de se. Upon this point Nelson, C. J., said: "In popular language, the term 'death by his own hand' means the same as suicide or felo de se. . . . The connection in which they are used in this policy indicates that the phrase 'death by his own hand' meant an act of criminal self-destruction." This case substantially held that the phrase "die by his own hand" referred to a voluntary act of self-destruction, and not to the taking of one's own life while insane and incapable of discerning between right and wrong. This question arose subsequently in connection with instructions to the jury by the judge, and in these cases [19] the doctrine stated in Breasted v. Farmers' Loan & Trust Company [19a] does not seem to be strictly adhered to, and in a case which arose in 1873,[19b] it was held that an insured person who takes his own life must be insane to such an extent as to render him unconscious that the act he does will cause his death, or he must commit it under the influence of some insane impulse which he cannot resist, in order to take the case out of the proviso. It was held not sufficient that the insured did not understand the moral nature and quality of the act which he was doing. This case cites and approves the case of Borradaile v. Hunter,[19c] and adopts the doctrine laid down in that and kindred cases. The case of Breasted v. Farmers' Loan & Trust Company,[20] has many times been cited as being contrary to the English and Massachusetts cases, and in fact the courts in many states have laid down a doctrine contrary to such decisions and have cited the decision of Breasted v. Farmers' Loan & Trust Company as supporting the rule above discussed. Though this last decision does not expressly oppose the doctrine of Borradaile v. Hunter, and attempts to distinguish that case, yet it does in fact lay down a rule in conflict with such decision. But whatever doubt there may have been as to the rule in New York as laid down in the earlier decision, the court has in the Van Zandt case above noted expressly adopted the rule in Borradaile v. Hunter. In Meacham v. New York State Mutual Benefit

R.) 418, 12 L. J. C. P. 225, 7 Jur. 443.

[18] 4 Seld. (8 N. Y.) 299.

[19] Mallory v. Travelers' Ins. Co. 47 N. Y. 52, 7 Am. Rep. 410; Fowler v. Mutual Life Ins. Co. 4 Lans. 202.

[19a] *Cited* in note 14 above.

[19b] Van Zandt v. Mutual Benefit Life Ins. Co. 55 N. Y. 169, 14 Am. Rep. 215.

[19c] *Cited* in note 16 above.

[20] 8 N. Y. 209, 59 Am. Dec. 482.

Association [1] the by-laws provided against liability in case assured died "from suicide," and the court, per Parker, J., said: "Hay died by his own hand within eleven days after the issuance of the certificate. Unless, therefore, such self-destruction was the result of accident, mistake, or insanity, or was involuntary because driven to it by an insane impulse which disabled him from controlling his own action, Hay committed suicide within the meaning of the policy and it became void." [2] In 1903 a case was decided in this state which bears somewhat, although not directly, upon this point in that the original contract, including the certificate and by-laws, contained no exception of suicide, subsequently, however, suicide, sane or insane, was made an excepted risk under the by-laws, and it was held that the amended by-law was valid to the extent that it provided for a forfeiture of contract rights in case of suicide while insured was sane, and it was a fundamental principle that even though unexpressed in the original contract that assured should not intentionally cause his own death and in addition the amended by-law was valid because there could be no such thing as a vested right to commit suicide when sane, and also that it was nothing more than the written expression of a provision which the law read into the contract. But beyond this question of intentional taking of one's own life while sane the decision does not go except to cite with other cases the English decision hereinbefore considered [3] as supporting the point that the beneficiary stood in place of assured and as the latter could not benefit by his own wrong those who represented him could not be permitted to benefit by it, distinguishing, however, the case of a beneficiary under a benefit certificate and one under a straight life policy.[4]

**(q) Same subject: rule in Ohio.**[5]—In a case decided in Ohio in 1883,[6] the proviso was, "shall under any circumstances die by his own hand," and it was held that as to the words "die by his own hand," the preceding words being disregarded as too general and uncertain, "the decided preponderance however favors the general rule and rejects the English doctrine," and the court adopted the

[1] 120 N. Y. 237, 242, 24 N. E. 283.

[2] *Citing* Van Zandt v. Mutual Benefit Life Ins. Co. 55 N. Y. 169, 14 Am. Rep. 216; Newton v. Mutual Benefit Life Ins. Co. 76 N. Y. 426, 32 Am. Rep. 335.

[3] Borradaile v. Hunter, 5 Man. & G. 639, 5 Scott (N. R.) 418, 12 L. J. C. P. 225, 7 Jur. 443, above *considered* under subd. (b).

[4] Shipman v. Protected Home Circle, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83, 32 Ins. L. J. 705. As to abandonment of by-laws, see §§ 379 et seq. herein; same as to suicide, see § 2647 herein. As to vested rights, see §§ 730 et seq., 741 et seq. herein. As to suicide in absence of stipulation contra, see §§ 2650, 2651 herein.

[5] See § 2658 herein.

[6] Schultz v. Life Ins. Co. 40 Ohio St. 217, 48 Am. Rep. 676.

rule laid down in Mutual Life Insurance Company v. Terry,[7] in the United States supreme court. Two judges dissented.

(r) **Same subject: rule in Pennsylvania.**[8]—In a case in this state, decided in 1878,[9] the condition was "die by suicide," and it was held that if insured intended to take his own life and knew at the time that death would result from his act, and he was insane at the time, the policy was not forfeited, and the charge that insanity, in the sense in which the jury were to "consider it, must not be a mere disturbance of the intellect, but such a complete change in the moral and mental condition of the patient as would put an end to his responsibility as a free and intelligent being; unless the deceased was insane in this sense his death by his own act was suicide. . . . If they found that he was not a responsible moral agent when he did the act which occasioned his death, they might find that it was not suicidal. . . . If . . . he was still able to discern that self-destruction was criminal and might have resisted the impulse to which he succumbed," the verdict must be for defendant. The point of inability to distinguish between right and wrong was also noted, and this was held no error. Woodward, J., also said: "When the disease attains a stage at which the mental power to judge of the moral nature of the act is entirely gone, self-destruction does not become suicide in the sense of self-murder." Again, in 1873,[10] where the stipulation was, "die by his own hand," it was held no error to charge that "if the assured was not conscious of the act he was committing, but acted under an insane impulse or delusion sufficient to impair his understanding or will, or if his reasoning powers were so far overthrown by his mental condition that he was incapable of exercising his reasoning faculties with regard to the act of self-destruction, then the defendants are liable." And in 1853,[11] it was declared that the proviso "die by his own hands" must be disconnected from the following words, "in or in consequence of duel," etc., but that the clause covered suicide by swallowing arsenic.

(s) **Same subject: rule in Tennessee.**[12]—In Tennessee,[13] where the condition was, "shall die by suicide or by his own hands," it was held to import a criminal act of self-destruction; that the act of suicide, to be within the proviso, must be committed with mind

[7] 15 Wall. (82 U. S.) 580, 584.

[8] See § 2658 herein.

[9] Connecticut Mutual Life Ins. Co. v. Groom, 86 Pa. St. 92, 27 Am. Rep. 689, aff'g 1 W. N. C. 145.

[10] American Life Ins. Co. v. Isetts, 74 Pa. St. 176.

[11] Hartman v. Keystone Ins. Co. 21 Pa. St. 466.

[12] See § 2658 herein.

[13] Phadenhauer v. Germania Life Ins. Co. 7 Heisk. (54 Tenn.) 567, 19 Am. Rep. 623.

enough for criminal intent; that it was not suicide if committed by one incapable of distinguishing between right and wrong, although capable of comprehending; that the means selected would cause the death, and that the act must also be voluntary.

**(t) Same subject: rule in Texas.**[14]—In Texas, in the court of civil appeals [15] the policy contained a warranty not "to die by my own act," and the assured designedly killed himself by a pistol shot. The following charge was approved: "But if you should find that at the time the said Walden took his life his reasoning faculties were so far impaired that he was not able to understand the moral character or the general nature, consequences, and effect of the said act, or if he was impelled thereto by an insane impulse, then you will find for the plaintiff." The court, per Stephens, J., said: "The principal objection to the change is that it made the inability to understand the moral character of the act the test, though its physical nature, consequence, and effect may have been understood," and that the above rule is supported by the weight of authority. It was also declared by the court that the appellant, being a party to the leading case announcing the prevailing rule [16] had full notice that the proviso would receive the same construction in a state where the English rule had not been adopted.

**(u) Same subject: rule in Vermont.**[17]—In a case decided in this state in 1875,[18] the proviso was "die by suicide," and a charge was

[14] See § 2658 herein.

[15] Mutual Life Ins. Co. v. Walden — Tex. Civ. App. —, 26 S. W. 1012.

[16] Mutual Life Ins. Co. v. Terry, 15 Wall. (82 U. S.) 580, 21 L. ed. 236; Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. ed. 433.

[17] See § 2658 herein.

[18] Hathaway v. National Life Ins. Co. 48 Vt. 335.

*Opinions of Text-writers.* — Mr. Bacon considers the rule laid down in the United States Mutual Life Ins. Co. v. Terry, 15 Wall. (82 U. S.) 580, 21 L. ed. 236, 7 Alb. L. J. 310, and substantially followed in Michigan (John Hancock Mutual Life Ins. Co. v. Moore, 34 Mich. 41) as the most approved rule, one sustained by a preponderance of authority, and the "settled rule in most of the states in the Union:" 2 Bacon on Benefit Societies and Life Ins. (2d ed.) pp. 673, 675, sec. 334. Mr. Biddle says: "By the employment of the words 'intentional self-destruction' and 'suicide' the idea of a self-destruction consciously and intentionally brought about is intended," and upon the point whether the exception of liability in case of suicide and "whether the exception is intended only to apply to suicide in its technical sense—that is, a felo de se or self-murder by the insured who is conscious at the time of the moral nature of the act—or whether the exception is intended also to include intentional self-destruction by the insured when not at the time conscious of the moral nature of the act." This author reviews certain English cases (namely, Bayley v. Alexander, East. Not. Cas. 79; 2 Morley's India Dig. 140; Borradaile v. Hunter, 5 Man. & G. 639, 5 Scott (N. R.) 418, 12 L. J. C. P. 225, 7 Jur. 443; Clift v. Schwabe, 3 Com. B. 436, 2 Car. & K. 134, 17 L. J. C. P. 2, and says: "It must be admitted that the reasoning in the above English cases is ex-

held not erroneous which was in substance that if assured had sufficient mind, reason, and judgment to rationally consider and con-

tremely difficult to answer, and that the result arrived at in the opinion of the author of this treatise is logically irresistable:" 2 Biddle on Ins. (ed. 1893) 830 et seq. Mr. Bliss says: "It seems to us that the views taken by the courts of Massachusetts are most in accordance with the intentions of the parties to the contract. . . . Indeed, between judges and juries, the reasoning revolves in a circle and utterly deprives the clause of any practical application. The juries say because a man killed himself otherwise than accidentally, therefore he must have been insane, and the judges say if a man was insane when he killed himself the policy is not forfeited. Under such a condition of things, there is practically no case left to which the clause can apply:" Bliss on Life Ins. (ed. 1872) p. 392, sec. 238. Chitty says: "In criminal cases also, and as regards the protection from punishment for committed acts whilst in a state of mental derangement, the question is simple and adapted to the comprehension of every jury-man, viz.: 'Whether at the time the act was committed, the prisoner was incapable of judging between right and wrong and that the particular act was an offense against the law of God and nature:'" Chitty's Medical Jurisprudence (ed. 1834) 344. Mr. Cooke, referring to the clause "die by suicide" and like clauses, says: "It seems universally agreed that its meaning is limited to intentional self-destruction, thus excluding cases of accident and uncontrollable impulse. For clearly it is an act on the part of the insured that is contemplated, and such act implies a will behind the act; in other words, a voluntary act is contemplated. Perhaps it scarcely needs adding that this implies a will to do the act that actually was done and not some other essentially distinct act; in other words, that the actor realized that the result was what in the natural course of things it would be. . . . As it is the weight of authority is decidedly to the effect that the expression 'die by his own hand' involves, not only the idea that the act of self-destruction was voluntary, but that it was accompanied with a disability to distinguish right from wrong, or, as it has been expressed, to understand its moral aspect and character:" Cooke on Life Ins. (ed. 1891) p. 69, sec. 42. A recent medical authority uses the following language: "But it is said that an insane delusion or an irresistible impulse may be so marked as to preponderate over the rest of the intellect, so that the subject is no longer responsible for his acts. That is true, but if it leave him with sufficient intelligence to adapt means to ends and to know the result of a complicated act, such a grade of irresponsibility certainly should not abrogate this contract, made in good faith while he was perfectly sane, and set up in its stead another contract of very different import. If the delusion or impulse is so marked that he no longer understands the physical nature of the act, then it might be called an accident and as such would not be included within the proviso:" 1 Hamilton's System of Legal Medicine (ed. 1895) 582, article, "The Medical Jurisprudence of Life Insurance," by Brandreth Symonds, A. M., M. D. Mr. Elliott says: "Where the policy simply provides that suicide by the insured shall render it invalid, the weight of authority supports the rule established by the Supreme Court of the United States in the well-known Terry case" (see subd. (a) ante herein) Elliott on Ins. (ed. 1907) sec. 370, p. 414. See also 4 Cooley's Briefs on The Law of Ins. p. 3214. Mr. Richards says: "The English, New York, and Massachusetts courts and others have

template what he was doing and so took his own life, there could be no recovery; that it was not enough to warrant a recovery that as-

adopted the view that, to take the case out of the proviso of the policy on the ground of insanity, the assured must have been so mentally disordered as not to understand that the act he committed would cause his death, or he must have committed it under the influence of some uncontrollable insane impulse. These courts hold that it is not sufficient to show that his mind was so impaired that he was not conscious of the moral obliquity of the act." He then states the rule given in Accident Ins. Co. v. Crandall, 120 U. S. 531, 30 L. ed. 740, 7 Sup. Ct. 685 (Bigelow v. Berkshire Life Ins. Co. 93 U. S. 284, 23 L. ed. 918; note 19 Am. Rep. 628; Ritter v. Mutual Life Ins. Co. 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. 300), and adds: "The distinction between these two rules of law is probably too metaphysical to make it of any practical consequence whether the jury is charged in terms of the one or in terms of the other:" Richards on Ins. (2d ed.) 208, sec. 184. In his last edition (3d ed. 1909, p. 514, sec. 368) he says the distinction "is perhaps so metaphysical as to make it of somewhat questionable moment in many instances whether the jury is charged in terms of the one or in terms of the other; but the Federal Supreme Court considers its rule as sounder in principle as well as simpler in application." Mr. Niblack says: "There is, however, an irreconcilable difference in the opinion of the courts as to their [clauses as to suicide] proper meaning, but also a noticeable want of harmony in the opinions of judges of different courts which have passed upon the subject:" Niblack's Benefit Societies and Accident Ins. (2d ed.) p. 303. sec. 156. Mr. Phillips says: "I take our law to be that any mental derangement which would be sufficient to exonerate a party from a contract would render a person incapable of occasioning the forfeiture of a policy under this condition:" 1 Phillips on Ins. (3d ed.) p. 486, sec. 895. See criticism in 4 Allen (Mass.) 96. "There are many circumstances going to show that it, 'self-destruction,' frequently originates from a deranged mind. One is, that although considerable forethought and ingenuity may have been evinced in preparing the means, yet when the attempt fails, in many cases, the individual after his recovery has either no recollection or a very faint one of the fact itself, receiving it upon the testimony of others:" Dean's Medical Jurisprudence (ed. 1866) 509. "As a non compos cannot commit murder, so neither can he be felo de se:" 1 Collinson on Lunacy (ed. 1812) 494, sec. 24. "A man insures his life. The circumstances connected with his chances of insanity are fully disclosed. His family antecedents are carefully scanned for hereditary taint. A medical opinion and the testimony of his referees are taken upon the nature of his mental, as well as bodily, habits and constitution. The contract is made, and at the close of a long series of premiums paid his reason becomes undermined, melancholia fastens upon him, and he destroys himself; he meets death by his own hand, but it is not the less on that account the result of disease than is collapse and rigor the result of cholera:" Article, "The Suicide Clause in Life Policies," 12 Sol. J. & R. (1868) 498. See article, "Life Insurance—Suicide," 1 Va. L. (1877) 197–203. "It is quite evident that the preponderance of the authorities is in favor of the proposition that voluntary suicide avoids a policy containing the usual provisos. Precisely what is meant by 'voluntary suicide' is not very apparent, but we infer from the language of the opinions that the

sured's mind was unsound to some extent or so unsound that he was unable to distinguish right from wrong; that if an insane idea to take his own life possessed his mind, it being impaired, and that idea grew stronger and his mind, reason, and judgment weaker, and the idea became irresistable to take his own life, even though his mind contrived the means, then "in reality this insane idea or impulse, and not his mind or will, took his life," and it was held that insanity short of delirium or frenzy, whereby all power or self-will and control was lost, would excuse the suicide, and the court, per Pierpont, C. J., said: "It is not enough for the jury to find that the mind of the deceased is so impaired that he is incapable of distinguishing between right and wrong, but they must be satisfied that his mind was so overthrown that he had no power to resist the insane impulse to take his life, so that the act was the direct and immediate consequence and result of his insanity."

§ 2661a. **Whether suicide question for court or jury.**—The ordinary rule is that if the evidence is so clear and convincing that all reasonable men would draw the same conclusion therefrom, then the question is one for the court. If, however, the evidence is conflicting and such that reasonable men could fairly differ in their conclusions or inferences therefrom, the question is one for the

term is intended to include all suicides not perpetrated in the 'madness of delirium.' This is a construction severely strict in favor of the companies. The proviso avoiding the policy in cases of suicide, etc., is the language of the company and is also in the nature of a forfeiture, and should for both reasons be construed, if its meaning is doubtful, in favor of assured:" Article, "Suicide and Life Insurance," 4 Alb. L. J. (1871) 53; article, "Suicide in Life Insurance, Sane or Insane," 4 Cent. L. J. (1877) 51, and article 4 Cent. L. J. 75; article, "Suicide—Effect upon a Life Insurance Policy" (1885), 21 Cent. L. J. 378, 382 (Charles B. Elliott); annotated case, 25 Cent. L. J. 82 (William M. Rockel); n. 59 Am. Dec. 487 et seq.; Ray's Medical Jurisprudence of Insanity, 439 et seq.; Taylor's Medical Jurisprudence (ed. 1865) 1038 et seq.; 2 Paris and Fonblanque's Medical Jurisprudence (ed. 1823) 104 et seq. As to suicidal mania, see Maudsley's Responsibility for Mental Disease (ed. 1878) 133 et seq.; Mann's Medical Jurisprudence of Insanity (ed. 1893) 34–44, for judicial opinions in the different states where insanity was set as a defense to crime. Difficult to define insanity (Taylor's Medical Jurisprudence, (ed. 1865) 1019), and the position of the courts thereon greatly varied: Elwell's Medical Jurisprudence (ed. 1871) 371–400, medical authorities, and 27 Howell's State Trials, 1290; Mosler v. Common, 4 Barr (Pa.) 266, per Gibson, C. J., and quoting Dr. D. Meredith Reese, to the effect that the latter is unprepared to lay down any better rule than that of "'Knowledge of right and wrong,' or the knowledge that the act was 'contrary to the laws of God and nature' at the time of its commission," notwithstanding the objection by the medical profession that "such 'knowledge' is often possessed by the insane who are unquestionably such." See notes 59 Am. Dec. 487; 3 Am. Rep. 454; 21 Am. Rep. 543; 19 Am. Rep. 628; 8 Am. St. Rep. 885, 886.

jury.[19] And even though the facts are not disputed, the question whether insured committed suicide may be one for the jury, as where differing conclusions might be drawn therefrom by reasonable men.[20] And if the evidence is not necessarily inconsistent with

[19] *United States.* — Metropolitan Life Ins. Co. v. Williamson, 174 Fed. 116, 98 C. C. A. 90 (whether morphine taken with suicidal intent); Supreme Tent Knights of Maccabees of the World v. King, 142 Fed. 678, 73 C. C. A. 668, 35 Ins. L. J. 577 (evidence held to justify withdrawing case from jury).

*Arkansas.*—Industrial Mutual Indemnity Co. v. Watt, 95 Ark. 456, 130 S. W. 532 (evidence showed that insured shot himself).

*Colorado.*—Preferred Accident Ins. Co. v. Fielding, 35 Colo. 19, 83 Pac. 1013, 35 Ins. L. J. 260 (question of accidental death or suicide).

*Illinois.*—Knights Templars & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066 (insured died from gunshot).

*Indiana.*—Hodson v. Great Camp, Knights of the Modern Maccabees, 47 Ind. App. 113, 93 N. E. 861 (conflicting evidence however slight makes question one for jury); Equitable Life Ins. Co. v. Hebert, 37 Ind. App. 373, 117 Am. St. Rep. 324, 76 N. E. 1023.

*Iowa.*—Wood v. Sovereign Camp Woodmen of the World, 166 Iowa, 391, 147 N. W. 888; Scott v. Sovereign Camp Woodmen of the World, 149 Iowa, 562, 129 N. W. 302 (insured died from pistol shot and it was claimed that he had been murdered); Van Norman v. Modern Brotherhood of America, 143 Iowa, 536, 121 N. W. 1080 (insured found with rifle bullet wound in temple); Tackman v. Brotherhood of American Yeomen, 132 Iowa, 64, 8 L.R.A. (N.S.) 974n, 106 N. W. 350, 35 Ins. L. J. 368 (insured found dead in barn with strap around his neck).

*Kentucky.*—Hunziker v. Supreme Lodge Knights of Pythias, 117 Ky. 418, 78 S. W. 201, 25 Ky. L. R. 532; Paulsen v. Modern Woodmen 1510; Manhattan Life Ins. Co. v. Beard, 112 Ky. 455, 23 Ky. L. Rep. 1747, 66 S. W. 35.

*Michigan.*—Furbush v. Maryland Casualty Co. 133 Mich. 479, 95 N. W. 551, 10 Det. L. N. 245 (insured found on roadside with gunshot wound in head).

*Maine.*—Arnold v. Connecticut Mutual Life Ins. Co. 95 Me. 331, 49 Atl. 1103 (clause was: "Self-destruction of insured in any form").

*Minnesota.*—Bunker v. United Order of Foresters, 97 Minn. 361, 107 N. W. 392 (injuries were such that if insured had been sane it would have been death by suicide).

*Missouri.* — Normand v. Order United Commercial Travelers of America, 163 Mo. App. 175, 145 S. W. 853, 41 Ins. L. J. 1090 (death from bullet wound in head; question whether self-inflicted or accidental).

*North Dakota.*—Paulsen v. Modern Woodmen of America, 21 N. Dak. 235, 130 N. W. 231 (insured died by strychnine poisoning).

*South Dakota.*—Bircher v. Modern Brotherhood of America, 25 S. Dak. 325, 126 N. W. 583 (insured drowned).

*Utah.*—Moran v. Knights of Columbus, 46 Utah, 397, 151 Pac. 353.

*Washington.*—Klein v. Knights & Ladies of Security, 87 Wash. 179, L.R.A.1916B, 816n, 151 Pac. 241.

*Wisconsin.*—Agen v. Metropolitan Life Ins. Co. 105 Wis. 217, 80 N. W. 1020, 29 In. L. J. 37 (insured died from pistol shot; question of law).

On burden of proof as to suicide in action on life insurance policy, see notes in 4 L.R.A.(N.S.) 636, and 50 L.R.A.(N.S.) 1008.

[20] Industrial Mutual Indemnity Co. v. Watt, 95 Ark. 456, 130 S. W.

the theory that a person insured against accident came to his death through homicide rather than suicide, the cause of his death must be determined by the jury.[1] And upon the question of accident or suicide, whether death was caused solely and proximately by the injuries may be one for the jury.[2] Under a Maine decision it was stipulated that insurer should not be liable in the event of the self-destruction of insured in any form except upon proof that the same should be the result of disease or of accident occurring without the voluntary act of insured, and it was held that whether his self-destruction was the result of insanity was for the jury.[3]

Again, in an action upon a life policy, where the defense is that the deceased committed suicide by taking cyanide of potassium, it is reversible error for the court to direct a verdict for the plaintiff when there is some evidence, though circumstantial, in support of the issue tendered by the insurance company.[4] So in an action upon a life policy, it is reversible error for the court to take from the jury the question of death by suicide, upon the ground that there is not sufficient evidence to go to the jury upon that issue, where it was shown that, up to the time of taking morphine, the deceased was in perfect health, that he was in the prime of life, that he died suddenly, and that his life was insured for a large amount, and in which his creditor claimed an insurable interest. The jury should also consider, as bearing upon this question, the financial condition of the deceased, the business in which he was engaged, and whether there was any reason for his taking his own life, if he did so.[5]

So the question of insanity in connection with that of suicide may properly be one for the jury,[6] as may also the question of delirium at the time of death.[7]

A finding of suicide implies the intentional act of a sane person.[8]

**§ 2661b. Waiver of defense of suicide.**—Under a Georgia deci-

of America, 21 N. Dak. 235, 130 N. W. 231.

[1] Furbush v. Maryland Casualty Co. 131 Mich. 234, 100 Am. St. Rep. 605, 91 N. W. 435.

[2] Preferred Accident Ins. Co. v. Fielding, 35 Colo. 19, 83 Pac. 1013, 35 Ins. L. J. 260.

[3] Arnold v. Connecticut Mutual Life Ins. Co. 95 Me. 331, 49 Atl. 1103.

[4] Germania Life Ins. Co. v. Ross-Lewin, 24 Colo. 43, 65 Am. St. Rep. 215, 51 Pac. 488.

[5] Hale v. Life Indemnity & Investment Co. 61 Minn. 516, 52 Am. St. Rep. 616, 63 N. W. 1108.

[6] Van Norman v. Modern Brotherhood of America, 143 Iowa, 536, 121 N. W. 1080; Banker's Fraternal Union v. Donahue, 33 Ky. L. Rep. 196, 109 S. W. 878; Switchmen's Union of North America v. Johnson, 32 Ky. L. Rep. 583, 105 S. W. 1193; Mooney v. Ancient Order of United Workmen, Grand Lodge of Kentucky, 114 Ky. 950, 24 Ky. L. Rep. 1787, 72 S. W. 288.

[7] Wilcox v. Court of Honor, 134 Mo. App. 537, 114 S. W. 1155.

[8] Shipman v. Protected Home Circle, 174 N. Y. 398, 63 L.R.A. 347, 67 N. E. 83.

sion a policy clause, excepting assurer from liability in case of assured's death by his own act whether sane or insane during the period of one year after the policy was issued, was held, unless such waiver was against public policy, to waive the code provision of that state providing that death by suicide releases insurer from the obligations of its contract, and it was also decided that there was in that state no clearly defined public policy opposed to the waiver of such statute, but that there was a clear and vitally important public policy requiring that contracts be enforced according to the terms and intention of the parties thereto.[9] So the fact that a mutual benefit society distributes among its subordinate lodges what purports to be a copy of its constitution and by-laws, which contains no exemption from liability in case of suicide, and in reliance upon which, a member who subsequently committed suicide, acted in joining the order, does not estop it from taking advantage of a provision in its laws containing such exemption in avoidance of liability on his certificate; since the members are conclusively presumed to know what the provisions of the laws are, they being a part of the contract of insurance.[10]

So accepting and retaining an assessment does not waive the right to avoid a policy for suicide where it is stipulated that such act of assured precludes recovery, and the assessment is absolutely payable.[11] So acceptance of overdue assessments and dues by a local officer of a lodge is held not to constitute a waiver of the exception of liability in case assured dies by his own hand.[12] Nor is there any waiver of a provision in a life policy against liability for death from suicide, where the company, being requested after the death of insured to accept payment of a past-due premium, stated that the policy had been canceled for nonpayment of premium, and referred the beneficiary to the local agent as to its revival, there being no demand for payment and no question raised as to the liability of the company.[13]

And it is decided that sending blanks for proofs of death with an express non-waiver statement does not constitute a waiver of

[9] Mutual Life Ins. Co. of N. Y. v. Durden, 9 Ga. App. 797, 72 S. E. 295, Civ. Code 1910, sec. 2500.

[10] Benes v. Supreme Lodge Knights & Ladies of Honor, 231 Ill. 134, 14 L.R.A.(N.S.) 540 (annotated on estoppel of mutual benefit society by misrepresentations as to laws of order), 121 Am. St. Rep. 304, 83 N. E. 127.

[11] Bennett v. Beavers' Reserve Fund Fraternity, 159 Wis. 145, 150 N. W. 181.

[12] De Voney v. Modern Woodmen of America, 148 Ill. App. 68, 38 Nat. Corp. Rep. 408.

[13] Scherar v. Prudential Ins. Co. 63 Neb. 530, 56 L.R.A. 611, 88 N. W. 687.

the defense of suicide, although there is some proof that assurer had knowledge of the cause of death.[14]

Again, inasmuch as the defense of suicide when sane rests upon considerations of public policy, there can be no more a waiver thereof either intentionally or unintentionally, by stipulations or defects in the pleadings than by provisions or omissions in the contract itself.[15]

[14] Tuttle v. Iowa State Traveling Men's Assoc. 132 Iowa, 652, 7 L.R.A. (N.S.) 223, 104 N. W. 1131, one judge dissenting. Statements in proofs of loss, how far conclusive, see § 3319 herein.

On furnishing blanks for proofs of loss or claim as a waiver of breaches of condition or forfeiture, see note in L.R.A.1917A, 1065.

[15] Security Life Ins. Co. of America v. Dillard, 117 Va. 401, 84 S. E. 656, 45 Ins. L. J. 679. The court per Kelly, J., said: "As was said by Mr. Justice Field in Oscanyan v. W. R. Arms Co. 103 U. S. 261, 26 L. ed. 539, referring to a case in which a recovery was forbidden by morality and public policy: 'The objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties. It was one which the court itself was bound to raise in the interest of the due administration of justice.'"

# CHAPTER LXXII.

## EXCEPTED RISKS AND LOSSES—MARINE.

§ 2670. Excepted risks and losses: marine risks generally.
§ 2671. Excepted risks and losses: repugnant stipulations.
§ 2672. Excepted liability for loss caused by negligence, want of ordinary care, etc.: gross negligence.
§ 2673. Excepted liability for damage unless caused by negligence of ship.
§ 2674. Warranted free from mortality.
§ 2675. Exception of loss from specified cause followed by qualifying clause.
§ 2676. Exception of loss or damage from ice.
§ 2677. Exception of loss by barratry.
§ 2678. Excepted liability in bill of lading from damages arising from sweating, heat, steam, etc.
§ 2678a. Warranted "free from any claim consequent upon loss of time:" freight.
§ 2679. Explosion: loss from bursting of boilers or breaking or derangement of machinery: steamboat clause.
§ 2679a. Perils of the harbor: exclusion of loss from bursting or explosion of boilers, unless, etc.
§ 2680. Warranted free from insurrection.
§ 2681. Limited or prohibited trade: prohibited waters.
§ 2681a. Risk suspended while loading at specified island.
§ 2682. Warranty against illicit, prohibited, or contraband trade: against seizure therefor.
§ 2683. Exception of perils of the sea.
§ 2684. Warranted free from capture, etc.: capture by authority of de facto government.
§ 2685. A technical or actual capture or seizure not necessarily within the exception of these risks.
§ 2686. Capture and seizure may be synonymous.
§ 2687. Exception of loss by detention.
§ 2688. Other cases as to exception of capture, seizure, and detention.
§ 2689. Exception none the less binding because written on margin of policy.
§ 2690. Illegal seizure or attempt to seize within exception.

§ 2691. Warranted free from loss or damage arising out of collision of foreign powers or of our government with others.
§ 2692. Exception of loss from existing regulations does not include subsequently enacted decrees.
§ 2693. Warranted free from confiscation in ship's ports of discharge.
§ 2694. Exception of risk of blockaded port: turned away, etc.: free of loss if not permitted entry, etc.
§ 2695. Exception of loss or damage to goods or property on deck unless, etc.
§ 2696. The memorandum clause: generally.
§ 2697. What articles are within the clause.
§ 2697a. "Free from particular average:" "average unless general:" when the ship has stranded: statutes.
§ 2697b. Loss from defective condition of frozen meat cargo: "free from particular average and loss," etc.
§ 2697c. Effect of rider: "free of particular average:" "absolute total loss of part" amounting to —— per cent.
§ 2698. Warranted free from average unless general.
§ 2699. Or the ship be stranded or burns: "unless the vessel be sunk, burned, or stranded."
§ 2699a. Where the words "on fire" instead of "burned," or "burnt" are used.
§ 2700. Warranted "free from average under —— per cent unless general" and like clauses.
§ 2701. Unless it amounts to —— per cent and happens by stranding.
§ 2702. Exception of "loss or average" under specified per cent: expense of repairs.
§ 2703. Percentage: aggregate of losses in case of collision.
§ 2704. Value only of cargo at risk and not of whole cargo forms basis of percentage.
§ 2705. "Each package subject to its own average" and similar clauses: separately valued.
§ 2705a. Same subject: effect of rider.
§ 2706. "Average recoverable on each package separately or on the whole."
§ 2707. Effect of separate valuation of each package, etc.: when there is and when not an insurance on each separate package, etc.
§ 2708. Where articles of different kinds are each separately valued.
§ 2709. Where percentage is fixed for each particular class or impliedly fixed upon each enumerated article.
§ 2710. Where insurance is upon cargo in bulk: general designation of "all other goods:" goods of distinct kinds under one general designation.
§ 2711. The question of addition of successive losses to reach the limitation: cases.
§ 2712. Same subject: conclusion.

§ 2713. Where liability is limited to invoice value.
§ 2714. Particular and general average losses cannot be aggregated, nor are general average charges included in partial loss.
§ 2715. Addition of loss by jettison and salvage expenses.
§ 2716. Percentage clause qualified by agreement as to salvage and expenses.
§ 2717. Whether certain other charges and expenses may be added.
§ 2718. Exception of loss under specified percentage: other insurers.
§ 2719. Exception as to leakage, breakage, dampness, etc.
§ 2720. Whether under exception of loss under specified percentage the premium should be deducted.
§ 2721. Exception of liability under specified percentage: deviation.
§ 2722. Exception of claim arising from canceling of charter.

**§ 2670. Excepted risks and losses: marine risks generally.**—The clauses in marine policies excepting losses differ largely, although there are certain clauses common as to most of their provisions to all policies. The most general division is into those exceptions which come under special warranties, and those covered by the "memorandum" clause. The decisions under the latter clause are numerous, and cover a great variety of points as to its construction. Those under the former class rest largely upon the particular language in which it is expressed, and its construction with reference to such rules of law as are applicable in the given case.

**§ 2671. Excepted risks and losses: repugnant stipulations.**—A printed stipulation limiting the liability of the insurer, whether it be a clause "free from average," or a limitation of liability from losses under a specified percentage, or an exemption of losses arising from or occasioned by designated or other limitations of liability, may be qualified, enlarged, or limited by a valid written clause, specific and certain in its provisions; for the rule that written clauses prevail over printed ones to which they are repugnant obtains as well in cases of this character as in others, but the clauses should be reconciled as far as possible, and the whole contract should be construed together in order to give effect to the intentions of the parties.[16] Thus, where the printed clause stipulated to be "free from average under ten per cent," and other printed clauses warranted to be "free from average unless general, and all other goods free from average under five per cent unless general," it was decid-

[16] Bargett v. Orient Mutual Ins. Co. 3 Bosw. (16 N. Y.) 385; Hernandez v. Sun Mutual Ins. Co. 6 Blatchf. (U. S. C. C.) 317; Fed. Cas. No. 6,415; Coster v. Phœnix Ins. Co. 2 Wash. (U. S. C. C.) 51; Fed. Cas. No. 3,264; Neilson v. Commercial Ins. Co. 3 Duer. (N. Y.) 455, *cited* in 46 N. Y. 614.

As to construction, written and printed clauses. See §§ 223, 224 herein.

ed that the written clause controlled, and operated as a limitation of all averages to the ten per cent specified therein.[17]

**§ 2672. Excepted liability for loss caused by negligence, want of ordinary care, etc.: gross negligence.**—If it is stipulated that the insurer shall not be liable for perils, loss, misfortunes, or expenses consequent upon or arising from or caused by "the want or ordinary care and skill in navigating" the vessel, there can be no recovery for general average expenses incurred in rescuing the vessel from a peril consequent upon negligence in navigating her.[18] So under a clause exempting from liability for "any loss occasioned by the negligence or misconduct of those in charge of the steamboat," there can be no recovery where the boat sinks at her mooring in consequence of overloading, the danger arising therefrom being so great that it was apparent long before the accident to many passengers inexperienced in navigation.[19] And under an exception for loss for want of ordinary care and skill "necessary and proper on such voyage and in said navigation," a want of ordinary care, skill, knowledge, attention, and seamanship, and ignorance of the channel and navigation on the part of the master and others constitutes a good plea in defense, and the same rule applies to an insurance on the cargo under a similar clause.[20] If the policy warrants that the boat shall be navigated free from any loss or damage by the negligence of those in charge of her at or before the time of any accident or disaster, this excludes a loss occasioned by the negligence of the pilot.[1] But if the exception be against want of ordinary care, and a vessel is run ashore and a storm arises after the stranding, and she is scuttled to save her and the cargo from total loss, the proximate cause of the loss is the storm and not the stranding, and the loss is not within the exception.[2] Although under a like exception where a steamer, stranded in a fog on an island, rode out of her course and was abandoned, and it appeared that she had a defective compass and was without a lookout, and was violating a statute regulating the speed to be maintained in a fog, it was held that it was incumbent, in order to recover, to show that these facts neither caused nor contributed to the loss, but that it arose from a

[17] Coster v. Phœnix Ins. Co. 2 Wash. (U. S. C. C.) 51, Fed. Cas. No. 3,264.

[18] The Ontario (U. S. D. C.) 37 Fed. 220.

As to negligence generally; marine risks, see §§ 2849–2850a herein.

[19] Empire Parish Packet Co. v. Union Ins. Co. 32 La. Ann. 1081.

[20] Gillespie v. British America Fire & Life Assurance Co. 7 U. C. Q. B. 108.

[1] Levy v. New Orleans Mutual Ins. Assoc. 2 Woods (U. S. C. C.) 63, Fed. Cas. No. 8,290.

[2] Northwest Transportation Ins. Co. v. Boston Marine Ins. Co. (U. S. C. C.) 41 Fed. 793. But see The Ontario (U. S. D. C.) 37 Fed. 220.

peril insured against.[3] The term "gross negligence," as used in a policy exempting from loss on that account, is the want of that diligence which even careless men are accustomed to exercise. If one omits slight diligence, he is grossly negligent, for he fails in the lowest degree of prudence.[4] The fact of want of ordinary skill and care must be clearly found to bring the loss within the exception, for if there are inconsistent findings upon the point whether the acts of a master are those of a careful, skilful, and prudent seaman, and whether his acts were justified, a new trial may properly be granted.[5] Again, where a policy covered such loss or damage as a steam tug might become "legally liable for, from accident caused by collision" and if a warranty against loss from "want of ordinary care or skill" is used in connection with and immediately following a warranty that a steam tug with her tow shall not go out of the usual and regular channels or to any port or place where the master or pilot through ignorance or inexperience ought not to undertake her navigation, it will be construed as if the clause read "warranted free from loss arising from ignorance or want of ordinary skill or care on the part of the master or pilot as to any port or place the steam tug may use" for in such case the rule of construction most favorable to assured will apply and the said clause "want of ordinary care or skill" will not be extended so as to defeat the entire purpose of the contract even though a collision occurred through want of ordinary care or skill.[6] But where a policy expressly excepts losses caused by the gross negligence, recklessness or wilful misconduct of the owner, master, officers or crew of the vessel, and it is claimed that the loss of the boat was due to the gross negligence of the owners in not providing a proper and safe tiller rope, and also that the pilot was guilty of gross negligence in trying to change rudders while the boat was backing, and

[3] Richelieu & Ontario Navigation Co. v. Boston Mutual Ins. Co. 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. 934, *cited* in The Martello (The Martello v. Willey, 153 U. S. 64, 74, 38 L. ed. 637, 641, 14 Sup. Ct. 723; Belden v. Chase, 150 U. S. 674, 699, 37 L. ed. 1218, 1227, 14 Sup. Ct. 264; St. Louis & M. Valley Transportation Co. v. United States, 33 Ct. Cl. 269; The Lansdowne, 105 Fed. 436, 443; Donnell v. Boston Towboat Co. 89 Fed. 757, 762, 32 C. C. A. 331, 336, 50 U. S. App. 435; Thames Towboat Co. v. Central Ry. Co. 61 Fed. 117, 118; Greenwood v. Westport, 60 Fed. 560, 567; The New York, 53 Fed. 553, 559; The City of Para, 44 Fed. 689, 690; Earnmore Steamship Co. v. Union Ins. Co. 44 Fed. 374, 376; McCarthy v. St. Paul Fire & Marine Ins. Co. 43 N. Y. Supp. 343, 19 Misc. 274, 276.

[4] Lycoming Ins. Co. v. Barringer, 73 Ill. 230; Campbell v. Monmouth Mutual Fire Ins. Co. 59 Me. 430.

[5] Lawton v. Royal Canadian Ins. Co. 50 Wis. 163, 6 N. W. 505.

[6] Rogers v. Ætna Ins. Co. 95 Fed. 103, 35 C. C. A. 396, 28 Ins. L. J. 808.

in directing the engineer to shove it off the pier, whereby a collision occurred, and the question for gross negligence is left to the jury, which returns a verdict for assured, it will be sustained.[7]

§ 2673. **Excepted liability for damage unless caused by negligence of ship.**—In a Federal case it appeared that the bill of lading excepted liability for damage to fruit by frost unless caused by negligence of the ship. The steamship was loaded with green fruit in one hold and general merchandise in another. On the vessel's arrival in New York in February it commenced discharging the fruit, which could have all been discharged during the day, which was a warm one; but in accordance with the request of certain consignees, the libelant assenting, the unloading was discontinued and was not again commenced until the fourth day thereafter, and completed the fifth day, the intervening days being cold. The fruit was transferred to a warehouse, and was subsequently found to be frozen, but was frozen before it was discharged from the vessel, and it was held that there was no negligence, and the exception in the bill of lading protected the ship from liability, and that she was not obligated during the cold weather to suspend discharging from the holds in which there was no fruit for the purpose of protecting the fruit in the other hold from liability to injury from frost.[8] But the ship may be liable for loss resulting from negligence in stowage even though within the exceptions of a bill of lading; as where the dunnage wood placed between all the drums of a consignment of glycerine on board a steamship had fallen out during the voyage from between two drums only, whereby they were cut by chafing together, and the glycerine leaking out, the voyage being a rough one, it was held that the only fair inference was that these two drums were not properly secured according to the usual manner.[9]

§ 2674. **Warranted free from mortality.**—Where live stock is insured under a policy with a warranty "free from mortality and jettison," reference must undoubtedly be had to the intention of the parties as evidenced by the language employed. Thus, mortality is held to mean a death arising from natural causes, and not a violent one; as where the live stock insured under a similar exception so wounded and bruised each other, by reason of the laboring of a vessel in a severe storm, that they died, this was declared a loss by the perils of the sea, and not within the exception.[10] The effect

[7] Jones v. Western Assur. Co. 198 Pa. St. 206, 47 Atl. 948.

[8] The Alesia, 35 Fed. 531.

[9] Marx v. The Britannia, 34 Fed. 906. See The Torsa, 85 L. J. P. 226, [1916] P. 257 (bill of lading exception of all loss by neglect, etc., case of bad stowage).

[10] Lawrence v. Aberdein, 5 Barn. & Ald. 107, 24 R. R. 299, 14 Eng.

of a special clause limiting the risk to mortality from certain causes would be to exclude mortality from other causes.[11] Reference must also be had to the fact whether the mortality arose from a peril insured against as the proximate cause, or whether it was superinduced by other causes, natural inherent vice, or otherwise.[12] In case the warranty "to be free from mortality or jettison" in an insurance on live stock has by practice among underwriters received a certain construction, the assured is not bound thereby, unless he is shown to have been cognizant thereof, either expressly or impliedly.[13]

**§ 2675. Exception of loss from specified cause followed by qualifying clause.**—If the policy contains a stipulation exempting the insurers from loss to a cargo from a specified cause limiting the generality of exception, it will be construed with reference to such qualifying clause. Thus, if a cargo of ice is insured, exempting the insurers for loss from the ice melting "in consequence of putting into port," this will not include a loss occasioned by the melting of ice from other causes, such as the leaking of the vessel, and the necessary unloading of ice to examine and repair the vessel in a tropical port where the vessel is by reason of distress.[14] But where a cargo of wheat on board a canal boat in the port of New York was insured against certain perils while "lying up as aforesaid," with an exception of ice from the perils enumerated, and the policy also gave permission that the boat be towed from place to place in port, the clause "lying up as aforesaid" covers the boat while being towed, and the insurers are not liable for injury by ice during that time.[15] Although in case of illicit or prohibited trade, and the exception be limited as to existing regulations, this clause will not bring a loss arising subsequently within the exception.[16] The company will be discharged only as to any loss arising from towing by a vessel of that character.[17]

**§ 2676. Exception of loss or damage from ice.**—If the policy contains an exception of liability for loss from ice, reference should be had to the fact whether ice is the proximate cause of the loss.

Rul. Cas. 296; Gabay v. Lloyd, 3 Barn. & C. 793, 5 D. & R. 641, 3 L. J. (O. S.) K. B. 116, 27 R. R. 486.

[11] Jones v. Schmoll, *cited* in 1 Term Rep. 130n, 1 R. R. 196n.

[12] Tatham v. Hodgson, 6 Term Rep. 656.

[13] Gabay v. Lloyd, 3 Barn. & C. 793, 5 Dowl. & R. 641, 3 L. J. (O. S.) K. B. 116, 27 R. R. 486.

[14] Tudor v. New England Mutual Marine Ins. Co. 12 Cush. (66 Mass.) 554. See also as to application of principle, Dibby v. Gage, 14 Allen (96 Mass.) 261, 266.

[15] Dows v. Howard Ins. Co. 5 Rob. (28 N. Y.) 473.

[16] Wood v. New England Mutual Marine Ins. Co. 14 Mass. 31, 7 Am. Dec. 182.

[17] Grant v. Lexington Fire, Life & Marine Ins. Co. 5 Ind. 23, 61 Am. Dec. 74.

And if the policy be on time, the exemption is not limited to the season of navigation where ice is clearly the proximate cause of the damage;[18] but if the policy provides that it shall cease if the boat is "prevented or detained by ice or the closing of navigation from terminating the trip," the being detained by ice means detention in the ordinary course of navigation, and does not exempt a loss, the predominating and efficient cause of which is a storm; as where boats being towed are separated from the tugs by a gale which drives them ashore, where they are stranded, and ice forms around them in the night so that the tugs cannot reach them, even though the channel of the river is open, and the boats remain frozen in till a thaw, when they are sunk by the wind and ice and the cargo injured.[19] If the exemption is of liability for injuries in consequence of ice, except when lying between piers, the protection contemplated from piers is that where they are sufficiently near to each other as to prevent such injury from floating ice on both sides of the vessel, and if she is moored at the time of her injury between piers two thousand feet apart, she is not lying between piers within the intent of the policy, and, in the absence of evidence of the practical construction of such a clause the construction thereof is a question for the court.[20]

§ 2677. **Exception of loss by barratry.**—If the policy provides that the underwriter shall be free from all losses caused by barratry, mere carelessness or unskilfulness of the master will not release the insurer, there being no fraud or criminal conduct on his part.[1] And where barratry of the master is excluded, the assured being owners, and the command of the vessel devolved upon the second mate during the course of the voyage, his acts while in command were held those of a mariner, and one of the risks covered by the policy.[2] So an exemption of loss "by barratry of the master if the master is owner," it is held, will not release the insurers in case of an insurance on a vessel by the holder of a bill of sale, the vessel being registered in his own name, it appearing that the original owner was owner pro hac vice, having retained possession and control of the vessel, and victualing, manning, and sailing her at his own expense, and the master having fraudulently run her ashore, and the vessel being totally lost.[3] Again, if loss by barratry be ex-

[18] Allison v. Corn Exchange Ins. Co. 57 N. Y. 87.

[19] Brown v. St. Nicholas Ins. Co. 61 N. Y. 332.

[20] Huntley v. Providence-Washington Ins. Co. 79 N. Y. Supp. 35, 77 App. Div. 196.

[1] Louisville Underwriters v. Pence, 93 Ky. 96, 40 Am. St. Rep. 176, 19 S. W. 10, 21 Ins. L. J. 493, 14 Ky. Law Rep. 21.

[2] Tate v. Protection Ins. Co. 20 Conn. 481, 52 Am. Dec. 350.

[3] Clark v. Washington Ins. Co. 100 Mass. 509, 1 Am. Rep. 135.

cepted, the insurers are not released by reason of mere error on the part of the pilot, where by a collision and consequent exposure, fire results.[4] And if a policy be to a named person "on account of whom it might concern," with a clause, "loss by barratry not taken if assured be owner of the vessel," the defense of barratry of the master would be valid, if the intention was to insure the owners of the vessel; or, the contract being indivisible, then the defense could be availed of if it was intended to insure the persons named and the owners.[5]

**§ 2678. Excepted liability in bill of lading from damages arising from sweating, heat, steam, etc.**—If the bill of lading excepts liability for damages to the cargo from "damages arising from sweating, heat, steam," etc., and it appears that the cargo was stowed in the customary manner, and that being a quantity of Brazil nuts and a portion of the crop particularly liable to become heated, and that it was carefully watched and ventilated so far as possible, but that stress of weather necessitated keeping on the hatches during a portion of the voyage, it is held that negligence of the vessel must then be shown to bring a damage to the cargo from heat and sweat within the exception.[6]

**§ 2678a. Warranted "free from any claim consequent upon loss of time:" freight.**—Where a policy upon freight is warranted free from any claim consequent upon loss of time, whether arising from a peril of the sea or otherwise, and freight is lost by reason of necessary delay in repairing the steamer's main shaft in consequence of which the charter is canceled, a recovery is precluded for the resulting loss of freight.[7]

**§ 2679. Explosion: loss from bursting of boilers or breaking or derangement of machinery: steamboat clause.**—Insurers are not liable for damage resulting "on account of" bursting of boilers where by a policy of insurance upon the body, tackle, apparel, and other furniture of a propeller the insurers are not to be liable "for" the bursting of boilers.[8] So where the policy excepted from the perils insured against "damage that might be done by the bursting of boilers," but provided that only "loss or damage occurring subsequent to and in consequence of the bursting of boilers is covered by this policy," and the boiler of the vessel burst, the explosion

[4] Germania Life Ins. Co. v. Sherlock, 25 Ohio St. 33, 50, 1 Wkly. Law Bul. 26, 7 Ohio, 17.

[5] Paradise v. Sun Mutual Ins. Co. 6 La. Ann. 596.

[6] The Portuense (Johnson v. The Portuense) 35 Fed. 670 (annotated case).

[7] Bensaude v. Thames & Mersey Marine Ins. Co. [1897] 1 Q. B. 29, 75 L. T. R. 405, 66 L. J. Q. B. (N. S.) 45, rev'g 75 L. T. R. 155, aff'd [1897] App. Cas. L. R. 609. See § 2783 herein.

[8] Strong v. Sun Mutual Ins. Co. 31 N. Y. 103, 88 Am. Dec. 242.

being so violent as to tear open the side of the vessel to such an extent that she was immediately submerged, it was held that as the vessel was rendered worthless the moment the rents and apertures were made, the loss was not subsequent to the explosion within the intent of the words, and that the policy did not cover the loss.[9] And where a marine contract binds the insurers for all losses occasioned by fire except from explosion of boilers while the vessel is navigated upon the waters named in the policy and within the assured's control, but in a subsequent clause excepts claims for loss or damage occasioned by the "collapsing of flues," this does not cover a loss by fire occasioned by the collapsing of a flue.[10] And if the policy provides that the insurers are to be not liable for any "breakage or derangement of the engine, or the bursting of the boiler, or any parts thereof," the insurers are only relieved from liability to indemnify the assured for broken or deranged machinery, and are not exempt from obligations to pay for a total loss, even though such loss could be traced back to the breaking of the machinery as its first cause.[11] So where the contract provided an exemption from liability for loss by the breaking of any part of the machinery, and the boat broke her shaft while being towed, and sprung a leak and sunk, it was held that the insurer was not released by the existence of one of the excluded causes, unless the loss was due to that cause.[12] In another case, where the stipulation was against "any loss occasioned by fire except when caused by explosion of boiler," and the policy also warranted against loss by "bursting of boilers, collapsing of flues, or the consequences of any character resulting from either of the foregoing exceptions," the insurer was held liable for all losses occasioned by fire except from explosion of boilers.[13] So where a steamboat was insured for a certain voyage, the company not to be liable for breakage or derangement of the engine or bursting of the boiler, or for effects of fire from any cause connected with the operation or the repair of engine or boiler, unless the damage was occasioned by stranding or sinking of the vessel after her engine or boiler shall have been put in successful operation, it was held that if the immediate or proximate cause of loss was stranding, notwithstanding the loss could be traced back to a breakage of machinery, the

[9] Evans v. Columbian Ins. Co. 44 N. Y. 146, 4 Am. Rep. 650.

[10] Louisville Underwriters v. Durland, 123 Ind. 544, 7 L.R.A. 399, 24 N. E. 221.

[11] Western Ins. Co. v. Cropper, 32 Pa. St. 351, 75 Am. Dec. 561.

[12] Union Ins. Co. v. Smith, 124 U. S. 405, 31 L. ed. 497, 8 Sup. Ct. 534. See Orient Ins. Co. v. Adams, 123 U. S. 67, 31 L. ed. 63, 8 Sup. Ct. 68.

[13] Louisville Underwriters v. Durland, 123 Ind. 544, 7 L.R.A. 399, 24 N. E. 221.

"steamboat clause" did not exonerate the insurers from liability.[14] But it is held that where the policy provides that the insurers shall not be liable for breaking of the machinery unless occasioned by stranding, this will render insurers liable, where the vessel is injured first by perils of the sea and afterward by stranding, for so much of the injury only as the assured proves to have been occasioned by the stranding.[15] If there be an exemption from loss by explosion occurring at the time of the entry or indorsement under a running policy, provided the occurrence "might be known to the applicant, the public, or the company at the time," the application should be made whether the property insured "was known to be involved therein or not," and the vessel's boiler has exploded at the time the application is made, the policy does not cover a loss on goods, although the goods are not known to be on board.[16] It is evident from the above cases that the courts will consider the proximate cause of the loss, in construing clauses of this character, in connection with the facts of the case, and that the tendency also is to favor the assured, where the construction so admits, without departure from the intent evidenced by the words chosen. Some of the cases, however, can well be compared with cases discussing the same principles under fire policies, noted elsewhere.[17]

**§ 2679a. Perils of the harbor: exclusion of loss from bursting or explosion of boilers, unless, etc.**—An injury to a lighter while proceeding up a harbor resulting from concussion or shock and not by reason of any waves or swell of the water, nor by any débris thrown upon her, but caused by an explosion of dynamite which was being transferred to a barge lying at a nearby pier, is not a loss under a policy insuring a lighter against perils of the harbor where that is the only provision under which it is claimed insurer is liable, although it would seem that said loss is not within an exception from liability in the same policy which excluded loss from bursting or explosion of boilers, unless caused by stress of weather, stranding, collision, or burning, nor within a warranty not to carry gunpowder or other explosives. A distinction was also made in that the policy insured only against perils of the harbor and not "all other perils and losses."[18]

[14] Commonwealth Ins. Co. v. Cropper, 21 Md. 311.

[15] Heebner v. Eagle Ins. Co. 10 Gray (76 Mass.) 131, 69 Am. Dec. 308.

[16] Mark v. Ætna Ins. Co. 29 Ind. 390.

[17] "This company is not to be held liable . . . in case of insurance upon a steamer for any injury to the machinery or boilers, unless occasioned by stranding, sinking, burning, or collision with another vessel:" Exception in a form used in San Francisco.

[18] Listers Agricultural Chemical

**§ 2680. Warranted free from insurrection.**—A warranty on a cargo of slaves to be free from insurrection means that the insurers shall not be liable for a loss therefrom, and not that there shall be no insurrection.[19] The case so holding is chiefly valuable at the present day because of the distinction between a warranty against an act and a warranty that there shall be no loss from that act; as well also as for the assertion therein of the principle that the proximate cause of the loss does not necessarily mean the last cause.

**§ 2681. Limited or prohibited trade: prohibited waters.**—If trade is limited to certain ports and places, or if trade with certain ports and places is excluded or prohibited by the terms of the policy, the stipulation binds the assured to an observance of the contract, and a breach avoids the contract, but in case a trade is confined to certain ports in specified places, or in designated seas, the assured may prove that the trade described in the policy included as a part thereof, or as incidental thereto, a direct voyage between certain of the ports to which it is limited.[20] But the ship's destination constitutes an important factor in determining the trade in which she is engaged;[1] and where trade with "all guano islands except the Chinchas" was prohibited, and the vessel loaded at Navassa, in the Caribbean Sea, with a product of that island claimed to be mineral phosphate, it was held that the insured must show that the character of the cargo was not such as to constitute a breach.[2] So if certain waters be prohibited, or if their navigation be prohibited within specified times, the insurer will be released by a breach of the stipulation by assured, and a permission to navigate certain waters above or below or within specified limits is binding upon the parties, and must be observed, or there can be no recovery.[3] And

Works v. Home Ins. Co. (U. S. D. C.) 202 Fed. 1011, 42 Ins. L. J. 862. See §§ 2797 et seq. herein.

[19] McCargo v. New Orleans Ins. Co. 10 Rob. (La.) 202, 43 Am. Dec. 180.

[20] Mallory v. Commercial Ins. Co. 9 Bosw. (22 N. Y.) 101.

As to trade and employment of ship: representations and warranties, see § 2098 herein.

[1] Harvey v. Beckwith, 12 Week. Rep. 896, 10 L. T. 632, 2 H. & M. 429.

[2] Whiton v. Albany City Ins. Co. 109 Mass. 24. In this case public documents of the United States showing the recognized character of the island as a guano island was held wrongly excluded.

[3] *Maine.*—Cobb v. Lime Rock Fire Marine Ins. Co. 58 Me. 326.

*Massachusetts.*—Odiorne v. New England Mutual Marine Ins. Co. 101 Mass. 551, 3 Am. Rep. 401.

*New York.*—Bearns v. Columbian Ins. Co. 48 Barb. (N. Y.) 445; Wheeler v. New York Mutual Ins. Co. 3 Jones & S. (35 N. Y.) 247; Day v. Orient Mut. Ins. Co. 1 Daly (N. Y.) 13.

the same rule would also apply to the rules of an association.[4] In another case a vessel was insured, while on her voyage from Liverpool to New Orleans, which latter port was known to be her home port, "to navigate the Atlantic Ocean between Europe and America, and to be covered in port and at sea." Another clause ran thus: "Warranted by the assured not to use ports in eastern Mexico, Texas, nor Yucatan, nor anchorage thereof." The vessel was lost in the Gulf of Mexico on her return trip from New Orleans to Liverpool, and it was held that the insurance covered the loss.[5]

**§ 2681a. Risk suspended while loading at specified island.**—The surrounding circumstances having disclosed the fact that the insurance company considered the roadstead at an island called Baker's Island, as very unsafe, the wording of a policy on a vessel sailing at and from one port to another, via Baker's Island, "the risk to be suspended while vessel is at Baker's Island loading," was construed to mean while at Baker's Island, whether loading or not, if there for the purpose of loading. Such a case is within the general rule that the surrounding circumstances out of which a written contract grows and which surrounded its adoption may be resorted to, not to vary the terms of the contract but to ascertain the subject matter and the stand point of the parties in relation thereto.[6]

**§ 2682. Warranty against illicit, prohibited, or contraband trade: against seizure therefor.**—Although a trade which is made illegal by the laws of the country to which the subject insured is bound or to which it is to be carried is illicit trade, yet the tribunals of other countries will not recognize as illegal a trade which the officers of that government may, to suit their own purposes, choose to arbitrarily designate as unlawful.[7]

An exception of illicit trade does not necessarily concern actual

*Ohio.*—Wilkins v. Tobacco Fire & Marine Ins. Co. 30 Ohio St. 317, 27 Am. Rep. 455.

*England.*—Provincial Ins. Co. of Canada v. Leduc, 43 L. J. P. C. 49, 22 Week. Rep. 929, L. R. 6 P. C. 224, 31 L. T. 141, 2 Asp. M. C. 338.

See Greenleaf v. St. Louis Ins. Co. 37 Mo. 25; Yeaton v. Fry, 5 Cranch (9 U. S.) 335, 3 L. ed. 117; Palmer v. Warren Ins. Co. 1 Story (U. S. C. C.) 360, Fed. Cas. No. 10,698.

Time policy; navigation limited, see § 2374 herein.

Prohibited ports or waters; warranty, see § 2400 herein.

On effect of navigating in forbidden waters in case of loss within waters covered by policy, see note in 10 L.R.A.(N.S.) 742.

[4] Harvey v. Beckwith, 12 Week. R. 896, 2 H. & M. 429, 10 Law T. 632.

[5] Merchants' Mutual Ins. Co. v. Allen, 121 U. S. 67, 30 L. ed. 858, 7 Sup. Ct. 821.

[6] Reed v. Merchants' Mutual Ins. Co. 95 U. S. 23, 24 L. ed. 348.

As to parol evidence, see §§ 185, 3802 et seq. herein.

[7] Thompson v. Mississippi Ins. Co. 2 La. 228, 22 Am. Dec. 129.

buying and selling, but refers to illicit acts concerning the management of the adventure, by reason of which the property is subject to seizure.[8] And if a trade is in no other way unlawful than in consequence of an accident over which assured has no control, the underwriters cannot avail themselves of it as a breach of warranty.[9] But a mere attempt at trading is held within the exception, and the risk is forfeited thereby.[10]

Under a warranty against seizure on account of illicit trade the underwriters are liable for a loss by illicit trade barratrously carried on by the master.[11] An insurer is also liable for damages sustained by the detention of a vessel having prohibited goods shipped by the master for smuggling, though there is a clause that the insurer shall be free from charge on account of any illicit or prohibited trade.[12]

If the goods described are known to be prohibited, they are not without the exception.[13] And the trading by a domiciled alien carried on between the United States and the enemies of his mother country is protected under the warranty against illicit trade.[14] Illicit trade is not however, legalized by the unauthorized permission of an officer of the government.[15]

The risk of illicit trade must be taken with knowledge, express or implied.[16] But if insurer and insured know there are contraband goods on board, and yet insurance is effected on lawful goods with a warranty against contraband, the warranty applies only to the lawful goods.[17] The exception also refers only to the goods of the assured, and not to those of other shippers.[18] And if the

[8] Smith v. Delaware Ins. Co. 3 Wash. (U. S. C. C.) 127, Fed. Cas. No. 13,035; Andrews v. Essex Fire & Marine Ins. Co. 3 Mason (U. S. C. C.) 6, Fed Cas. No. 374.

[9] Savage v. Pleasants, 5 Binn. (Pa.) 403, 6 Am. Dec. 424.

[10] Andrews v. Essex Fire & Marine Ins. Co. 3 Mason (U. S. C. C.) 6, Fed. Cas. No. 374; Deerow v. Waldo Mutual Ins. Co. 43 Me. 460; Church v. Hubbard, 2 Cranch (6 U. S.) 165, 2 L. ed. 249. See Higginson v. Pomeroy, 11 Mass. 104.

[11] The illicit trade must be carried on by the insured himself or with his knowledge and assent: Dunham v. American Ins. Co. 2 Hall (N. Y.) 422; Suckley v. Delafield, 2 Caines (N. Y.) 222.

[12] American Ins. Co. v. Dunham, 12 Wend. (N. Y.) 463, aff'g 15 Wend. (N. Y.) 9.

[13] Seton v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 175, Fed. Cas. No. 12,675.

[14] Johnston v. Ludlow, 1 Caines Cas. (N. Y.) XXIX.

[15] Tucker v. Juhel, 1 Johns. (N. Y.) 20.

[16] Andrews v. Essex Fire & Marine Ins. Co. 3 Mason (U. S. C. C.) 6, Fed. Cas. No. 374.

[17] Bowne v. Shaw, 1 Caines (N. Y.) 489. See DePeyster v. Gardner, 1 Caines (N. Y.) 492; Maryland & Phoenix Ins. Co. v. Bathurst, 5 Gill & J. (Md.) 159.

[18] Cucullu v. Louisiana Ins. Co. 5 Mart. N. S. (La.) 464, 16 Am. Dec. 199.

vessel is admittedly a prize of war, as enemies' property, no defense can be rested on the warranty against illicit or prohibited trade in contraband of war.[19]

Again, there is no breach of warranty of illicit trade by the owner of a vessel unless she is engaged in a trade which would furnish ground for her legal condemnation;[20] and the cause must be a legal and justifiable one under the law of nations to bring the seizure or detention within the exception.[1] So if the perils are excepted of illicit trade and trade in articles contraband of war, and the vessel is not violating any belligerent rights because of want of knowledge of a blockade, and there is a hostile capture, the insurers are not released.[2] But a warranty against illicit trade releases the insurers in case of a breach, although the act be prohibited subsequently to the insurance.[3] And it is held that a condemnation jure belli and for a breach of municipal regulations will falsify the warranty by which the insurer was protected from loss from illicit trade.[4] So the fact that assured has deposited or disposed of the contraband goods before the seizure does not relieve him from the breach of warranty.[5]

The warranty against seizure from illicit trade does not release insurers from a detention which properly comes within the clause as to "arrests and detainments of princes."[6]

*Warranty of "no contraband of war:" risk of capture covered: passengers not contraband: reinsurance.* In another case the question was whether underwriters of a policy of reinsurance effected by the plaintiffs were freed from liability by reason of a breach of warranty "not to carry cargo other than kerosene oil" the "risk of capture" being covered. The reinsurance was subject to the same clauses and conditions as the original policy and it also "war-

[19] Merchants' Ins. Co. v. Edmond, 17 Gratt. (Va.) 138.

[20] Thompson v. Mississippi Ins. Co. 2 La. 228, 22 Am. Dec. 129.

[1] Carrington v. Merchants Ins. Co. 8 Pet. (33 U. S.) 495, 8 L. ed. 1021, *cited* in Stacey v. Emery, 97 U. S. 642, 646, 24 L. ed. 1035, 1036; Magoun v. New England Marine Ins. Co. 1 Story (U. S. C. C.) 169, Fed. Cas. No. 8,961; Bradstreet v. Neptune Ins. Co. 3 Sumn. (U. S. C. C.) 615, Fed. Cas. No. 1,792; Dole v. New England Mutual Marine Ins. Co. 6 Allen (80 Mass.) 373, 394.

*Compare* § 2690 herein.

[2] Lovering v. Mercantile Ins. Co. 12 Pick. (29 Mass.) 348.

[3] Smith v. Delaware Ins. Co. 3 Wash. (U. S. C. C.) 127, Fed. Cas. No. 13,035.

[4] Cucullu v. Louisiana Ins. Co. 5 Mart. N. S. (La.) 464, 16 Am. Dec. 199.

[5] Carrington v. Merchants' Ins. Co. 8 Pet. (33 U. S.) 495, 8 L. ed. 1021.

[6] Mumford v. Phœnix Ins. Co. 7 Johns. (N. Y.) 449.

As to exception of "restraint of princes," etc., see note to § 2688 herein.

As to risks and losses: arrests: arrests, restraints and detainments, etc., see §§ 2737, 2739 herein.

ranted no contraband of war." At the time a state of war existed between Russia and Japan. There was a cable guaranty that consul for Japan had written the British consul that kerosene was not regarded as contraband, but no "further guaranty." The steamer, a neutral ship, was captured by a Japanese cruiser and condemned, two Russian naval officers, under German names, having been received on board as passengers, the court finding no proof that the captain or owners were ignorant of the fact that these persons were Russian officers. The plaintiffs paid the original policy as for a total loss and sued the reinsurers claiming indemnity. It was held that there was no breach of warranty, the term "contraband" being applicable to goods only and not to persons. That is, said term in its natural sense, and in the absence of special circumstances, or of something in the context pointing to another meaning, or unless the words are used in connection with some place, or trade usage in which they have acquired a secondary meaning, applies only to goods.[7]

§ 2683. **Exception of perils of the sea.**—If an insurance on goods and on commissions as consignee excludes "all loss and expense that may arise from the ordinary dangers and perils of the sea," a loss consequent upon thick weather is not within the policy, even though such exception would cover a loss by capture, yet the proximate cause must be considered, and the fact that the vessel had been taken and was in charge of a prize master and men, and was being taken into port where she was lost, does not make the insurers liable.[8] If the unseaworthiness of the vessel at the time of sailing on the voyage caused or contributed to produce the necessity for a jettison, the loss is not within the exception of perils of the seas, and the carrier is liable for nondelivery of the goods.[9]

§ 2684. **Warranted free from capture, etc.: capture by authority of de facto government.**—It may be stated as preliminary to the discussion of the warranty, or exception, free from capture, seizure, etc., that:—(1) a technical or actual capture or seizure is not necessarily within the exception of these risks:[10] (2) "capture" and

[7] Yangtsze Ins. Assoc. v. Indemnity Mutual Marine Assur. Co. (1908) 2 K. B. 504, 77 L. J. K. B. (N. S.) 995, 24 T. L. R. 687, 13 Comm. Cas. 283, 99 L. T. (N. S.) 498, 32 Sol. J. 550, 5 B. R. C. 53, aff'g Bigham, J., [1908] 1 K. B. 910, 24 T. L. R. 381, 77 L. J. K. B. (N. S.) 392, 32 Sol. J. 315.

[8] Law v. Goddard, 12 Mass. 112.

Perils of the seas and rivers as risk covered, see §§ 2797 et seq. herein.

Perils of the seas, etc.; proximate and remote cause, see §§ 2832 et seq. herein.

[9] Dupont De Nemours v. Vance, 19 How. (60 U. S.) 162, 15 L. ed. 584.

As to seaworthiness, see §§ 2151–2183 herein.

[10] See § 2685 herein.

"seizure" may be synonymous:[11] (3) the danger of capture may constitute the basis of loss within an exception of loss by detention:[12] (4) the exception, or warranty to be free from capture, seizure, etc., may be binding although written on the margin of the policy:[13] (5) an illegal seizure or attempt to seize may come within the exception:[14] (6) the said warranty or exception may by its very terms be limited or extended, as where it covers only a partial loss, etc., and: (7) said warranty may be so far connected or involved with other clauses as to necessitate a construction of all of them, as in case of warranty also against all consequences of hostilities or warlike operations, etc., including the question of proximate cause.[15]

It is not necessary that the capture be made under authority of a perfectly lawful government. A capture is lawful when made by a declared enemy, lawfully commissioned and according to the laws of war. Thus, where a vessel was warranted free from capture and was burned by the commander of a privateer, acting under a commission issued to him by the government of the confederate states, the loss was held attributable to the capture, and not a taking of pirates or assailing thieves or by fire, and the fact that the war is a civil one renders the capture none the less one[16] upon the ground that during the war of the Rebellion the

[11] See § 2686 herein.

[12] See § 2687 herein.

[13] See § 2689 herein.

[14] See § 2690 herein.

[15] As to points (6) and (7), see § 2688 herein. See next following note in this section, and as to proximate cause, see also c. LXXIV. (§§ 2832 et seq.) herein.

On liability of insurer under policy of marine insurance for losses arising out of state of war, see note in 5 B. R. C. 4.

[16] Dole v. New England Mutual Marine Ins. Co. 2 Cliff. (U. S. C. C.) 394, Fed. Cas. No. 3,966. (In this case the insurance was on the ship warrant-free from capture, seizure, or detention, the risks covered being perils of the sea, fire, enemies, pirates, assailing thieves, restraints, and detainments, and the policy was executed prior to the secession); Swinnerton v. Columbian Ins. Co. 37 N. Y. 174, s. c. 9 Bosw. (N. Y.) 361, 93 Am. Dec. 560 ("warranted free from loss or expense arising from capture, seizure, or detention, or in consequence of any attempt thereat." In this case the vessel was seized and sunk by a large body of men professing to act by authority of the state of Virginia); Fifield v. Pennsylvania Ins. Co. 47 Pa. St. 166, 86 Am. Dec. 523 ("loss by seizure, capture, or detention or the consequence of any attempt thereat;" vessel seized by privateer in commission of confederate government); Mauran v. Alliance Ins. Co. 6 Wall. (73 U. S.) 1, 18 L. ed. 836 (same exception; vessel was seized by officers and crew of steamer belonging to confederate state); Dole v. Merchants' Mutual Marine Ins. Co. 51 Me. 465 (same exception; vessel seized by confederate cruiser; held, also, that the fact that the war is a civil one renders the capture none the less one, and that the words "capture and seizure" were broad enough to cover a taking by pirates; there was appended to the clause, however,

seceding states were a de facto government, and although erected by unlawful and unconstitutional means, they were clothed with many of the highest attributes of government, had adopted a constitutional form therefor, had sufficient resources of men and money to carry on a war of unexampled dimensions, were recognized as belligerents by the British government, and treated as such from the outset by the supreme government, and therefore were the supreme power of the states in rebellion.[17]

§ 2685. **A technical or actual capture or seizure not necessarily within the exceptions of these risks.**—The fact that there is a technical or actual capture or seizure does not necessarily bring such capture or seizure within the exception as to these risks. Thus, the seizure of a vessel by the mutinous acts of the crew is not within a warranty to be free from capture, seizure, or detention.[18] And where the warranty was "free from loss or destruction by or arising from any belligerent nature, or any seceding state or states of the Union," it was held that although the forcible taking of possession by the United States government was a capture, yet it was not within the exception, and that there was neither an absolute nor a technical total loss, the government having satisfied the amount nearly in full.[19]

§ 2686. **Capture and seizure may be synonymous.**—If an insurance be against capture, but warranted free from seizure within a specified jurisdiction, the word "capture" will be held synonymous with "seizure" when the capture is made in a place excepted by the warranty.[20]

§ 2687. **Exception of loss by detention.**—If the goods insured are warranted free from detention by specified powers, and she is stopped by a blockading squadron of one of those powers, and

the words "any stipulation in this policy to the contrary, notwithstanding"); Dole v. New England Mutual Marine Ins. Co. 6 Allen (88 Mass.) 373 (same exception; vessel seized by armed steamer commanded by Semmes, a citizen of the state of Maryland claiming authority of confederate government. Maryland, however, had not then seceded.)

[17] Mauran v. Alliance Ins. Co. 6 Wall. (73 U. S.) 1, 18 L. ed. 836. See also Robinson v. International Assur. Soc. 52 Barb. (N. Y.) 450, s. c. 42 N. Y. 54, 1 Am. Rep. 400, cases last note.

[18] Greene v. Pacific Mutual Ins. Co. 9 Allen (91 Mass.) 217.

[19] Murray v. Harmony Fire & Marine Ins. Co. 58 Barb. (N. Y.) 9; Kellner v. Le Mesurier, 4 East, 396, 402, 1 Smith, 72, 7 R. R. 581, per Lord Ellenborough; Brandon v. Curling, 4 East, 410, 1 Smith, 85, 7 R. R. 592. But see Emerigon on Ins. (Meredith's ed. 1850) c. xxi. secs. 32, 33, pp. 429–34.

[20] Black v. Marine Ins. Co. 11 Johns. (N. Y.) 287.

ordered back under pain of capture and condemnation, this is a loss by detention by said power within the exception.[1]

**§ 2688. Other cases as to exception of capture, seizure, and detention.**—A warranty against any loss by seizure or detention extends only to partial losses occasioned by a seizure or temporary detention not followed by a condemnation.[2]

In case of a warranty to be free from capture or seizure in a port of discharge, the main question seems to be whether the vessel was in her port of discharge with the design of there discharging her cargo, and was within danger of capture from the land, and that she might be within said port if at a place where ships usually unload, or where she is lying on and off a river or estuary, provided she intends to discharge at such place, and that the mere fact of capture by a force from the shore is not of itself sufficient when the other factors are wanting.[3]

If the exception is from loss by French risks, a capture by a French privateer is within the exception, and discharges a policy,

[1] Wilson v. United Ins. Co. 14 Johns. (N. Y.) 227.

[2] Johnston v. Ludlow, 2 Johns. Cas. (N. Y.) 481, 1 Caines Cas. (N. Y.) xxix.

The following decisions, although not insurance cases, show the views taken by the courts as to like excepted perils specified therein and the application of governing principles concerning the same in such contracts *exception* of *"restraint of princes:"* bill of lading: when danger of mines excuses vessel from proceeding to ordered port: cargo landed at another port and export thereof prohibited: recovery of freight, lighterage and warehouse charges precluded. East Asiatic Co., Ltd. v. The Steamship Toronto Co., Ltd. 31 T. L. R. 543.

*Restraint of princes*, etc.: Something more than reasonable apprehension of restraint necessary to justify plea of: charter party. Mitsin & Co. Ltd. v. Watts & Co. Ltd. 85 L. J. K. B. 1721, [1916] 2 K. B. 826, 115 L. T. 348, 32 T. L. R. 622.

*Exception of restraint of princes etc., and circumstances beyond shippers' control:* bill of lading: vessel sailed from plague port and cargo damaged by fumigation at port where vessel compelled to call: exception not applicable. Ciampa v. British Indian Steam Navigation Co., Ltd. 84 L. J. K. B. 1653, [1915] 2 K. B. 774, 20 Com. Cas. 247.

*Exception* in bill of lading, *of act of God and the King's enemies:* vessel deviated and was torpedoed: carrier not protected. James Morrison & Co. Ltd. v. Shaw, Savill & Albion Co., Ltd. 85 L. J. K. B. 724, aff'd [1916] 2 K. B. 783, 115 L. T. 508, 61 Sol. J. 9, 32 T. L. R. 712.

As to risks and losses: arrests, restraints etc., see §§ 2737, 2738 herein.

[3] 1 Arnould on Marine Ins. (Perkins' ed. 1850) *871–73; 2 Id. (Maclachlan's ed. 1887) 838 et seq.; Id. (9th ed. Hart & Simey) sec. 963, pp. 1125–6, *citing* Dalgleish v. Brooke, 15 East, 295, 13 R. R. 476; Oom v. Taylor, 3 Camp. 204; Maydhew v. Scott, 3 Camp. 205, overruling Keyser v. Scott, 4 Taunt. 660, 13 R. R. 721; Jarman v. Coape, 13 East, 394, 2 Camp. 615, 12 R. R. 374; Reyner v. Pearson, 4 Taunt. 662, 13 R. R. 723; Levin v. Newnham, 4 Taunt. 722, 14 R. R. 648; Mellish v. Staniforth, 3 Taunt. 499; Levy v. Vaughan, 4 Taunt. 387, 13 R. R. 643.

so that the insurers will not be liable for any loss which may subsequently happen.[4] But where the exemption was from capture, and the vessel was driven ashore and captured, the capture was held the proximate cause of loss.[5]

*Warranted free from capture, etc., and all consequences thereof, or of any attempt thereat, and free from all consequences of hostilities.* Where under such a warranty the vessel went ashore off the confederate coast, and part of the cargo was prevented from being saved by the interference of confederate officers, it was held that so much of the cargo as was lost as a consequence of hostilities was within the exception.[6]

*Same warranty: fear of capture or seizure.* In another case a marine policy was upon rice shipped on board a certain vessel "from" L "to all or any port or ports, place or places," in Cuba, with a provision as to delivery in case of war or blockade preventing the vessel entering the port to which she was bound, said delivery being deemed final and the whole freight being considered earned, and further providing; "Warranted free from capture, seizure and detention . . . and also from all consequences . . . of hostilities or warlike operations." The vessel sailed from L. to Havana and the master upon learning at a port of call that war had been declared and hostilities begun between the United States

[4] Roget v. Thurston, 2 Johns. Cas. (N. Y.) 248.

[5] Coolidge v. New York Fireman's Ins. Co. 14 Johns. (N. Y.) 308.

[6] Ionides v. Universal Marine Ins. Co. 14 Com. B. (N. S.) 259, 32 L. J. C. P. 170, 10 Jur. (N. S.) 18, 8 L. T. 705, 11 W. R. 858. See Bolivia Republic v. Indemnity National Marine Ins. Co. 78 L. J. K. B. 596, [1909] 1 K. B. 785, 100 L. T. 503 ("warranted free from capture, seizure," etc., "and the consequences thereof, or any attempt thereat, piracy excepted and also from all consequences of hostilities or warlike operations, whether before or after declaration of war" there was a seizure for a political object of goods and stores destined for an expeditionary force which had been sent by plaintiffs to take possession of outlying territory on the borders of Brazil; a gunboat had been fitted out by certain persons partly Brazilians and partly Bolivians who objected to the establishment of Bolivian authority in the territory and desired to set up a free republic and the gunboat stopped the steamer carrying such goods, etc., and seized the same, it was held that the loss was not by "piracy" and insurers were not liable, that is, the seizure was within the warranty or exception); Robinson Gold Mining Co. v. Alliance Marine & General Assur. Co. 73 L. J. K. B. 898, [1904] A. C. 359, 91 L. T. 202, 53 W. R. 160, 9 Com. Cas. 301, 20 T. L. R. 645, [1902] 2 K. B. L. R. 489, 71 L. J. K. B. 94, 76 L. T. 858, 7 Com. Cas. 219, 51 W. R. 105, [1901] 2 K. B. 919, 70 L. J. K. B. 892, 85 L. T. 419, 6 Com. Cas. 244 (gold was insured warranted free of capture, seizure, detention, and the consequences thereof; same was requisitioned on eve of war, within the territory of the South African Republic: held that the gold was seized within the meaning of warranty and insurers were not liable).

and Spain and that Havana was blockaded, refused, under the powers conferred upon him by the bill of lading to proceed with the voyage to Havana and took the vessel back to Liverpool where the rice was discharged, some being sold and some stored. Assured sued for the freight which they had paid and also the expenses incurred in connection with the discharge and storing. It was decided that no recovery could be had as the loss was not due to the consequences of hostilities, but to a proper exercise by the master of the discretion vested in him by the bill of lading. Mathew, J., said: "I am of opinion there has been no loss under the policy. There was no capture or seizure, and no attempt to capture or seize within the first part of the clause in the policy. . . . The vessel did not in fact encounter any direct hostilities. . . . Under the bill of lading the Master was entitled to go back and he went back, and claimed, and was paid, freight. The loss so incurred was clearly not a consequence of hostilities, but was due to the terms of the bill of lading. It seems to me that the loss was a consequence from the proper exercise by the master of his discretion under the bill of lading. The policy was not a policy against fear of capture or seizure."[7]

*Warranted free from capture, etc., and the consequences of hostilities: capture or seizure followed by shipwreck and subsequent condemnation: doctrine of relation back: total loss.* In another case a policy for twelve months was expressed to be on disbursements but the rights thereunder were by agreement to be determined as if the insurance had been on hull and machinery. The usual perils, in a Lloyd's policy, of the seas, men of war, takings at sea, arrests, etc., appeared in the policy, but the risk was only against total loss although there was a clause: "warranted free from capture, seizure and detention, and the consequences of hostilities, piracy and barratry excepted" the policy was issued in 1905 and the vessel, a German one, sailed for Vladivostok, a naval port and base of naval operations in the war between Russia and Japan, she carried coal which had been declared contraband of war. While on a circuitous route taken to avoid Japanese cruisers she was obliged, by reason of injury from ice to seek a port of refuge and was stopped by a Japanese cruiser before she reached said port and declared to be captured for carrying contraband but while being navigated toward a court of prize she was wrecked, grounded and became a total loss as she lay. She and her cargo were thereafter condemned. It was decided that there was a total loss by capture which precluded recovery by the owner. Although

[7] Nickels & Co. v. London & Provincial Marine & General Ins. Co. 70 L. J. Q. B. (N. S.) 29, 17 T. L. R. 54, 6 Com. Cas. 15, 5 B. R. C. 1.

other points were raised by counsel, it was declared by Lord Loreburn, L.C., that the real question was whether there was a total loss by capture, seizure, or detention, or the consequences of hostilities and that there was a total loss by capture "to say nothing of the other words, namely, seizure and so forth" on the day on which the ship was seized lawfully, even though the lawfulness of the capture was not authoritatively determined until afterwards. Earl Halsbury also declared that the ship was a total loss from the moment she passed into the possession of the Japanese cruiser, or forces, quoting from Lord Mansfield in Goss v. Withers.[8] A part of which quotation is as follows: "The ship is lost by capture though she be never condemned at all nor carried into any port or fleet of the enemy, and the insurer must pay the value;" and what was said in Ionides v. Universal Marine Ins. Co.,[9] was also concurred with, that is, that the words " 'warranted free from capture' etc., are to be construed as if those words were used in a policy against those events:" and it was further declared "that where, as in this case, the possession was taken by a hostile force and an adjudication of condemnation as prize by the proper tribunal followed on grounds recognized by the general consent of nations to be lawful cause of capture, the rightfulness of the seizure and consequently the change of property related back to the time of capture." [10] In the case which was affirmed, Cozens-Hardy, M.

[8] 2 Burr. 683.

[9] 14 C. B. N. S. 259, 32 L. J. C. P. 170, 10 Jur. N. S. 18, 8 L. T. 705, 11 W. R. 858.

[10] Andersen v. Martin [1908] L. R. App. Cas. 334, 77 L. J. K. B. N. S. 950, 99 L. T. N. S. 254, 24 T. L. R. 775, 52 Sol. J. 680, 13 Com. Cas. 321, 5 B. R. C. 66, aff'g [1908] 1 K. B. 601, 77 L. J. K. B. N. S. 569, 98 L. T. N. S. 146, 24 T. L. R. 208, 13 Com. Cas. 225, 10 Asp. M. C. 605, s. c. [1907] 2 K. B. 248, 76 L. J. K. B. 674, 97 L. T. 375, 10 Asp. M. C. 494, 12 Com. Cas. 309. Owing to the importance of the above decision we feel justified in citing the authorities relied on or considered by counsel in said case noting them in the order in which they appear with relation to the points involved. They are as follows, for appellant:—The Tobago (1804) 5 C. Rob. 218; The Maria (1799) 1 C. Rob. 340, 374; The Dispatch (1801) 3 C. Rob. 278; Der Mohr (1800) 3 C. Rob. 129; Der Mohr (1802) 4 C. Rob. 314; Hahn v. Corbett (1824) 2 Bing. 205, 9 J. P. Moore, 390, 3 L. J. C. P. 253, 27 R. R. 590; Hall's Internat. L. sec. 277; Arnould, sec. 829, and in reply. Hamilton v. Mendes (1761) 2 Burr. 1198, 1 W. Bl. 276, 1 Eng. R. Cas. 112; In re Banda & Kirwee Booty (1866) L. R. 1 A. & E. 109, 35 L. J. Adm. N. S. 17, 12 Jur. N. S. 819, 14 L. T. N. S. 293. For respondent: —Goss v. Witters (1758) 2 Burr. 683, 2 Ld. Kenyon, 325, 1 Eng. R. Cas. 1; Hamilton v. Mendes (1761) 2 Burr. 1198, 1211, 1 W. Bl. 276, 1 Eng. R. Cas. 112; Cory v. Burr (1883) 8 App. Cas. 393, 398, 52 L. J. Q. B. N. S. 657, 49 L. T. N. S. 78, 31 Week. R. 894, 5 Asp. M. L. C. 109; Dean v. Hornby (1854) 3 El. & Bl. 180, 2 C. L. R. 1519, 23 L. J. Q. B. N. S. 129, 18 Jur. 623, 2 Week. R. 156; Stevens v. Bagwell (1808) 15 Ves. Jr. 139, 10 Rev. Rep. 46; Mor-

R.,[11] declared that "the capture was the real cause of the loss and the subsequent perils of the sea were an irrelevant matter for all purposes we have to consider." Fletcher Moulton L. J., said: "I cannot see how we could possibly come to any other conclusion of fact than that this vessel was lost to the insured by seizure. If nothing else had happened that must have been the consequence. . . . In my opinion the doctrine of relation back is not involved in our decision on this case." Farwell, L.J., said: "I agree that I do not think it is necessary for us to consider the doctrine of relation back." And it was accordingly held that as between owner and insurer the question of relation back of the captors' title was immaterial, although Channel, J., in the same case[12] had held that although the capture did not of itself divest the owner of his property in the ship, by the subsequent condemnation the title of the captors was caused to relate back to the date of the capture so that the owner was devested of his insurable interest in the ship at the time she was wrecked, and therefore recovery on the policy was precluded.

**§ 2689. Exception none the less binding because written on margin of policy.**—A warranty to be free from capture, seizure, or detention renders the insurers no more liable for a loss within the exception than if contained in the body of the policy, and the legal effect of such a warranty is the same as if it had been that insurers should not be liable for such losses.[13]

**§ 2690. Illegal seizure, or attempt to seize, within exception.**—An illegal seizure or attempt to seize is so far within an exception against seizure as to exempt the insurers from loss under the warranty. This was so held where a vessel flying the British flag was intentionally fired into by a Russian fort and sunk, under an

rough v. Comyus (1748) 1 Wils. K. B. 211; Alexander v. Duke of Wellington (1830) 2 Russ. & M. 35, 9 L. J. Ch. 36; Ruys v. Royal Exchange Assur. Corp. [1897] 2 Q. B. 135, 66 L. J. Q. B. N. S. 534, 77 L. T. N. S. 23, 8 Asp. M. L. Cas. 294.

See also Dole v. New England Mutual Marine Ins. Co. 6 Allen (88 Mass.) 374, s. c. 2 Cliff. (U. S. C. C.) 394, Fed. Cas. No. 3,966 (*considered* under § 2684 herein): also note "where subject of insurance is lost after capture," 5 B. R. C. 77—*considering* above case and Magoun v. New England Ins. Co. 1 Story (U. S. C. C.) 157, Fed. Cas. No. 8,961 (obiter); Graham v. Pennsylvania Ins. Co. 2 Wash. (U. S. C. C.) 113, Fed. Cas. No. 5,674; McCargo v. New Orleans Ins. Co. 10 Rob. (La.) 202, 43 Am. Dec. 180; Law v. Goddard, 12 Mass. 112; Collidge v. New York Fireman's Ins. Co. 14 Johns. (N. Y.) 308; Murray v. Harmony Fire & Marine Ins. Co. 58 Barb. (N. Y.) 9.

[11] [1908] 1 K. B. 601.

[12] [1907] 2 K. B. 248.

[13] Dole v. New England Mutual Marine Ins. Co. 2 Cliff. (U. S. C. C.) 394, Fed. Cas. No. 3,966. In Swinnerton v. Columbian Ins. Co. 37 N. Y. 174, 93 Am. Dec. 560, the stipulation was in margin of policy.

alleged mistake as to the nationality of the flag, there being a war between Turkey and Russia, although no hostilities then existed between England and Russia. The court was of opinion that the object of the Russians was to detain the ships.[14]

**§ 2691. Warranted free from loss or damage arising out of collision of foreign powers or of our government with others.**—Where the warranty was to be "free from all claim for loss or damage arising from or growing out of collision with foreign powers or of our government with others," and the vessel was destroyed by fire by reason of the burning of all the cotton in and about the city under orders of the insurgent military commander, in whose possession the city then was, during the war of the Rebellion, it was held that the loss was within the exception.[15]

**§ 2692. Exception of loss from existing regulations does not include subsequently enacted decrees.**—If the exception be of loss from existing regulations of any belligerent, the insurer is nevertheless liable for a loss arising under a decree passed subsequently to the execution of the policy.[16]

**§ 2693. Warranted free from confiscation in ship's port or ports of discharge.**—Under this warranty, if the port of discharge is that of one government, and the vessel is there boarded by a privateer of another government, and taken into one of the latter's ports and condemned, this is not a confiscation in the ship's port of discharge, but a capture by the latter government.[17]

**§ 2694. Exception of risk of blockaded port: turned away, etc.: free of loss if not permitted entry, etc.**—If there is a warranty that insurers "take no risk of a blockaded port, but if turned away the assured to be at liberty to proceed to a port not blockaded," it is held that the insurer is protected from every loss happening in consequence of a blockade, whether such blockade were strictly legal or not.[18] And under a clause of like character it is held that a fear of danger of blockade which prevents proceeding to

[14] Powell v. Hyde, 5 El. & B. 607, 25 L. J. Q. B. 65, 2 Jur. (N. S.) 84, 4 W. R. 51. See Goss v. Withers, 2 Burr. 683, 694, 695, 2 Ld. Ken. 325, per Lord Mansfield; Emerigon on Ins. (Meredith's ed. 1850) c. xii., sec. 18, p. 353. *Compare*, however, Carrington v. Merchants' Ins. Co. 8 Pet. (33 U. S.) 495, 8 L. ed. 1021 (*considered* under § 2682 herein).

[15] Marcy v. Merchants' Mutual Ins. Co. 19 La. Ann. 388.

[16] Wood v. New England Marine Ins. Co. 14 Mass. 31, 7 Am. Dec. 182.

[17] Levi v. Allnutt, 15 East, 267, per Lord Ellenborough, as to definition of "confiscation."

[18] Radcliff v. United Ins. Co. 7 Johns. (N. Y.) 38, s. c. 9 Johns. (N. Y.) 277.

the port of destination releases insurers.[19] Again, where the warranty was to be "free from loss if not permitted entry," by reason of having negroes on board, and the vessel anchors at the usual place where vessels stop to be disinfected, and is lost before permission can be obtained to land the negroes, the insurers are liable.[20]

If an insurance is against all risks blockaded ports excepted, the exception is not of the port but of the risk of capture for breaking the blockade;[21] and the exception in such case is held not a warranty.[22]

**§ 2695. Exception of loss or damage to goods or property on deck unless, etc.**—If the policy stipulates that the insurers shall not be liable for loss or damage to property on deck unless by special agreement in writing indorsed on the policy, and the policy also provides that "it shall be lawful for such boats to load in such a manner as is usual and customary for vessels employed in the navigation aforesaid to be laden, without reference to any provisions on the same subject in marine law or custom applicable to vessels laden for sea voyages," the two stipulations must be construed together, and will permit the carrying of goods on deck without an agreement indorsed on the policy if it is customary to carry goods on deck of the character of those so carried, and there being no evidence that the insurers were ignorant of such custom, they were held liable for goods so carried without indorsement in writing consenting thereto.[1]

**§ 2696. The memorandum clause: generally.**—Under the memorandum clause covering certain enumerated articles perishable in their nature, the insurers stipulate a limitation of their liability, and the terms used are various,[2] giving rise to numerous cases as

[19] Ferguson v. Phœnix Ins. Co. 5 Binn. (Pa.) 544.

As to risks and losses: fear of danger: blockade: as embargo, etc., see §§ 2776–2778 herein.

[20] Dickey v. United Ins. Co. 11 Johns. (N. Y.) 358.

[21] Yeaton v. Fry, 5 Cranch (9 U. S.) 335, 3 L. ed. 117.

[22] Yeaton v. Fry, 5 Cranch (9 U. S.) 335, 3 L. ed. 117, *cited* in Palmer v. Warren Ins. Co. 1 Story (U. S. C. C.) 366, Fed. Cas. No. 10,698; Wright v. Sun Mutual Ins. Co. Fed. Cas. No. 18,095, 6 Am. L. Reg. 490; Greenleaf v. St. Louis Ins. Co. 37 Mo. 29; Wilkins v. Tobacco Fire & Marine Ins. Co. 2 Cin. Sup. Ct. Rep. 213.

[1] Allen v. St. Louis Ins. Co. 85 N. Y. 473.

[2] Such as "insured only against general average and actual total loss," "insurers not to be liable hereunder for any constructive total loss on such articles if any portion thereof be delivered in specie at the port of destination," "free from average under—per cent unless general," "free from average unless general," "free from average on (specified articles) except general," "free from average on (specified articles) under —per cent," "free from all average on (specified articles) unless general or otherwise specially agreed," or in case of a policy on goods liable to heat, "in case of aver-

to their construction and effect. In certain cases there is a clause separate and apart from the memorandum clause, whereby all merchandise not excepted from the memorandum is "free from particular average and partial loss," and the insurance is against "loss or damage only when occasioned by stranding, sinking, fire, collision, or other extraordinary peril, and amounting to fifty per cent or more." Commissions and profits are insured free from partial loss and from particular and general average, and against total loss only, and other profits and commissions are insured against total loss of vessel only. The Common Memorandum in use in England was introduced in 1749, and, under the form in use at Lloyds and the statutory form, certain articles are "warranted free from average unless general or the ship be stranded;" certain other articles are "warranted free from average under ——— pounds per cent," and all other goods, also the ship and freight, are "warranted free from average under ——— pounds per cent unless general or the ship be stranded." [3] And what is known as the memorandum clause in marine policies, whereby the insurer is exempted from any partial loss of goods that are esteemed perishable in their nature, is intended to apply only when goods are perishable, and there is difficulty in proving whether the loss oc-

age—per cent on the sum insured shall be deducted from the average," "free from particular average," "no loss or average shall in any case be paid under——per cent," and various other clauses. See remarks as to free of particular average clause. 2 Arnould on Marine Ins. (9th ed. Hart & Simey) sec. 901, pp. 1123 et seq., where this form is given: "Warranted free from particular average, unless the vessel or craft be stranded, sunk or burnt, each craft or lighter being a separate insurance."

[3] 2 Arnould on Marine Ins. (ed. 1887) 818, and form of policy 231, 232; Id. (9th ed. Hart & Simey) secs. 882 et seq., pp. 1103 et seq. "It was first introduced here about the year 1749, before which time the insurer was liable for every injury, however small, that happened to the thing insured. It was, therefore, thought better by such stipulation to free him from small partial losses than to compensate him for the extraordinary risk by adapting the premium to the nature of the commodity. This must in such case either have rendered the calculation of the premium a matter of much nicety or else have made the policy too complicated:" 1 Marshall on Ins. (ed. 1810) *221 et seq. This author also says that in consequence of a decision in 1754 (Cartillon v. London Assur. Co., *cited* in 3 Burr. 1553), whereby the words "or the ship be stranded" enabled the insurer to prove his whole partial loss on the ship being stranded. The London Assurance Company and the Royal Exchange Assurance Company, the two great companies, omitted the words "or the ship be stranded" (Id. *224). The London Assurance Company afterward inserted the clause. See Mason v. Sperry, *reported* in 1 Marshall on Ins. (ed. 1810) 226, per Lord Mansfield; Cocking v. Frazer, *reported* in 1 Marshall on Ins. *227. See also 17 Earl of Halsbury's Laws of England, secs. 902 et seq., pp. 458 et seq.

curred from the inherent quality of the articles or from the peril insured against.[4] So it is declared that: "The warranty or memorandum clause was introduced into policies for the protection of the insurer from liability for any partial loss whatever on certain enumerated articles, regarded as perishable in their nature and upon certain others, none under a given rate per cent." [5]

Whatever may have been originally intended in introducing the memorandum clause as to the recovery only of the surplus over the amount of percentage limited in case of loss, the practice is to hold the underwriters liable, in the absence of a contrary stipulation, for the whole amount of the loss, and not merely for the excess where the loss exceeds the rate of percentage specified.[6] And it is asserted that the rule is firmly established in the United States Supreme Court that insurers are not liable on memorandum articles except in case of actual loss, and that there can be no actual total loss where a cargo of such articles has arrived in whole or in part, in specie, at the port of destination, but only when it is physically destroyed or its value extinguished by a loss of identity, and that the rule is that articles warranted free of particular average, or free of average unless general are insured only against an actual total loss.[7]

**§ 2697. What articles are within the clause.**—It may be shown by evidence whether certain articles are perishable in their own nature,[8] or whether certain articles belong to the class specified;[9]

[4] Mayo v. India Mutual Ins. Co. 152 Mass. 172, 9 L.R.A. 831, 23 Am. St. Rep. 814, 25 N. E. 80.

[5] Washburn & Moen Manufacturing Co. v. Reliance Marine Ins. Co. 179 U. S. 1, 45 L. ed. 49, 21 Sup. Ct. 535, 30 Ins. L. J. 97, 101, per Mr. Chief Justice Fuller.

[6] 2 Arnould on Marine Ins. (Perkins' ed. 1850) *871; Id. (Maclachlan's ed. 1887) 838; Id. (9th ed. Hart & Simey) secs. 884 et seq., pp. 1105 et seq.; 2 Phillips on Ins. (3d ed.) 477, 478, sec. 1791.

[7] Washburn & Moen Manufacturing Co. v. Reliance Marine Ins. Co. 179 U. S. 1, 45 L. ed. 49, 21 Sup. Ct. 535, 30 Ins. L. J. 97, 102, per Mr. Chief Justice Fuller. See also St. Paul Fire & Marine Ins. Co v. Beacham, 128 Md. 414, 97 Atl. 708 *considered* at end of next following section.

[8] *United States.*—Robinson v. Commonwealth Ins. Co. 3 Sum. (U. S. C. C.) 220, Fed. Cas. No. 11,949.

*Maine.*—Williams v. Cole, 16 Me. 207.

*Massachusetts.*—Tudor v. New England Mutual Marine Ins. Co. 12 Cush. (66 Mass.) 554.

*New York.*—Coit v. Commercial Ins. Co. 7 Johns. (N. Y.) 385, 5 Am. Dec. 282; Bakewell v. United Ins. Co. 2 Johns. Cas. (N. Y.) 246; Astor v. Union Ins. Co. 7 Cow. (N. Y.) 202.

*Pennsylvania.*—Klett v. Delaware Ins. Co. 23 Pa. St. 262; Nelson v. Louisiana Ins. Co. 5 Mart. (N. S.) (Pa.) 289.

[9] Moody v. Surridge, 2 Esp. 633, 5 R. R. 575; Astor v. Union Ins. Co. 7 Cow. (N. Y.) 202; Scott v. Bourdillion, 5 Bos. & P. (N. R.) 213.

as that prunes are "fruit." [10] So usage of the trade may be important in determining what articles are perishable in their own nature,[11] and the use of the words "all other articles perishable in their nature" will cover articles of that character not enumerated.[12] Fertilizer, when constituting a ship's cargo, will not be treated as if included in the common memorandum clause of a policy insuring it, which exempts the insurer from liability for partial loss in certain enumerated articles of a perishable nature, among which fertilizers are not included so as to defeat a claim for constructive total loss and abandonment.[13]

*Distinction between memorandum articles and other property: "free of particular and general average."*—A distinction is made, and it is declared that a different rule applies, between memorandum articles and other property, such as a vessel, that may be

[10] De Pau v. Jones, 1 Brev. (S. C.) 437.

[11] Mason v. Sperry, *reported* in 1 Marshall on Ins. (ed. 1810) 226, per Lord Mansfield; Wadsworth v. Pacific Ins. Co. 4 Wend. (N. Y.) 33, 38, per Walworth, Ch. See Nelson v. Louisiana Ins. Co. 5 Mart. (N. S.) (La.) 289, and cases under first note under this section.

[12] Baker v. Ludlow, 2 Johns. (N. Y.) 289. "Corn, fish, salt fish, flour, and seed are warranted free from average unless general or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent and all other goods; also the ship and freight are warranted free from average under three pounds per cent unless general or the ship be stranded:" English form in use at Lloyds, Consolidated Stat. Ins. Law, 20 Vict. c. 23; 35 Geo. III. c. 63. "It is agreed that bar, bundle, rod, hoop, and sheet iron, wire of all kinds, tin plates, steel cutlery, hardware, and all other articles subject to rust, madder, sumac, willow and wicker ware (manufactured or otherwise) salt, guano, cigars except in tin packages), fireworks, saltpeter, grain, and seeds of all kinds possessing the power of germination, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, vegetables and roots, rags, jute and hemp bags, bagging, and articles used for bags or bagging, hops, pleasure carriages, household furniture, printed books, personal effects, paintings, statuary, engravings and prints, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature are hereby insured only against general average and actual total loss, and the insurers are not to be held liable hereunder for any constructive total loss on such articles, if any portion thereof be delivered:" Form used by a San Francisco company.

The English marine insurance act 1906 (6 Edw. VII. c. 41) First Schedule; Butterworth's Twentieth Century Stats. (1900–1909) p. 425; 15 Chitty's Stats. (1902–1907) p. 906, reads: "Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, hemp, flax, hides and skins are warranted free from average, under five pounds per cent, and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent unless general, or the ship be stranded."

[13] Mayo v. India Mutual Ins. Co. 152 Mass. 172, 9 L.R.A. 831, 23 Am. St. Rep. 814, 25 N. E. 80.

insured. This point arose and was passed upon as evidently necessary to be determined in connection with the question of particular and general average and constructive total loss in the following case. It appeared that the policy was "on bills and disbursements free of particular and general average." An action in assumpsit was brought to recover, as alleged, under an insurance against loss on account of marine disaster to a named schooner in a specified sum for a balance due on a repair bill for work, etc., on said vessel, alleging also a stranding and constructive total loss and that said disaster was not a case of particular or general average and upon this phase of the case the distinction above mentioned was made. It was further decided that "particular average" as used in the policy meant partial loss, and "free of particular average" was equivalent to "against total loss only." The principal question, however, being whether there was a constructive total loss, it was decided, upon demurrer overruled and a default judgment, that there was such a loss and judgment was affirmed.[13a]

**§ 2697a. "Free from particular average:" "average unless general:" where the ship has stranded: statutes.**—The *California* Code provides: "Where it has been agreed that an insurance upon a particular thing or particular class of things shall be free from particular average, a marine insurer is not liable for any particular average loss not depriving the insured of the possession, at the port of destination, of the whole of such thing, or class of things, even though it become entirely worthless; but he is liable for his proportion of all general average loss assessed upon the thing insured." [14]

The marine insurance act of 1906, of *England* provides: "(1) Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but, if the contract be

[13a] St. Paul Fire & Marine Ins. Co. v. Beacham, 128 Md. 414, 97 Atl. 708, *considering* Kettel v. Alliance Ins. Co. 10 Gray (76 Mass.) 144; Marcardier v. Chesapeake Ins. Co. 8 Cranch (12 U. S.) 39, 3 L. ed. 481, and *distinguishing* Washburn & Moen Manufacturing Co. v. Reliance Marine Ins. Co. 179 U. S. 1, 45 L. ed. 49, 21 Sup. Ct. 535, 30 Ins. L. J. 97 (upon point that insurance here was upon vessel and not on memorandum articles).

As to distinction between particular and general average, see § 3408 herein.

[14] Cal. Civ. Code, sec. 2711. Construed in California Canneries Co. v. Canton Ins. Office, Ltd. 25 Cal. App. 303, 143 Pac. 549, 44 Ins. L. J. 685, 692, where it is said: "Indeed, it is not denied that the law of marine insurance has always recognized two distinct classes of insurance, one against *total loss only* and the other against *total or partial loss,* and this distinction finds expression in sec. 2711 of the civil code."—Burnett, J.

apportionable, the assured may recover for a total loss of any apportionable part.

"(2) Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and laboring clause in order to avert a loss insured against.

"(3) Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage, a general average loss cannot be added to a particular average loss to make up the specified percentage.

"(4) For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded." [15]

Said statute also provides: "a particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss."

"The term 'average unless general' means a partial loss of the subject-matter insured other than a general average loss, and does not include 'particular charges.' "

"Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods are on board." [16]

§ 2697b. **Loss from defective condition of frozen meat cargo: "free from particular average and loss," etc.**—In a policy "at and from" on a frozen meat cargo it was "warranted free from particular average and loss caused by the stranding, sinking, burning or collision of the ship or craft; . . . also partial loss arising from transshipment. Including all risk of craft, or otherwise to and from the vessel." The insurance also covered "loss from defective condition of the meat from every cause (except improper dressing)

[15] Marine ins. act 1906 (6 Edw. VII. c. 41) sec. 76; Butterworth's Twentieth Century Stats. (1900–1909) p. 419; 15 Chitty's Stats. (1902–1907) p. 901. See also as to the rule under subd. (1) above, Chalmers & Owens Dig. of Marine Ins. (2d ed.) p. 119, *quoted* from in California Canneries Co. v. Canton Ins. Office, Ltd. 25 Cal. App. 303, 143 Pac. 549, 44 Ins. L. J. 685, 693. —Barnett, J.

[16] Marine ins. act 1906 (6 Edw. VII. c. 41) Sched. I. (Rules for Construction) subdivs. 13, 14; Butterworth's Twentieth Cent. Stats. (1900–1909) pp. 425–427; 15 Chitty's Stats. (1902–1907) pp. 907, 908; Id. sec. 64, subdiv. (1). See § 2717 herein.

which shall rise during the currency of the insurance." At the inception of the risk the meat was in good order and condition, but on arrival at its port of destination it was in such a condition that it was condemned by the authorities as unsound and unfit for human consumption and was sold for the manufacture of manure. This unsound, unfit condition was not caused by improper dressing, but arose on board the vessel and not from transhipment, nor was the vessel or any craft stranded, sunk, burnt, or in collision, and it was decided that the assurer was not liable as the words warranted free from particular average and loss, etc., constituted a well known formula and have a particular meaning well understood, which is, that the policy is warranted free from particular average and free from loss and that the clause should be read: "Warranted free from particular average and free from loss unless caused by the stranding, sinking, burning or collision of the ship or craft, except that particular loss arising from transshipment will be covered, and all risk of craft or otherwise to and from the vessel will be covered notwithstanding." [17]

**§ 2697c. Effect of rider: "free of particular average:" "absolute total loss of part" amounting to —— per cent.**—A rider on the margin of a policy of marine insurance stating: "Free of particular average, but liable for absolute total loss of a part, if amounting to five per cent, "is in pari materia with a memorandum by which goods are "warranted by the assured free from average unless general," and qualifies the memorandum so that, instead of limiting the liability to an actual total loss, it permits recovery for an actual total loss of a part.[18]

**§ 2698. Warranted free from average unless general.**—The effect of the memorandum clause is not to enlarge the perils insured against, but to exempt the underwriters from losses of a certain kind or within those perils.[19] Before the introduction of the memorandum clause the insurer was liable for every damage to the thing insured, and the object in inserting such a clause was probably to protect the insurers from losses from inherent decay, although its effect is to free the insurer from partial losses, subject to such exceptions as the clause stipulates. But all articles enumerated in the

[17] Otaga Farmers' Co-operative Assoc. of New Zealand v. Thompson, 79 L. J. K. B. 692 (1910) 2 K. B. 145, 102 L. T. 711, 15 Com. Cas. 28.

[18] Washburn & Moen Manufacturing Co. v. Reliance Marine Ins. Co. 179 U. S. 1, 45 L. ed. 49, 21 Sup. Ct. 1, 30 Ins. L. J. 97, aff'g 82 Fed. 296, 27 C. C. A. 134, *cited* in Chicago Ins. Co. v. Graham & Morton Transportation Co. 108 Fed. 271, 275, 47 C. C. A. 320, 323; Devitt v. Providence-Washington Ins. Co. 173 N. Y. 17, 22, 65 N. E. 777.

[19] Potter v. Suffolk Ins. Co. 2 Sum. (U. S. C. C.) 197, Fed. Cas. No. 11,-339.

memorandum clause are not in all cases perishable in their nature, and the exception may be broad enough to include other losses, or to cover such articles as the parties may choose to insert. And in construing this clause and determining its effect consideration must be given to the meaning of the word "average," and also to the exact language of the memorandum stipulation, as well as to the understood interpretation of the clause at the present day.[20]

The clause "free from average unless general" is as to its effect, capable of two divisions: 1. A warranty to be free from average; 2. A warranty to be free from average unless general. In so far as it is a warranty to be "free from average," it covers only total losses arising from the perils of the sea and excludes partial losses. This principle is evidenced by all the cases, even those where the construction of other words used in this clause has been involved. Thus, Lord Mansfield declared in an early case that although the word "average" gave rise to an ambiguity,[1] as used in the clause, yet all partial losses were excluded and the insurer was not liable to any particular average.[2] In so far as the clause "free from average" is qualified by the words "unless general," the word "unless" means the same as "except," and the insurer is liable, under

[20] Biays v. Chesapeake Ins. Co. 7 Cranch (11 U. S.) 415, 3 L. ed. 389, per Livingston, J.; Brooke v. Louisiana State Ins. Co. 5 Mart. N. S. 646; Whiting v. Independent Mutual Ins. Co. 15 Md. 297, per Bartol, J. See Wadsworth v. Pacific Ins. Co. 4 Wend. (N. Y.) 33, 38, per Walworth Ch.; Wilson v. Smith, 3 Burr. 1550, 1 W. Bl. 507, per Lord Mansfield; 1 Marshall on Ins. (ed. 1810) *223, *231.

[1] See Wadsworth v. Pacific Ins. Co. 4 Wend. (N. Y.) 33; Biays v. Chesapeake Ins. Co. 7 Cranch (11 U. S.) 415, 3 L. ed. 389, per Livingston, J.

[2] Wilson v. Smith, 3 Burr. 1550, 1 W. Bl. 507, per Lord Mansfield. So Mr. Justice Butler declared in another case that from the first introduction of the clause the underwriter had never been held liable, except where there was a total loss of the articles: Cocking v. Frazier, reported in 1 Marshall on Ins. (ed. 1810) *228. Lord Kenyon declared in 1793 that there could not be a recovery for a partial loss where there had been no stranding, where the words "or the ship be stranded" were also used: Andrews v. Vaughan, *reported* in 1 Marshall on Ins. (ed. 1810) *233. So Lord Alvanley and Mr. Justice Chambre in another case declare that the underwriter is not liable for partial losses. Dyson v. Rowcroft, 3 Bos. & P. 474, 7 R. R. 809. See also:

*United States.*—Morean v. United States Ins. Co. 3 Wash. (U. S. C. C.) 256, Fed. Cas. No. 9,064, 1 Wheat. (14 U. S.) 219, 4 L. ed. 75.

*Louisiana.*—Skinner v. Western Marine & Fire Ins. Co. 19 La. 273.

*Maine.*—Williams v. Kennebec Ins. Co. 31 Me. 455.

*New York.*—Saltus v. Ocean Ins. Co. 14 Johns. (N. Y.) 138; Bargett v. Orient Mutual Ins. Co. 3 Bosw. (16 N. Y.) 385.

*England.*—Manning v. Newnham, 2 Camp. 624, 3 Doug. 130, 12 R. R. 761; Reimer v. Ringrose, 6 Exch. 263, 20 L. J. Ex. 175; Wilson v. Royal Exchange Assur. Co. 2 Camp. 623, 12 R. R. 760.

the clause "free from average unless general," for all losses where there is a general average, but all other partial losses are excluded by the clause.[3] The court in a California case [4] illustrates the distinction by a New York decision in which it appeared that the policy covered a certain number of barrels of potatoes "warranted by the assured free from average unless general." The vessel arrived at its destination, and after some of the barrels had been unloaded, it sank with the remainder on board, and it was decided that insurers were not liable because of the warranty against particular average; there being no total loss; [5] and the California court, in view of this distinction, adds as to the case before it that: "It is entirely clear that within the meaning of these terms there was here no *total loss* or a *general average loss,* but only a *partial* and *particular average* loss." [6] An insurance on hides, "warranted by the assured free from average unless general," leaves the underwriters free from all partial losses of every kind which do not arise from a contribution towards the general average; and where only

[3] The words "free from average unless general" are understood to be convertible with "total loss:" Bryan v. New York Ins. Co. 25 Wend. (N. Y.) 617, per Nelson, J.; Aranzamendi v. Louisiana Ins. Co. 2 La. 432, 22 Am. Dec. 136. "The insurer is liable for all losses arising . . . where there is a general average, but all other partial losses are excluded by the terms of the policy; the word 'unless' means the same as except . . . and is not to be construed as a condition, . . . and the words 'free from average unless general' could never mean to leave the insurer liable to any particular average:" Wilson v. Smith, 3 Burr. 1550, 1 W. Bl. 507, per Lord Mansfield. "It is well understood at the present day with respect to such articles that underwriters are free from all partial losses of every kind which do not arise from a contribution toward general average:" Biays v. Chesapeake Ins. Co. 7 Cranch (11 U. S.) 415, 3 L. ed. 389, per Livingston, J.

*United States.*—Hernandez v. New York Mutual Ins. Co. 6 Blatchf. (U. S. C. C.) 326, Fed. Cas. No. 6,414. See further, Humphreys v. Union Ins. Co. 3 Mason (U. S. C. C.) 429, Fed. Cas. No. 6,871.

*Kentucky.*—Louisville Marine & Fire Ins. Co. v. Bland Coleman, 9 Dana (39 Ky.) 143

*Louisiana.* — Gould v. Louisiana Mutual Ins. Co. 20 La. Ann. 259.

*Missouri.*—Edgar Thompson Steel Co. v. Boylston Mutual Ins. Co. 12 Mo. App. 244.

*New York.*—Wadsworth v. Pacific Ins. Co. 4 Wend. (N. Y.) 33; Maggrath v. Church, 1 Caines (N. Y.) 196, 2 Am. Dec. 173.

*South Carolina.*—De Pau v. Jones, 1 Brev. (S. C.) 437.

*England.*—Hedburg v. Pearson, 7 Taunt. 154, Holt N. P. 349; Great Indian Peninsular Ry. Co. v. Saunders, 30 L. J. Q. B. 218, 1 Best & S. 41, aff'g 2 Best & S. 266, 31 L. J. Q. B. 206, 9 Jur. (N. S.) 1326, 9 L. T. 386, 12 W. R. 106.

[4] California Canneries Co. v. Canton Ins. Office, Ltd. 25 Cal. App. 303, 143 Pac. 549, 44 Ins. L. J. 685, 692. —Burnett, J.

[5] Chadsey v. Guion, 97 N. Y. 333, *cited* under § 2707 herein.

[6] Id.—Burnett, J.

a part of the hides insured were lost, being less than one sixth of the sum insured by the policy, there can be no recovery.[7]

**§ 2699. Or the ship be stranded or burns: unless the vessel be sunk, burned, or stranded.**—This clause exists under the English form of policy and Lloyds policy under the common memorandum covering "all other goods, also the ship and freight." It also exists in numerous cases under policies in this country, sometimes as a part of the memorandum itself, and in other cases being contained in the body of the policy. In some instances the liability for a loss or damage exists only when occasioned by stranding, in others unless the vessel be stranded, or "unless occasioned by stranding." This clause was held in 1754 to be a condition, and upon the ship's being stranded the insured was let in to prove his whole partial loss.[8] Again, in 1790, Lord Kenyon declared that the stranding of the ship put the memorandum "in the same situation as any other commodity not mentioned in the memorandum, and the underwriters are liable for all damages sustained by it; for otherwise there would be a very considerable difficulty in ascertaining how much of the loss arose from the perils insured against, and how much from the perishable nature of the commodity, which was the very thing the memorandum was intended to prevent." [9] The same eminent authority, two years later, said that "'when a ship is stranded then the underwriters agree to ascribe the loss to the stranding as being the most probable occasion of the damage.'" [10] In a subsequent case before the court of King's Bench he affirms the doctrine of the decision of 1754, as well as that of the two succeeding cases above noted, and declares that if the ship be stranded, that destroys the exception, and lets in the general words of the policy, and it is also held that in case of stranding the insurer is liable for any partial loss sustained by any of the articles covered by the clause, even though the loss did not arise from the stranding, but solely from some other cause.[11] In this last case the ship struck on a sunken rock, and her planks being started the water flowed into the hold and over the cargo, and the ship was run on shore, where the water flowed in and over part of the cargo, but she was, however, able to proceed on her voyage, and arrived at her destination with the greater part of her cargo, although very much

[7] Biays v. Chesapeake Ins. Co. 7 Cranch (11 U. S.) 415, 3 L. ed. 389.

[8] Cantillon v. London Assur. Co. 3 Burr. 1553.

[9] Browning v. Elmslie, *cited* 7 Term Rep. 216; 4 Term Rep. 783.

[10] Nesbitt v. Lushington, 4 Term Rep. 783, 2 R. R. 519.

[11] Burnett v. Kensington, 7 Term Rep. 210, 1 Esp. 416, Peake's Add. Cas. 71, 4 R. R. 424, 14 Eng. Rul. Cas. 187. See also opinions of Mr. Justice Ashurst, Mr. Justice Lawrence, and Mr. Justice Gross in this case.

damaged, a small part having been left as entirely unfit for use. Neither the ship nor cargo received the damage in consequence of the stranding, but solely on account of striking on the rock, and if there had been no stranding, both the ship and cargo would have been totally lost. Part of the damage to the cargo happened after the stranding, and it was said that if no damage whatever were occasioned by the stranding, yet if the ship thereafter encountered bad weather and the cargo sustained an average loss, the insurers would have been liable, and, as will be noted, the stranding occurred while the memorandum articles were at risk, but if the risk had then terminated, the rule could not well apply.[12]

It is apparent, therefore, from the above cases that the clause "free from average unless general or the ship be stranded" excludes a recovery for partial or particular average loss where there is no stranding, and, as appears from the preceding section, there may be a recovery for a general average loss, and as the clause in question is now generally construed the rule stated under the first three cases under this section seems to prevail, and where the ship is stranded the insurers are liable, as to the articles covered for any average loss, to the same extent as if there had been no clause "free from average," and this is so even though the loss cannot be ascribed to the stranding, but proceeds solely from some other peril happening prior or subsequently to the stranding, provided the risk on the articles covered has not terminated at the time of the stranding. Another exception as to the liability for particular average in cases where a per cent limit is fixed will be noted hereafter. The above are also substantially the conclusions stated by Mr. Arnould, Mr. Maclachlan, Mr. Marshall, Mr. Phillips, and Mr. Parsons. So it is declared that: "If the ship be stranded, the underwriters agree to be responsible for any loss by sea damage on the enumerated articles, however trifling the extent of the deterioration may be, just as though no warranty to be free from average had been inserted in the policy;" and again, "The underwriter is liable for no particular average losses, or for none under the rates specified, unless the ship be stranded. But if the ship be stranded while the memorandum articles are on board, then the underwriter is liable to pay all particular average losses, whether caused by the stranding or not, just as though the memorandum did not exist."[13] In the last

[12] Roux v. Salvador, 1 Bing. (N. C.) 536, 1 Scott, 491, 4 L. J. C. P. 156, overruled but not on this point, 3 Bing. (N. C.) 276, 4 Scott, 1, 2 Hodges, 209, 7 L. J. Ex. 328, per Lord Abinger.

[13] 1 Arnould on Marine Ins. (Perkins' ed. 1850) *857, *860; 2 Id. (Maclachlan's ed. 1887) 821–23; Id. (9th ed. Hart & Simey) secs. 887 et seq., pp. 1108 et seq.

edition of Mr. Arnould's treatise it is said: "The meaning of the memorandum, therefore, is: 1. That all losses, in the nature of general average, are to be paid by the underwriter as though the policy did not contain the memorandum: 2. That the underwriter is liable for no particular average losses, or for none under the rates specified, unless the ship be stranded: 3. But that if the ship be stranded while the memorandum articles are on board, then the underwriter is liable to pay all particular average losses, whether caused by the stranding or not, just as though the memorandum did not exist." [14] Again: "It is now settled that if the ship be stranded the insurer is liable for any partial loss on any of the articles, though it did not arise from the stranding, but from some other cause." [15] It is also said "The doctrine adopted in England appears to be that after a stranding the construction of the policy is the same in respect to all losses on goods on board at the time of the stranding, whether happening before or after the stranding, as if it had not contained this exception. . . . A stranding does not let in a claim for a loss that took place previously on goods that had been landed before the stranding. In Great Britain and in the United States, the insurers are, in the common form of the policy, generally I believe without exception liable for general averages of however small amount." [16] Mr. Parsons states substantially the above rules, but as to the rule that regards the insertion of the condition "unless," he says the "construction is now well settled, but we do not think that it rests on good grounds." [17] So in a comparatively recent work it is declared that: "The meaning and effect of this clause is that where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding; provided that when the stranding takes place the risk has attached, and if the policy be on goods, that the damaged goods are on board." [18]

If the policy contains the words "free of particular average unless the vessel be sunk, burned, stranded, or in collision," and a collision occurs, the exception is destroyed, and ceases to operate from that moment, and subsequent losses must be borne by the underwriter, whether resulting from the collision or not.[19] In the case finally deciding as above, although the principal point was that of "collision" the court discusses the meaning of the words

[14] 2 Arnould on Marine Ins. (9th ed. Hart & Simey) sec. 887, p. 1108.

[15] 1 Marshall on Ins. (ed. 1810) *234.

[16] 1 Phillips on Ins. (3d ed.) 448, 449, secs. 1761–63.

[17] 1 Parsons on Marine Ins. (ed. 1868) 630, 631.

[18] 17 Earl of Halsbury's Laws of England, sec. 911, p. 460.

[19] London Assurance v. Companhia De Moagens Do Barreiro, 68 Fed.

"burned" and also of the word "stranded" in connection with the difficulty attending the construction of the term "collision" as a word of limitation in the same memoranda. Another important factor was that under the terms of the contract and the circumstances the contract was interpreted according to the English law. The court, per Mr. Justice Peckham, also said: "It appears in evidence also that there were in use two well-known forms of particular average clauses by maritime insurance companies, one or the other being usually stamped on the insurance certificates. One clause reads, 'Free of particular average unless caused by stranding, sinking, burning, or collision;' the other clause reads as in this case, 'Free of particular average unless the vessel be stranded, sunk, burned, or in collision.' The clause in use in this certificate was termed the 'English clause.' Many agents of English companies offered either clause, and the form in use in this case was regarded as a better clause for the insured than the 'caused by' clause. It did not appear, however, that the London Assurance Company used any other than the clause found in the memorandum in this case. Referring then to the English law upon the question as to the meaning of this language, the English courts, many years ago, decided it, and that decision has been adhered to ever since. The English courts have held, and do now hold, that the expression, 'free of particular average unless the vessel be stranded,' meant that if a loss occurred during the adventure, although from a cause not related in any way to the stranding of the ship, the insurers were liable upon the general language of the policy. . . .

"It thus appears that the learned judges of the Court of King's Bench a hundred years ago deliberately decided that the damage need not be the result of the stranding of a vessel. . . .

"Although the original language of the memorandum confined the exception to a stranding of the ship, it was afterwards extended so as to read, 'Free of particular average unless the vessel be sunk, burned, stranded, or in collision.' The same rule applies to all; and, if the vessel be either sunk, burned, stranded, or in collision, it is sufficient to render the insurer liable, although the loss does not result therefrom. . . . Having decided more than a hundred years ago what the meaning was, that meaning has been continuously attributed to the memorandum by the English courts up to the present time. The fact that the underwriters still continue its use under such circumstances shows that they have

247, 15 C. C. A. 379, 28 U. S. App. As to "collision," see §§ 2751 et
379 (aff'g 56 Fed. 44) aff'd 167 U. seq. herein.
S. 149, 17 Sup. Ct. 785, 42 L. ed.
110, 26 Ins. L. J. 833.

adopted this construction, and that they intend this meaning. Any additional exception which they have placed in the memorandum since the first decision, and which forms a part of the original exception, must be given the same meaning. Originally, the exception contained only the word 'stranding,' but subsequently, and at different times, the words 'burned, sunk, or in collision,' were added to it, and they must all be given the same construction, as an exception that has been given to the word 'stranding,' had, if any of them occur, the memorandum is struck out, and the general words of the policy come in force. The question of whether the law of this country does or does not accord with the law of England in this matter does not arise in this case, and we express no opinion upon that question." [20] If slight fires occur in the coal in the bunkers of an iron ship, which are put out by pumping water on the coal and some injury is done by the heat to the ship's plating and otherwise, the ship is not "burnt" within the meaning of that term as used in the memorandum in the policy.[1]

**§ 2699a. Where the words "on fire," instead of "burned" or "burnt" are used.**—In a Federal case decided in 1914, the clause was: "warranted free from particular average, unless the vessel or craft or the interest insured be stranded, sunk, or on fire," in a printed slip attached to the margin of the policy; and in the body of the printed form of said policy it read: "warranted free from average unless general or the ship be stranded, sunk or burnt." It was held that the insertion of the words "on fire" instead of "burnt" clearly evidenced an intent to distinguish from the term and construction used in former policies and, in view of the testimony of an average adjuster of London, England, that under clauses containing the words "on fire" it was the practice there to consider the warranty open if some structural part of the vessel has been actually on fire, said clause would be so construed in accordance with the rule of strict construction against insurer as the warranty was drawn in the nature of an exception to its liability; and accordingly, as the fire in this case was on a structural part of the ship and endangered the ship by actually burning some part of it, it was sufficient to open the warranty clause and the warranty being open by reason of the ship being "on fire" insurer

[20] London Assurance v. Companhia De Moagens Do Barreiro, 167 U. S. 149, 42 L. ed. 110, 17 Sup. Ct. 785, 26 Ins. L. J. 833.

[1] The Glenlivet [1893] L. R. P. D. 164, [1894] L. R. P. D. 48, 68 L. T. R. (N. S.) 860, 69 L. T. R. 706, *cited* in London Assurance v. Companhia De Moagens Do Barreiro, 68 Fed. 247, 15 C. C. A. 379, 384, 28 U. S. App. 437, (aff'g 56 Fed. 44) per Acheson, Cir. J., aff'd 167 U. S. 149, 17 Sup. Ct. 785, 42 L. ed. 110, 26 Ins. L. J. 833, also *considered* in case which is subject of § 2699a herein.

was liable.[2] This decision was affirmed in the Circuit Court of Appeals in 1915,[3] and the court, per Morrow, C. J., considers particularly the Glenlivet case[4] and says: "In that case fires had broken out in the coal bunkers of the vessel on different occasions and some damage was done to the structure of the vessel—a plate was cracked and some angle irons were burnt—and the question before the court was whether the ship had been 'burnt' within the meaning of the word as used in a particular average warranty in a policy of marine insurance. The court held that the ship was not 'burnt,' and the rule was there laid down that a ship is not 'burnt' within the meaning of the warranty unless the injury by fire be of so substantial a character that the ship as a whole can be said to be 'burnt' in the popular sense of the term. . . .

"And this is the condition in which we find the warranty in the present case, with the exception that the word 'burnt' has been entirely left out, and the words 'on fire' substituted therefor. The clause thus worded has never been construed by the courts of either the United States or Great Britain; and in our determination of the question we must be guided by the history of the clause as above set forth, and such additional light as has been thrown upon the subject by the testimony of the witnesses in the case. . . .

"What, then, was the true intent and meaning of the words 'on fire' in the clauses, 'warranted free from particular average unless the vessel or craft, or the interest of the insured, be stranded, sunk or on fire?' The learned proctors for the Insurance Company contend that the expression is synonymous with the word 'burnt' as used in the policies prior to the decision in the Glenlivet Case, and must be construed even as the word 'burnt' was construed in that case. If that construction be the true one, it follows that the ship cannot be deemed to be 'on fire' within the meaning of the

[2] Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co. Ltd. (U. S. D. C.) 210 Fed. 958, 43 Ins. L. J. 650, s. c. 184 Fed. 947, 40 Ins. L. J. 1282. The court in the above case says that previous to the Glenlivet case [1893] Prob. 164; [1894] Prob. 48, 68 L. T. R. (N. S.) 860, 69 L. T. R. 706, *cited* in London Assurance v. Companhia De Moagens Do Barreiro, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. 785, 26 Ins. L. J. 833, the word "burned" was used in the F. P. A. clause, and after the case was decided the words "on fire" were substituted for the word "burned;" and "That no case has been suggested where the words 'on fire' have ever been before the courts in the same relation in any other case."—Neterer, D. J.

[3] Thames & Mersey Marine Ins. Co. v. Pacific Creosoting Co. 223 Fed. 561, 139 C. C. A. 101, 46 Ins. L. J. 486.

[4] [1893] Prob. 164; [1894] Prob. 48, 68 L. T. R. (N. S.) 860, 69 L. T. R. 706, also *quoting* from Gow on Marine Ins. p. 179, noted under § 2699 herein.

warranty unless the injury by fire is of so substantial a character that the ship as a whole can be held to be 'on fire' in the popular sense of the term. In this construction we are unable to concur. But we do agree with the learned proctors for the Insurance Company that the words must be construed in the light of their popular meaning. That popular meaning is vastly different from the popular meaning of the word 'burnt.' In a strict, technical sense, perhaps, the words are closely allied. Generally speaking, it would be impossible to conceive of an object being 'burnt' which had not also been 'on fire,' although the Court of Appeals in the Glenlivet Case refers to angle irons as being 'burnt,' despite the fact that the angle irons could not have been on fire. And vice versa, no object could, in the nature of things, ever be said to have been on fire without also being burnt. All this, we say, in a strict, technical sense; but the term is not to be interpreted by any such method. In a general and popular sense the two expressions convey very different ideas to the mind. The word 'burnt' creates in the mind the idea of a definite, accomplished condition, a completed result. The words 'on fire' convey rather the idea of a present state or condition, regardless of any definite, fixed result. And this natural meaning, rather than any strained effect, must be the meaning attributed to the words in the present policy of insurance, and must be deemed to have been the construction placed upon them by the parties to the contract of insurance. Thus construed, it seems entirely plain to us that the Sardhana might well have been on fire, although the injury therefrom might not have been of so substantial a character that the ship as a whole could have been said to be either 'burnt' or 'on fire.' In the determination of the question we are, of course, confronted with the same difficulty which beset the English Court of Appeals, and we concur with that court that each case must be decided according to the actual facts appertaining to each particular case." It will be observed, however, that the court differs somewhat in its conclusion upon the point relating to the extent of, or substantial character of the injury by "fire."

**§ 2700. Warranted "free from average under——per cent unless general" and like clauses.**—The memorandum clause frequently contains a stipulation to be "free from average under" a specified "per cent unless general," or the policy may contain a clause covering other than memorandum articles, whereby it is stipulated to be "free from particular general average less than" a certain per cent, or not to be liable for a partial loss on enumerated articles unless it amounts to a certain per cent on the aggregate value, and happens by stranding, or "free from particular average and partial

loss," and free from loss or damage only when occasioned by stranding, etc., and amounting to a specified per cent or more, and various other forms of substantially the same character. In construing these clauses reference must be had in all cases to the words used as evidencing the intent of the parties. The character of the terms may therefore be such as to operate as a limitation of all kinds of averages. Thus, where the stipulation was free from average under ten per cent, it was held to exclude certain extraordinary charges and damages under that per cent, although in the nature of general average.[5] So where the clause was "free from average under seven per cent unless general," it was held that there could be no recovery except for an actual total loss or a general average.[6] So in case of an insurance on a steamer warranted "free from average under fifteen cent unless general," the policy being valued, there can be no recovery for damages under the stipulated per cent;[7] nor for expenses for repairs under the specified per cent of the valuation where the insurer is not to be liable "for any partial loss on vessel or freight under five per cent, excepting in all cases general average."[8] If the stipulation was not to be liable "for the expense of docking or hauling out for repairs, nor for any loss except in cases of general average, unless the necessary repairs required solely by the disaster, shall amount to ten per cent of the agreed value of the policy," the docking and hauling out for repairs must be required solely by the disaster, and must not be under ten per cent of the agreed value to warrant a recovery.[9]

§ 2701. **Unless it amounts to —— per cent and happens by stranding.**—If the policy provides that insurers shall not be liable for "partial loss on salt, grain, etc., unless it amounts to seven per cent on the whole aggregate value of such articles and happens by stranding," the company is not liable for a partial loss on such articles, unless occasioned by the stranding of the vessel.[10] But where there was a stipulation not to be liable "for any partial loss on goods esteemed perishable in their nature unless it amounts to

[5] Coster v. Phœnix Ins. Co. 2 Wash. (U. S. C. C.) 51, Fed. Cas. No. 3,264.

[6] Le Roy v. Gouverneur, 1 Johns. Cas. (N. Y.) 226. It will be observed that the word "actual" total loss is used; there is, however, a question whether there must be a constructive total loss in such cases.

[7] Riley v. Ocean Ins. Co. 11 Rob. (La.) 255.

[8] Padleford v. Boardman, 4 Mass. 548; Kerr v. Quaker City Ins. Co. 33 Mo. 158; Wallace v. Ohio Ins. Co. 4 Ohio, 234; Perry v. Ohio Ins. Co. 5 Ohio, 305.

[9] Snapp v. Fireman's Ins. Co. 2 Handy (Ohio) 252.

[10] Lake v. Columbus Ins. Co. 13 Ohio, 48, 42 Am. Dec. 188.

seven per cent . . . and happens by stranding," and the policy, however, insured against perils of the sea by which the articles were lost, and not by stranding, the insurers were held liable.[11] So in another case, the insurance was upon freight valued stipulated not to be liable for any partial loss on certain enumerated articles or other goods perishable in their nature, "unless it amounts to seven per cent and happens by stranding, not for partial loss on . . . vessel or freight unless it amounts to five per cent," and it was held that a loss of freight over five per cent was recoverable, although there was no stranding, and the cargo consisted of perishable articles.[12]

§ 2702. **Exception of "loss or average" under specified per cent: expense of repairs.**—If there is an exception of "loss or average" under a specified per cent on the agreed value of the policy, it is held that the expense of repairs must be ascertained by deducting one third new for old, and if the net loss thus arrived at is under the stipulated per cent of the agreed value, there can be no recovery.[13]

§ 2703. **Percentage: aggregate of losses in case of collision.**—In a case in Massachusetts the policy provided against liability for partial loss "on vessel and freight unless it amounts to seven per cent," and a clause was attached to the margin of the policy whereby risk by collision was covered "according to the decisions of the supreme court of Massachusetts prior to 1853, provided that the company shall not in any case be liable for a greater sum than the amount insured by this policy," and it was held that a loss subsequent upon collision through the vessel's own fault, by reason of which the owner was obliged to pay damages to the owner of the other vessel, was not recoverable from the insurers, as it did not amount to seven per cent of the vessel's value.[14] It is declared that if the policy stipulates against liability for partial loss on the ship under five per cent, and by reason of a collision, without fault on either side, a sum is apportioned on the vessel insured on account of injury to the other vessel, and said sum is paid under decree of a foreign court, to the operation of whose laws the vessel is subjected at the time, and said sum so apportioned and paid, together with the vessel's own loss, exceeds five per cent, the insurers are liable for the whole amount, for the loss by the

[11] Williams v. Cole, 16 Me. 207.

[12] Lord v. Neptune Ins. Co. 10 Gray (76 Mass.) 109.

[13] Kerr v. Quaker City Ins. Co. 33 Mo. 158; Wallace v. Ohio Ins. Co. 4 Ohio, 234; Perry v. Ohio Ins. Co. 5 Ohio, 305.

[14] Whorf v. Equitable M. Ins. Co. 144 Mass. 68, 10 N. E. Rep. 513; Wallace v. Ohio Ins. Co. 4 Ohio, 234. See preceding section.

collision is an entirety, and the items are not to be separated.[15] This rule, however, involves the discussion of other principles, and the case upon which it is based and principles discussed will be more fully considered hereafter.

**§ 2704. Value only of cargo at risk and not of whole cargo forms basis of percentage.**—If part of the cargo is delivered at the port of destination and a loss is sustained upon the balance thereof during the progress of a regular delivery or discharge, the insurer is liable if the loss amounts to more than the specified per cent of the value of the cargo then at risk, although the amount of the particular loss does not reach the specified per cent on the whole value of the cargo shipped,[16] and the same principle governs the case where the complete cargo is not on board, for the percentage is then also estimated of the amount of cargo then at risk, and not on the value of the whole cargo to be shipped.[17] But it is held that a total loss cannot take place after a part of the goods are safely discharged. Thus, it was decided that the insurers were not liable for the loss where a hundred barrels of potatoes out of sixteen hundred had been landed at the destination, and the balance on board was lost by the boat's sinking, the insurance being against total loss "free from average unless general" and "free from particular average." [18] And after the landing of a portion of a cargo at its destination, a loss of the balance from a risk insured against is only a partial loss within a warranty against particular average loss.[19]

**§ 2705. "Each package subject to its own average" and similar clauses: separately valued.**—If the policy contains a clause providing that each package shall be subject to its own average, this does not apply where the risk is upon cargo in bulk and not in packages. Thus, where the risk was described as "thirty-nine thousand eighty-five bushels bulk at one dollar and fifteen cents

[15] Peters v. Warren Ins. Co. 1 Story (U. S. C. C.) 463, Fed. Cas. No. 11,034; 3 Sum. (U. S. C. C.) 389, Fed. Cas. No. 11,035, aff'd 14 Pet. (39 U. S.) 99, 10 L. ed. 371. See § 2717 herein.

[16] Maryland Ins. Co. v. Bosley, 9 Gill & J. (Md.) 337. But see Gracie v. Maryland Ins. Co. 8 Cranch (12 U. S.) 84, 3 L. ed. 495; Moreau v. United States Ins. Co. 1 Wheat. (14 U. S.) 219, 4 L. ed. 75, per Washington, J.

[17] Rohl v. Parr, 1 Esp. 445, 5 R. R. 741.

[18] Chadsey v. Guion, 16 Jones & S. (48 N. Y. Super. Ct.) 267, aff'd 97 N. Y. 333; Gracie v. Maryland Ins. Co. 8 Cranch (12 U. S.) 84, 3 L. ed. 495.

[19] Gracie v. Maryland Ins. Co. 8 Cranch (12 U. S.) 84, 3 L. ed. 496, *cited* in Mobile Marine Dock & Mutual Ins. Co. v. McMillan, 27 Ala. 77, 102; Mansur v. New England Mutual Marine Ins. Co. 12 Gray (78 Mass.) 520, 524.

per bushel, sum forty-four thousand nine hundred and forty-five dollars, rate one per cent, premium four hundred and forty-nine dollars and forty-five cents," it was held that the clause did not apply, and that in determining the percentage of partial loss the proportion between the entire actual loss and the value of the entire shipment must be ascertained;[20] but if such a clause or a similar one is used, and the goods are shipped in separate packages separately valued, or it otherwise clearly appears that it is intended that each package be separately insured, or it clearly appears that it is intended to pay an average on each package, as if separate interests were separately insured, the underwriter is liable for a loss on each package to the extent of the per cent stipulated.[1] So where the hull and machinery were separately valued, and it was stipulated "average payable on the whole or on each, as if separately insured, warranted free from particular average under three per cent," and an expense was incurred in saving both from a total loss by fire, it was held that it should be apportioned against each subject insured separately, inasmuch as the insurance was in effect a separate one on each, but if by adding these together the claim did not amount to the limitation, there could be no recovery.[2]

**§ 2705a. Same subject: effect of rider.**—Where the policy stipulated: "no damage to be paid unless amounting to five per cent" and an attached rider contained the clause "warranted free from particular average under five per cent, each kind of goods and each bill of lading interest subject to separate average" is to be construed as meaning that the five per cent is to be computed upon the value of each kind of goods and each bill of lading interest and not upon the value of the entire cargo, and the term "average" is used in the sense of the per centum of damage necessary to constitute loss under the policy; that is, not insured against damage or partial loss unless equal to five per cent of the value of the particular kind of goods or particular bill of lading interest. "This appears to us to be the clear purpose and the plain reading of the language employed. Thus in Washburn & Moen Manufacturing Company v. Reliance Marine Insurance Company,[3] by the memorandum the goods were expressly warranted by the assured 'free

[20] Haenshen v. Franklin Ins. Co. 67 Mo. 156; Benecke's Principles of Indemnities, 478 and note.

[1] Stevens on Average (5th ed.) 220–26; 2 Arnould on Marine Ins. (Perkins' ed. 1850) *869; Id. (Maclachlan's ed. 1887) 836; Id. (9th ed. Hart & Simey) secs. 899 et seq., pp. 1120–1.

[2] Oppenheim v. Fry, 3 Best & S. 873, aff'd 5 Best & S. 348, 33 L. J. Q. B. 267, 10 L. T. 539, 12 W. R. 831.

[3] 179 U. S. 1, 8, 45 L. ed. 49, 21 Sup. Ct. 1, 3, 30 Ins. L. J. 97.

from average unless general' and by the rider 'free from particular average, but liable for absolute total loss of a part if amounting to five per cent.' The court, speaking by the chief justice, remarked: 'The memorandum and marginal clauses were in pari materia, and to be read together. They were not contradictory, and the rider merely operated to qualify the memorandum by allowing recovery for an actual total loss in part, which could not otherwise be had. In other words the qualification was manifestly inserted so that, while conceding that under 'the memorandum clause no liability was undertaken for a constructive total loss, but only for liability for an actual total loss, the insurers might be held for an actual total loss, of a part.' The rider in that respect qualified the provision in the policy that, in order to constitute a claim under it, the partial loss must equal five per cent of the entire cargo. This policy covered the entire cargo. It insured 'all grain, flour, general merchandise, etc., shipped on board of the propellor, City of Duluth.' When therefore, a loss has occurred on any particular species exceeding five per cent of the value of the species, that is a loss under the policy to be borne according to the terms of the policy. That is to say, a loss being ascertained, the amount to be paid by the insurer is determined in the same manner as in the case of a loss exceeding five per cent upon the entire cargo. Liability under the policy is not enlarged by the rider, except with respect to what shall be deemed a partial loss. The measure of liability for a loss ascertained is that which attaches by law to the policy stated in the rule laid down by Mr. Parsons and other text-writers upon the law of marine insurance. That measure of liability is the proportion of the ascertained loss which the amount insured is of the value of the whole property insured and at risk. We perceive nothing in the language of the rider to change the proper construction of the language of the policy. There is nothing to indicate design to change the rule that if the insurance covers only a part of the value of the property insured, the insured stands as his own insurer as to the remainder. . . . We consider that the insurance company is liable for that proportion of the loss which the sum insured bears to the value of the subject insured." [4]

§ 2706. **"Average recoverable on each package separately or on the whole."**—In an English case two policies were issued on galvanized iron, "average recoverable on each package separately or on the whole." The insurance was "at and from warehouses at Bristol to London," and covered all risks in transit "until safely delivered

[4] Chicago Ins. Co. v. Graham & Morton Transportation Co. 108 Fed. 271, 47 C. C. A. 320.—Jenkins, Cir. J.

on board export vessels, if so forwarded." The cargo was to be carried to the Thames and there delivered to the plaintiffs into barges, to be supplied them, and plaintiffs were to take the iron to another ship to be carried to Australia. There were thus two parts to the voyage for which the goods were insured. Part of the goods were damaged by perils insured against upon her arrival in the Thames. On arrival assured took the goods into their own control, noticed the damage, and the goods were landed to ascertain what packages contained iron that was damaged and the extent thereof. The underwriters were notified, but declined responsibility for undamaged goods, although they appointed a surveyor to attend to the examination on their behalf. The damaged and undamaged packages were separated, the former sold, and the remainder treated as undamaged goods, and shipped to Australia. The assured having thus elected to treat the insurance as being on each package, they claimed, in respect to those containing the damaged iron, the difference between the invoice price and the net sum resulting from the sale, which claim was allowed, as was also the cost incurred in respect to said packages. Assured also made the additional claim for costs incurred by reason of the unloading and examination, and it was held that the underwriters were not liable, in respect to the expenses incurred, in relation to any part of the cargo other than those cases which contained the damaged iron. Lord Esher, M. R., says: "They must put their claim in one of two ways. One way is to say that the undamaged goods were made of less value because of the damage to the other packages, because thereby they had lost their character, and would not sell for so much in the market. If they put their claim in this way, the answer is that it is contrary to the rules of insurance. The only other way to support the claim is to treat it as part of the damage to the damaged portion of the goods. As to this it is enough to say that it is impossible to make out how the damage to one part of the goods can be effected by an examination of the other part. What the assured did was no doubt a reasonable thing to do in their own interest, but they cannot throw the cost of doing it on the underwriters. In Stevens on Average, in part 1, section 3, article 10, it is pointed out that the underwriter engages to guarantee the assured against the direct operation of sea damage, and not against the consequential results; and the highest that could be said of the claim in this case is that it was in respect of damage which was a consequential result of the sea peril, and it is very doubtful if that could be justly said. The evidence which was given at the trial as to the practice of average adjusters in such cases shows that what was done in this case was in

accordance with the practice, so that authority and practice are both against the plaintiff. As to the other arguments in support of the plaintiff's case it is quite impossible to say that what was done here was to save loss to the underwriters, and I think I ought to say also that it is clear that the insurance was on the iron, so that no claim could arise in respect to damaged packing cases." It was also said in an earlier part of the opinion: "I incline to think, though I do not think it material to our decision, that this was an insurance on the whole cargo, and not on separate packages."[5]

**§ 2707. Effect of separate valuation of each package, etc.: when there is and when not an insurance on each separate package, etc.**—The point of separate valuation of packages, parcels, bales, etc., of the same kind of goods is one concerning which there is a want of unanimity in the authorities as to insurance, under the clauses excepting losses under a specified per cent, and where the policy covers total loss only. We believe, however, that the following rules are fairly deducible from the authorities: If goods of the same kind are specifically invoiced and insured, or it clearly appears that the insurance covers specifically packages, bales, boxes, bushels, or other separate division valued and insured by such package, etc., or by number of packages in parcels, being a specific part or division of the whole, there may be a recovery of a total loss of each parcel, etc., and the rule also applies in case each article so separately valued clearly intended to be separately insured sustains a loss equal to the specified per cent of its value under the percentage clause.[6] But it would seem that the fact alone of a separate valuation of specific bales, packages, etc., is not sufficient where it is not the manifest intent of the policy to effect a separate insurance on each package, parcel, etc., as a distinct basis on which to compute the rate of exception; at least it is declared that although each parcel, bale, package, or box of an article is separately valued, this is not of itself a separate insurance on each parcel, bale, or package. Thus, in case of an invoice of one hundred and four bales of cotton at a separate valuation per bale, and a stipulation that "no loss or average shall in any case be paid under five per cent unless general," a total loss of four

[5] Lysaght v. Coleman, 64 L. J. Q. B. 175, [1895] 1 Q. B. 49, 14 R. 22, 71 L. T. 830, 7 Asp. M. C. 552.

[6] Kettell v. Alliance Ins. Co. 10 Gray (76 Mass.) 144; Haenshen v. Franklin Ins. Co. 67 Mo. 156. *Examine* Biays v. Chesapeake Ins. Co. 7 Cranch (11 U. S.) 415, 3 L. ed. 389; Gracie v. Maryland Ins. Co. 8 Cranch (12 U. S.) 84, 3 L. ed. 495; Humphrey v. Union Ins. Co. 3 Mason (U. S. C. C.) 429, Fed. Cas. No. 6,871, per Story, J.; Morean v. United Ins. Co. 1 Wheat. (14 U. S.) 219, 4 L. ed. 75; Louisville Marine & Fire Ins. Co. v. Bland, 9 Dana (39 Ky.) 143, 148; Guerlain v. Columbian Ins. Co. 7 Johns. (N. Y.) 527.

bales will not entitle assured to recover anything from the insurers.[7] It is obvious, therefore, that the main difficulty exists in ascertaining the intention of the parties. Again, although a separate valuation ought to afford some evidence of such intent, yet if the express clauses used and the whole policy clearly shows that notwithstanding the separate valuation it was not intended that there should be, in effect, such an insurance as that the separate packages, parcels, etc., should afford a distinct basis on which to estimate the loss or complete the rate of exception, then the policy will be given that construction. Notwithstanding the above rules may be open to discussion in view of the authorities, nevertheless the rule is settled that in the absence of any indication in the policy, by separate valuation or otherwise, of an intent that each parcel, bale, or package shall form the basis of a separate adjustment of the loss, and except for general average there can be no recovery for a total loss or destruction of a part only of the particular species, even though distinct parcels, packages, or bales be lost by the specified perils, and this is so whether the particular article be shipped in bulk or separate packages, boxes, or parcels.[8]

[7] Newlin v. North American Ins. Co. 20 Pa. St. 312, s. c. 5 Clark (Pa.) 116, 1 Phila. 273. In a New York case the court says: "The various fallacies by which a contract such as the present has been construed as intended to cover a total loss of a part of the insured subject, when it was shipped in separate boxes or packages and valued separately, have now been rejected by the courts of the principal maritime countries;" but here the cargo was one thousand six hundred and fifty barrels of potatoes shipped in bulk, the adventure to continue until said goods and merchandise should be safely landed at the port of destination, and the contract here was upon the subject of insurance as an entirety, and such was evidently the intent of the parties: Chadsey v. Guion, 97 N. Y. 333. And this case is cited in another decision where an insurance was effected, "$14,300 on 6,000 boxes of lemons free of particular average, but liable for loss of part by jettison . . . lemons valued at 4.25 gold per box." The construction of other clauses and the question of repugnancy between printed and written clauses was involved, but, upon the point before us, the court held that this was not an insurance upon each box of lemons at the sum valued per box, but an entire single contract on the whole number of boxes, and that there must be a total loss of the whole or a loss of part by jettison: Hernandez v. Sun Mut. Ins. Co. 6 Blatchf. (U. S. C. C.) 317, Fed. Cas. No. 6,415.

[8] *United States.*—Gracie v. Maryland Ins. Co. 8 Cranch (12 U. S.) 84, 3 L. ed. 495; Humphrey v. Union Ins. Co. 3 Mason (U. S. C. C.) 429, Fed. Cas. No. 6,871.

*Connecticut.*—Poole v. Protection Ins. Co. 14 Conn. 47.

*Kentucky.* — Louisville Marine & Fire Ins. Co. v. Bland, 9 Dana (39 Ky.) 143, 148.

*Louisiana.* — Brooke v. Louisiana State Ins. Co. 5 Mart. N. S. (La.) 646.

*Missouri.*—Haenshen v. Franklin Ins. Co. 67 Mo. 156.

*New York.*—Chadsey v. Guion, 97 N. Y. 333; Wadsworth v. Pacific Ins. Co. 4 Wend. (N. Y.) 33.

*Pennsylvania.* — Waln v. Thompson, 9 Serg. & R. (Pa.) 115.

Under a warranty free from particular average, recovery is precluded for parts of the goods, not separately insured, spoiled by leakage and subsequently thrown away when the vessel arrives at its destination. In such case there is no total loss or a general average loss, but only a partial and particular average loss.[9]

The English rule is thus stated: "Where memorandum goods of the same species are shipped, whether in bulk or in packages, not expressed, by distinct valuation or otherwise, in the policy to be separately insured, and there is no general average and no stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, although consisting of one or more entire package or packages, and though such package or packages be entirely destroyed or otherwise lost by the specified perils." [10]

[9] California Canneries Co. v. Canton Ins. Office Ltd. 25 Cal. App. 303, 143 Pac. 549, 44 Ins. L. J. 685.

[10] Ralli v. Janson, 6 El. & B. 422, 25 L. J. Q. B. 300 (2 Arnould on Marine Ins. [Maclachlan's ed. 1887] 1016), overruling Davy v. Milford, 15 East, 559, see 15 R. R. 279n, "so far as the judgment in that case was against the underwriters, the opinion of Gibbs, C. J., in Hedburg v. Pearson, 7 Taunt. 154, and the dicta of Abbott and Holroyd, JJ., in Cologan v. London Assurance Co. 5 Maule & S. 447, 17 R. R. 390; Id. note. It is well, however, to compare this rule with that stated by Mr. Arnould and restated by Mr. Maclachlan, where it is said: "If a cargo is made up of separate packages capable of a distinct valuation in the outset, and the insurance appears from the terms of the policy to be separately effected on each distinct package, there can be no doubt that the loss will be treated as a total loss on each package lost:" 2 Arnould on Marine Ins. (Perkins' ed. 1850) *1038; 2 Id. (Maclachlan's ed. 1887) 1018, *citing* Hills v. London Assur. Corp. 5 Maule & S. 569, 9 L. J. Ex. 25, 52 R. R. 843, per Lord Abinger; Lewis v. Rucker, 2 Burr. 1167, 1170, per Lord Mansfield; and also, as illustrating the rule, the cases noted by Mr. Maclachlan and mentioned in the preceding note herein. See 2 Arnould on Marine Ins. (9th ed. Hart & Simey) secs. 898, 1082 et seq., pp. 1118, 1349 et seq. Mr. Phillips thus states the rule: "Where an insurance is made free from average indiscriminately upon an article, without any provision in the policy indicating that a loss is to be adjusted on the different bales or packages or parcels separately, the assured cannot recover for a total loss on account of the destruction of a part of the insured shipment of articles of the same description:" 2 Phillips on Ins. (3d ed.) 459, 462, sec. 1773, reviewing and citing many English and American cases. Mr. Parsons says: "In England the law seems to be that if the packages are separately valued the insured can recover for all that are totally lost, but not otherwise. It has been said that the rule is the same in this country, but we are not aware of any decision to that effect." In a note he says: "Whatever the law may be where each parcel is separately valued, it is certain in this country, where this is not the case, there can be no total loss of part:" 1 Parsons on Marine Ins. (ed. 1868) 637, 638n. See marine insurance act 1906 of England, sec. 76, subdiv. (1) sec. 79, subdiv. (1) given in Appendix C herein.

**§ 2708. Where articles of different kinds are each separately valued.**—If there are articles of different kinds, each class or kind separately valued, and there is a damage on one of the articles in excess of its valuation, a recovery may be had for a total loss on the whole of that particular article or class.[11] Or if the loss on such particular article or class so separately valued equals as to its value the specified percentage, there may be a recovery.[12]

**§ 2709. Where percentage is fixed for each particular class or impliedly fixed upon each enumerated article.**—It it held that if certain specific articles belonging to different classes are insured warranted free from average, and the policy fixes a standard or rate percentage for each of the several classes, as fifteen per cent for one class and ten per cent for another class, etc., and the loss upon the articles of the particular class equals the rate fixed for that class, the insurer is liable, although otherwise where it does not equal the rate specified in the class.[13] If certain specifically enumerated articles, as in case of hides, flax, etc., under the memorandum clause, are insured in gross under the percentage exception, such clause applies to each specified article separately the same as if it immediately preceded the article enumerated, and if the loss on such article equals the specified rate per cent excepted, the underwriters are liable, and the same rule applies to an exception of partial loss in memorandum articles specifically enumerated. Thus, it is declared, "when the cargo consists of several distinct species or kinds of articles, all of which are embraced in the memorandum, each forms a separate class or thing, and the exception is to be applied to each separately, considered as an independent subject of insurance. . . . The construction of the policy is the same as if there were a special exception of each article by itself from partial loss, instead of grouping them together in one clause." It is suggested, however, by the same court that this might not be the true interpretation if the exception were in general terms of all perishable goods; but the court adds: "It certainly is the only reasonable one where the articles are specifically named." [14]

[11] Deiderick v. Commercial Ins. Co. 10 Johns. (N. Y.) 234. In this case an abandonment was made of the particular article, which was sugar, separately valued, and it was held valid. Mr. Phillips, however, denies that an abandonment can be made in such a case: 2 Phillips on Ins. (3d ed.) 360, 361, sec. 1661. See chapter herein on abandonment.

[12] Ocean Ins. Co. v. Carrington, 3 Conn. 357. See Silloway v. Neptune Ins. Co. 12 Gray (78 Mass.) 73; 2 Phillips on Ins. (3d ed.) 475, sec. 1788.

[13] Louisville Marine & Fire Ins. Co. v. Bland, 9 Dana (39 Ky.) 143; Silloway v. Neptune Ins. Co. 12 Gray (78 Mass.) 73, per the court. See Hall v. Rising Sun Mutual Ins. Co. 1 Disney (Ohio) 308, 12 Ohio Dec. 639.

[14] Silloway v. Neptune Ins. Co. 12 Gray (78 Mass.) 73; 2 Arnould on

But where the policy provided that "the company shall not be liable for any partial loss on bar or sheet iron, iron wire, hoop iron, etc., grains of all kinds, etc., nor for any partial loss on hemp or flax unless the same shall amount to twenty per cent on the whole aggregate value thereof," it was held the insurer was exempted from any partial loss on bar iron, though the same exceeded twenty per cent.[15]

**§ 2710. Where insurance is upon cargo in bulk: general designation of "all other goods:" goods of distinct kinds under one general designation.**—It is well settled that if the insurance be upon the cargo in bulk, valued in bulk, and the policy not upon packages, parcels, bales, etc., the insurers are not liable for a total loss of part under a clause free from average. In such a case there is only an average loss on the whole.[16] In case of goods not specifically enumerated under the memorandum clause but designated generally as "all other goods" or the like, they constitute a mass of property separate and distinct from specifically enumerated articles, and their aggregate value forms the basis upon which the percentage fixed by the exception must be calculated, and to which aggregated mass the general exception applies, unless there be a specific exception of percentage applied to "all other goods" and the like, as an aggregate, in which case the loss is computed with reference to the exception specifically applicable.[17] Cases of the last character differ from those where goods which have no natural or artifical connection with each other, but are several separate articles essentially different in value, nature, kind, intended use, and manner of disposal on board, are insured under some general designation intended to include them all, and indicating their miscellaneous distinct character, such as "master's effects," or "any goods" of an emigrant, there being a clause "free from all average." Here the goods are not massed together to the extent of excluding a total loss of less than the whole, but the insurance is upon the

Marine Ins. (Perkins' ed. 1850) *870; 2 Id. (Maclachlan's ed. 1887) 835, *citing* Stevens on Average (5th ed.) 223; Id. (9th ed. Hart & Simey) sec. 898, p. 1118.

[15] Evans v. Commercial Ins. Co. 6 R. I. 47.

[16] Haenshen v. Franklin Ins. Co. 67 Mo. 156; Hills v. London Assur. Co. 5 Mees. & W. 569, 9 L. J. Ex. 25, 52 R. R. 843, per Lord Abinger; Wadsworth v. Pacific Ins. Co. 4 Wend. (N. Y.) 33, per Walworth, Ch. See Humphrey v. Union Ins. Co. 3 Mason (U. S. C. C.) 429, Fed. Cas. No. 6,871, per Story, J.; Poole v. Protection Ins. Co. 14 Conn. 47.

[17] 2 Arnould on Marine Ins. (Perkins' ed. 1850) *868; 2 Id. (Maclachlan's ed. 1887) 835, 836; Id. (9th ed. Hart & Simey) secs. 898 et seq., pp. 1118 et seq.; sec. 1086, p. 1352; 2 Phillips on Marine Ins. (3d ed.) 473, sec. 1786; Stevens on Average (5th ed.) 223.

several distinct articles, and insurers are liable for a total loss of any specific thing.[18]

In a Federal case the warranty was "free from all average" without any exception. The insurance was upon personal effects belonging to assured and his family. It was also stipulated that all claims were to be adjusted according to customs of English Lloyds. There was a total loss with the exception that certain articles, of little value in comparison with the value at which the entire property was insured, were saved. Upon the assertion that the sole question was whether the loss was total or not no allowance was made for the articles so saved in specie and judgment was rendered for the full policy amount. Upon appeal, however, it was decided that the contract of insurance should be applied distributively to the different articles insured and therefore the value of the articles saved must be deducted from the total insured value of the personal effects, accordingly the judgment below was modified to this extent and as so modified was affirmed. It was also determined that the clause "warranted free from all average" was in the nature of an exception to the liability of insurer and should be construed, strictly against him; also that in view of the stipulation as to adjustment by the custom of English Lloyds and of the fact that the policy was that of an English corporation there was a presumption that the words in the average clause were used in the sense in which they were understood in the English law.[18a]

**§ 2711. The question of addition of successive losses to reach the limitation: cases.**—Under a policy on a ship providing that the insurers should not be liable for a partial loss under five per cent it is held in Massachusetts that successive partial losses occurring upon different passages by distinct storms or gales cannot be aggregated to reach the five per cent limitation, and that assured has the burden of proving, in case of two several disasters, that there was a partial loss amounting to five per cent from one gale or disaster.[19] The doctrine of this case is but the affirmance of a decision rendered in the same state nearly half a century prior thereto, under a voyage policy on the ship providing against liability for a particular average, unless it amounted to five per cent, and the vessel sustained damage in a gale and several months there-

[18] Duff v. MacKensie, 3 Com. B. (N.S.) 16, 26 L. J. C. P. 313, 3 Jur. (N. S.) 1025; Wilkinson v. Hyde, 3 Com. B. (N. S.) 30, 27 L. J. C. P. 116, 4 Jur. (N. S.) 482.

[18a] Canton Ins. Office, Ltd. v. Woodside, 90 Fed. 301, 33 C. C. A. 63, 61 U. S. App. 214, 28 Ins. L. J. 269, modifying Woodside v. Canton Ins. Office, Ltd. (U. S. D. C.) 84 Fed. 283. (In 90 Fed. 301 the words "personal effects" and "master's effects" etc., are discussed.)

[19] Paddock v. Commercial Ins. Co. 104 Mass. 521.

after by collision with another vessel, it being held that the two losses could not be aggregated.[20] And both these decisions are followed in a Maine case in a policy upon the ship against partial loss under the same percentage.[1] Mr. Justice Story, however, while declaring no rule as to the ship, suggests the impracticability of ascertaining the injury to the ship by successive gales, especially where there has been great straining until she has been overhauled in port, and says in effect that he cannot see how the words should receive a different construction as to the ship and cargo.[2] In an English case a time policy on a ship provided, "The ship and freight shall be and are warranted free from average under three pounds per cent, unless general or the ship be stranded, sunk, or burnt." A loss was incurred on two successive voyages during the currency of the policy, although the loss on each particular voyage was under the specified rate per cent, but total loss added together exceeded three pounds per cent. It was held that the losses might be lumped together to reach the limited per cent so far as the voyages, though consisting of several passages, constituted an entire, distinct, and separate voyage.[3] Under another decision, the case being that of a voyage policy on the ship "free from average under three per cent unless general," distinct losses arising at different times were added together to reach the limitation.[4] As will be noted, the above cases were those of insurances upon the ship both under voyage and time policies. In another case, however, the stipulation provided against liability for any partial loss on goods, vessel, or freight under five per cent, "exclusive in each case," of all charges and expenses incurred for the purpose of ascertaining and proving the loss, and it was declared by Mr. Justice Story that successive losses on the cargo in the course of the voyage could be aggregated to reach the rate per cent limited, and also that the words "in each case" referred to the three separate subjects of insurance—goods, vessel, and freight.[5]

§ 2712. **Same subject: conclusion.**—In considering this question the main division is that of insurances upon cargo and freight and

[20] Brooks v. Oriental Ins. Co. 7 Pick (24 Mass.) 259.

[1] Hagar v. New England Mutual Ins. Co. 59 Me. 460.

[2] Donnell v. Columbian Ins. Co. 2 Sum. (U. S. C. C.) 366, Fed. Cas. No. 3,987, per Story, J.

[3] Stewart v. Merchants' Marine Ins. Co. 16 Q. B. D. 619, 625, 55 L. J. Q. B. 81, 53 L. T. 892, 34 W. R. 208, 5 Asp. M. C. 506, 14 Q. B. D. 555.

[4] Blackett v. Royal Exchange Assur. Co. 2 Tyrw. 266, 2 Cromp. & J. 244, 1 L. J. Ex. 101, 14 Eng. Rul. Cas. 179.

[5] Donnell v. Columbian Ins. Co. 2 Sum. (U. S. C. C.) 366, Fed. Cas. No. 3,987; Brooks v. Oriental Ins. Co. 7 Pick. (24 Mass.) 259, 267, per Putnam, J.

upon the ship. As to the ship, the division of voyage and time policies exists, and under the latter the point is presented of separate and distinct voyages during the continuance of the risk and of an entire voyage, although consisting of several passages. As to goods and freight, the rule permits the aggregation of successive averages occurring on the voyage, passage, or period during the continuance of the risk on that subject insured. It is clearly evident, however, from an examination of all the cases above noted by us that they are conflicting so far as the ship is concerned, and if only the decisions in this country are considered, we have the Massachusetts and Maine cases directly asserting a doctrine against the aggregation of successive partial losses occurring upon different passages by distinct storms or gales, while opposed thereto is the opinion of that eminent jurist, Mr. Justice Story; although this is somewhat weakened by the fact that, in his argument, he asserts that he is both for and against the addition of successive losses, and also by his declaration that he would be inclined to adopt the decision in the earlier Massachusetts case were it not that the case before him related only to the cargo.[6] Again, in England the result of the most recent case, as deduced by Mr. Maclachlan,[7] is

[6] Donnell v. Columbian Ins. Co. 2 Sum. (U. S. C. C.) 366, Fed. Cas. No. 3,987, per Story, J.

[7] *Opinions of Text-writers.*—Mr. Parsons is of the opinion that successive losses may be added, and that "the weight both of reason and authority lead to the conclusion," although he qualifies this statement by adding: "A distinction in this respect may exist between the ship and the cargo, because it is said that the damage done to the ship at different times may be more easily discriminated than the damage to the cargo, which can only be discovered at the end of the voyage:" 1 Parsons on Marine Ins. (ed. 1868) 635. Mr. Phillips says: "In regard to the cargo and freight, the practice of adjustments has always been to estimate the rate of the exception upon the aggregate loss of each passage or period during which the risk continues on the same subject;" and he adds: "The weight of authority leads to the conclusion that the exception applies to the aggregate of successive losses on the ship in the same manner as on the cargo:" 2 Phillips on Ins. (3d ed.) 468, sec. 1780. So Mr. Arnould is of opinion that there never has been any doubt as to the freight and goods, "that the true rule is to take the aggregate amount of the whole damage occasioned in the course of the voyage; . . . that the rule is the same with regard to the ship, also:" 2 Arnould on Marine Ins. (Perkins' ed. 1850) *866. Mr. Maclachlan exhaustively considers the question, noting and comparing four of the cases considered under the last section. (Stewart v. Merchants' Marine Ins. Co. 16 Q. B. D. 619, 55 L. J. Q. B. 81, 53 L. T. 892, 34 W. R. 208, 5 Asp. M. C. 506; Brooks v. Oriental Ins. Co. 7 Pick. (24 Mass.) 259; Donnell v. Columbian Ins. Co. 2 Sum. (U. S. C. C.) 366, Fed. Cas. No. 3,987; Blackett v. Royal Exch. Assur. Co. 2 Cromp. & J. 250, 2 Lyr. 266, 1 L. J. Ex. 101, 14 Eng. Rul. Cas. 179. And in this connection he exhaustively discusses the use and meaning of the term "average," and says: "The root of all this difference and error is to be

in conflict with the Massachusetts and Maine cases, but is in line with the intimation of Mr. Justice Story, favoring the aggregation of successive losses, but it qualifies that suggestion or opinion so far as time policies are concerned; and the same qualification, so far as this English case has any weight here, extends to Mr. Phillips' rule [8] and also so much of Mr. Parsons' rule as has any positive force.[9] It will be noted, however, although Mr. Parsons' opinion as first stated by him is positive enough, yet he immediately thereafter adds a qualifying clause, the effect of which is to take away the force of the preceding opinion and to leave no rule whatever stated as to the ship. With reference, however, to the conclusions arrived at by Mr. Parsons, Mr. Phillips, and Mr. Arnould,[10] the fact exists that the more recent Massachusetts and English cases and the Maine case above noted do not enter as a

found in the term 'average' erroneously viewed as a general term nomen generale. . . . The use of this term differs in different countries," and that "in England the use of it has always been one precise and definite meaning," and he concludes that the result of the last decision in England (Stewart v. Merchants' Marine Ins. Co. 16 Q. B. D. 619) "is that the purposes of the three and five per cent clauses of the memorandum. Averages may be added to make up the percentage. In respect of ship, such averages may be added as occur within the agreed voyage in a voyage policy, or in composing several passages in its entirety. In respect of goods or freight, such averages may be added as occur during the voyage, or any part of it, on which and whilst these subjects of insurance are at risk." He severely criticizes, however, not only this case but also two of the others noted, viz., Donnell v. Columbian Ins. Co. 2 Sum. (U. S. C. C.) 366, Fed. Cas. No. 3,987; and Blackett v. Royal Exch. Assur. Co. 2 Cromp. & J. 250, 14 Eng. Rul. Cas. 179, and evidently does not agree with the conclusions favoring the aggregation of successive losses: 2 Arnould on Marine Ins. (Maclachlan's ed. 1887) 829 et seq.; Id. (8th ed. Hart & Simey) sec. 893 et seq., pp. 1078 et seq. And see note, "Upon the origin, meaning, and history of the term 'average' as used in the maritime law:" Id. 919–26, where it is said: "Average, as the English form is of this ancient classical term, when used in connection with the contract of marine insurance, signifies the whole purpose of that contract, namely, the adverting from the individual adventurer by interposition of the underwriter of all the immediate consequences of the perils mentioned." But see Id. (9th ed. Hart & Simey) sec. 893, pp. 1116 et seq.; sec. 1032, p. 1289; Lowndes on General Average (4th ed.) 270. The memorandum clauses are in the English policy and in Lloyds' form: "Corn, fish, salt, fruit, flour, and seed are warranted free from average unless general. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent, and all other goods, also the ship and freight, are warranted free from average under three pounds per cent unless general or the ship be stranded."

[8] See note "Opinions of text-writers" above.

[9] See note "Opinions of Text-writers" above.

[10] See note "Opinions of Text-writers" above.

factor into the consideration of the point by them.[11] And this is important, although it cannot be assumed that these writers would or would not have changed or qualified their opinions, even with these cases before them had they been then decided. It may be noted here, however, that these later Massachusetts and Maine cases in effect affirm the doctrine of the early Massachusetts case considered by Mr. Phillips,[12] in determining what constituted the weight of authority, and the same point applies to Mr. Parsons'[13] opinion so far as it positively asserts anything. Mr. Maclachlan's[14] learned discussion, wherein he criticizes the result of the decision before him, is certainly entitled to weight, and we regret that he could not consider the more recent Massachusetts and Maine cases.[15] If the question rested alone upon the number of decisions in this country, the rule as to the ship is against the aggregation of successive losses, although mere numbers do not necessarily constitute what is known as the weight of authority, yet the constant reassertion of a principle is another matter. Nevertheless many reasons will suggest themselves to those familiar with this branch of the law and the practice of adjustments why there should in numerous cases be an addition of successive losses on the ship. In view, therefore, of the fact that the question is beset with so many difficulties, it is with much hesitation that we incline to the rule which permits the aggregation of successive losses under voyage policies, and also under time policies within the continuance of the risk, provided in the latter case such losses are also within a separate and distinct voyage, although in its entirety it may comprise several passages, unless the policy provides otherwise, as it does in some cases.[15a]

§ 2713. **Where liability is limited to invoice value.**—Where the goods were damaged to an amount not equal to the invoice value, but after the damage were worth the invoice value with the cost of importation added, and it was stipulated in the bill of lading that "in the event of damage, for which the ship is responsible, the liability shall not exceed the invoice value," it was held that the carrier was liable for the actual damage.[16]

[11] These cases were not decided until after the publication cited of their works.

[12] See note "Opinions of Text-writers" above.

[13] See note "Opinions of Text-writers" above.

[14] See note "Opinions of Text-writers" above.

[15] Paddock v. Commercial Ins. Co. 104 Mass. 521; Hagar v. New England Mutual Ins. Co. 59 Me. 460.

[15a] See Marine ins. act 1906 of England, sec. 77, given under Appendix C herein.

[16] Brown v. Cunard Steamship Co. 147 Mass. 58, 16 N. E. 717, *criticizing* The Lydian Monarch, 23 Fed. 298; Pearse v. Quebec Steamship Co. 24 Fed. 285, 289.

**§ 2714. Particular and general average losses cannot be aggregated, nor are general average charges included in partial loss.**—If the particular average is less than the specified rate per cent. there can be no recovery, even though when added to the general average it exceeds the rate limited,[17] and it is held that in estimating the damages under a provision that there shall be no right of abandonment unless in adjustment, as of a partial loss, the sum to be paid by the insurer equals one-half the agreed value of the vessel, general average charges are not included.[18]

**§ 2715. Addition of loss by jettison and salvage expenses.**—If the policy stipulates against partial loss and to be "free from average" unless it amounts to ten per cent, a loss occasioned by necessary jettison may be aggregated with salvage expenses to equal the specified rate per cent; at least this is so held in a case where the boat, owing to stress of weather, ran upon a rock, necessitating a jettison and incurring of said expenses.[19]

**§ 2716. Percentage clause qualified by agreement as to salvage and expenses.**—If the policy stipulates against liability under a specified per cent, but the insurers agree in addition to pay proportionably for salvage, they are bound for their proportion of salvage expense, though the loss does not amount to the specified rate per cent limited.[20]

**§ 2717. Whether certain other charges and expenses may be added.**—If expenses are incurred to recover articles totally lost, the underwriters are not liable therefor where they are not responsible for the principal loss by reason of its being only a total loss of part under an insurance free from average.[1] So under a clause making it the duty of assured, in case of any loss or misfortune, to use all reasonable and proper means for the security, preservation, and relief of the property, although the insurers are liable for a proportion of any reasonable expenses incurred in saving the property from the operation of the perils insured against, yet it cannot be added to the damage sustained by the goods to equal the rate per cent specified.[2] The policy may expressly exclude all charges

[17] See Billow v. Western Marine & Fire Ins. Co. 1 La. Ann. 57; Hotchkiss v. Commercial Mutual Ins. Co. 1 Rob. (24 N. Y.) 489; 2 Arnould on Marine Ins. (Perkins' ed. 1850) *866; 2 Id. (Maclachlan's ed. 1887) 834; Id. (9th ed. Hart & Simey) secs. 894 et seq., pp. 1117 et seq.; 2 Phillips on Ins. (3d ed.) 466, sec. 1779.

[18] Reynolds v. Ocean Ins. Co. 22 Pick. (39 Mass.) 191, 33 Am. Dec. 727.

[19] Gazzam v. Cincinnati Ins. Co. 6 Ohio, 71.

[20] Shultz v. Ohio Ins. Co. 1 B. Mon. (17 Ky.) 336.

[1] Biays v. Chesapeake Ins. Co, 7 Cranch (11 U. S.) 415, 3 L. ed. 389. See § 2706 herein.

[2] Indianapolis Ins. Co. v. Mason, 11 Ind. 171. As to liability under the suing and laboring clause, see Cory v. Boylston Fire & Marine Ins. Co. 107 Mass. 140, 9 Am. Rep. 14;

and expenses incurred for the purpose of ascertaining and proving the loss.[3] Otherwise, a question might exist whether such charges and expenses could be added to the damage to bring the loss within an exception limiting liability under the policy, although it seems to be the rule that such expenses and charges are not to be added to carry the loss beyond the limitation. So Mr. Phillips, in determining "whether the expenses of surveys, certificates, protests, and of the adjustment of the loss are to be included in determining whether a loss comes within any exceptions," thinks that the proper rule is that such charges and expenses must fall upon the party on whom the loss must have rested in case its amount had been ascertained without any expense.[4]

In a Federal case where the insurance was upon the hull under a stipulation to pay the loss if amounting to three per cent. it was held that while items for surveys, protest and adjusters charges were proper charges if the loss amounted to said per cent, still they could not be availed of to increase the loss to three per cent. An arbitrary charge of a salaried officer for superintending repairs was also rejected, it not being shown what his salary was, so that there was no basis for estimating what would be the pro rata for his time. The injury was to the rudder and because making full repairs would have necessitated a delay it was not repaired so as to put it in the condition it was in before the injury although it was made efficient, but the value of the vessel was thereby depreciated. Upon this point it was also decided that while something might be added to the cost of repairs for such diminution of value, still this was subject to the proviso that the combined amount shall not be in excess of the estimated cost of making complete repairs less the usual deduction for improvements; and as there was no evidence sufficient to show that said cost of proper repairs would have equaled the stipulated per cent the estimated depreciation in the value of the vessel could not be added to the cost of repairs as made, to bring the loss within the policy terms.[4a]

Under the Marine Insurance Act of 1906 of England "expenses

Juhel v. Marine Ins. Co. 7 Johns. (N. Y.) 412. In this case it is held that expenses incurred in attempting to recover the property may be recovered in addition to total loss.

[3] So excluded in the policies in Donnell v. Columbian Ins. Co. 2 Sum. (U. S. C. C.) 366, Fed. Cas. No. 3,987; Indianapolis Ins. Co. v. Mason, 11 Ind. 171.

[4] 2 Phillips on Ins. (3d ed.) 476 et seq., sec. 1791; Benecke's Principles of Indemnities, 474; 2 Arnould on Marine Ins. (Perkins' ed. 1850) *876; 2 Id. (Maclachlan's ed. 1887) 834; Id. (9th ed. Hart & Simey) secs. 894 et seq., pp. 1117 et seq.

[4a] Bull v. Insurance Co. of North America, 218 Fed. 616, 134 C. C. A. 374, 45 Ins. L. J. 521. See § 2702 herein.

incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.[4b]

**§ 2718. Exception of loss under specified percentage: other insurers.**—Under a policy containing the clause "free from particular average" under fifty per cent, certain amounts paid for agents expenses and salvors were claimed as reimbursable under the sue and labor clause, but upon exceptions taken it was held that recovery thereof was precluded when there are other insurers and the proportion of loss payable by the respondent is less than fifty per cent of the amount of the policy.[4c]

**§ 2719. Exception as to leakage, breakage, dampness, etc.**—If the policy expressly stipulates against liability for leakage or for damage or injury to goods from dampness, rust, change of flavor, etc., unless the same be occasioned from a specifically designated cause, reference must be had particularly to that cause in determining whether the insurer is liable. Thus, the insurers are exempt from liability for all leakage, ordinary or extraordinary, and from whatever cause, whether gradual or violent in its operation, except those specified in case the policy provides against liability for leakage unless occasioned by stranding or collision.[5] So where the policy stipulated against liability for leakage on molasses, etc., unless occasioned by stranding or collision, but in the margin was this memorandum: "On molasses, etc., if by shifting of cargo, owing to stress of weather, any cask become stove or broken, the staves started by each other, so as to lose their entire contents, and the same amount as to fifteen per cent on the quantity laden (being five per cent over ordinary leakage) the said excess of five per cent or over on the quantity shipped to be paid for by the company, but the company not liable for leakage arising from other causes than above mentioned," it was held that there could be no recovery for any loss by leakage, unless occasioned by stranding, nor for any loss by shifting of the cargo, unless such loss amounted

[4b] See marine insur. act 1906 of England, sec. 64, subdiv. (2) sec. 76, subdiv. (4) given in Appendix C herein. See also § 2697a herein.

[4c] Buzby v. Phoenix Ins. Co. (U. S. D. C.) 31 Fed. 422 (Butler, J., briefly considered the point whether insurers were liable and said that "In this country it is undecided" but evidently the decision in sustaining the exceptions was based upon Aitchison v. Lohre, 4 App. Cas. 755, 2 Q. B. D. 501, 3 Q. B. D. 558, 49 L. J. Q. B. 123, 41 L. T. 323, 28 W. R. 1, 4 Asp. M. C. 168.

[5] Cory v. Boylston Fire & Marine Ins. Co. 107 Mass. 140, 9 Am. Rep. 14.

As to leakage, breakage, "extraordinary leakage:" marine risks and losses, see §§ 2780, 2780a herein.

to fifteen per cent of the quantity laden;[6] and in another case wherein it was stipulated that the liability should not extend to leakage on liquids, etc., "unless occasioned by stranding or collision," and further providing by indorsement that the insurance was "on spirits of turpentine in cases packed in boxes on deck, free from loss by wet, breakage, leakage, or exposure," it was held that the insurers were exempted from liability for losses of which leakage was the proximate cause, whatever might be the cause by which the leakage itself was occasioned and, consequently, although occasioned by a peril insured against.[7] Again, in a policy on champagne wine valued by the case, it was provided that the insurers should not be liable for "damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored, musty, or moldy, unless the same be caused by actual contact with sea water with the articles damaged occasioned by sea peril," and it was held that, so far as the sea water came into actual contact with any case or package, the insurers were liable for any injury occasioned either by such direct contact or by heat or dampness thereby generated, but not for any injury by dampness or change of flavor to other packages, no part of which came into actual contact with the sea water,[8] and under a like clause in a policy on a cargo of barley in sacks, the malting quality of which was impaired, it was held that assuming that the damage to the sacks of barley which were not reached by the sea water, was caused by damp vapor arising from other sacks that were reached by the sea water which came into the vessel through a peril of the seas, such damage was not caused by actual contact of sea water with the articles damaged within the meaning of the policy, and that the company was not liable;[9] and the same ruling has been applied to an insurance on packages of teas under a like clause.[10] But if the cargo insured is in bulk, and of such a character that actual contact of sea water with a part may by absorption extend to the whole, such other portions will be affected by the cause designated as that insurers will be liable for the whole damage, but if the damage is caused by effluvia emitted by another part of the cargo of a distinct character, the insurer is not liable, even though such latter cargo is damaged by sea water. This is so held in a case of grain in bulk and hides.[11]

[6] McLaughlin v. Atlantic Mutual Ins. Co. 57 Me. 170.

[7] Neilson v. Commercial Mutual Ins. Co. 10 N. Y. Super. Ct. 455.

[8] Cory v. Boylston Fire & Marine Ins. Co. 107 Mass. 140, 9 Am. Rep. 14.

[9] Neideinger v. Insurance Co. of North America, 18 Blatchf. (U. S. C. C.) 297, 11 Fed. 514.

[10] Cator v. Great Western Ins. Co. 8 L. R. C. P. 552, 42 L. J. C. P. 266, 29 L. T. 136, 21 W. R. 850, 2 Asp. M. C. 90.

[11] Woodruff v. Commercial Ins. Co. 2 Hilt. (N. Y.) 122.

If a vessel upon becoming disabled at sea is stranded while being towed, and her bottom is damaged by pounding upon a reef, and upon first warehousing her cargo during repairs it appears in good condition although it is damaged by contact with sea water, handling, and being detained in a tropical climate, there is a loss by leakage occasioned by stranding within a policy excepting leakage unless occasioned by stranding, the policy also containing an exception of particular average unless the vessel be stranded.[12]

§ 2720. **Whether under exception of loss under specified percentage the premium should be deducted.**—It is held in Massachusetts that under an exception of liability "for a particular average" the percentage must be reckoned on the valuation, less the premium.[13] This rule has not been acted on in England, but the rule there is, says Mr. Arnould, "that the underwriter is liable whenever the loss under the limitations already pointed out amounts to five per cent or three per cent on the value in the policy or on the prime cost plus the premium and other costs of insurance," and this is restated by Mr. Maclachlan.[14] Mr. Phillips says, "The more scientific rule is to include the premium in estimating the value." [15] Mr. Parsons is of opinion that it should not be included "or else that it should be included also in estimating the amount of the value insured." [16]

§ 2721. **Exception of liability under specified percentage: deviation.**—If the policy stipulates against liability except the loss amount to a certain percentage and there is a deviation the insurer is not liable, unless the amount of the damage or loss sustained before the deviation equals the rate per cent specified, at least, this would seem to be the rule.[17] The case of a deviation, however, apparently rests upon different principles than that where the risk has terminated by its own limitation, and not by the breach of an implied condition in the policy.

§ 2722. **Exception of claim arising from canceling of charter.**—If a policy upon freight stipulates that "no claim arising from the canceling of any charter" shall be allowed, and the adventure is

[12] De Farconnet v. Western Ins. Co. (U. S. D. C.) 110 Fed. 405, aff'd 122 Fed. 448, 58 C. C. A. 612, s. c. 190 U. S. 558, 47 L. ed. 1183, 23 Sup. Ct. 854.

[13] Brooks v. Oriental Ins. Co. 7 Pick. (24 Mass.) 259.

[14] 2 Arnould on Marine Ins. (Perkins' ed. 1850) *870; Id. (Maclachlan's ed. 1887) 838; Id. (9th ed. Hart & Simey) sec. 900, p. 1122.

[15] 2 Phillips on Ins. (3d ed.) 476, sec. 1790.

[16] 2 Parsons on Marine Ins. (ed. 1868) 135, 136. See also 1 Parsons on Marine Ins. (ed. 1868) 270, 271.

[17] Hare v. Travis, 7 Barn. & C. 14, 9 D. & R. 748, 5 L. J. (O. S.) K. B. 348, 31 R. R. 139, 9 Eng. Rul. Cas 357.

frustrated by delay occasioned by perils of the sea while the vessel is on her way to a port of loading, and the voyage contemplated by the charter becomes impossible, the charter is not canceled, no agreement to actually set aside the charter being made by the parties, and insurers are liable.[18]

[18] In re Jameson & Newcastle Steamship Freight Ins. Assoc. 2 L. R. Q. B. D. (1895) 90, 64 L. J. Q. B. 560, 14 R. R. 444, 72 L. T. 648, 43 W. R. 530, 7 Asp. M. C. 593, rev'g 1 L. R. Q. B. D. (1895) 510, per Lord Esher, M. R.

# TITLE XI.

## RISKS AND LOSSES.

### CHAPTER LXXIII.

### RISKS AND LOSSES.

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**§ 2730. What risks and losses may be insured against: liability: generally.**—There are certain general principles governing contracts of insurance and liability thereunder. Thus all losses or risks may be insured against except such as are repugnant to public policy, positive prohibition, or are occasioned by the insurer's own fraud or misconduct; there must be some interest at risk, but it is not necessary that the thing insured should have a price or be capable of being assigned.[19] And within these limits the parties may as a rule make such contracts as they choose, or may qualify or limit the liability assumed either by specification of the amount of indemnity or by the enumeration of certain perils, or by the exclusion of specified perils, or by a limitation of the trade in which the assured in marine risks may engage, or by other limitations in other risks too numerous to be stated, or the policy may be against all risks. It may be stated as a general rule that the loss must be

[19] Bell v. Western Marine & Fire Ins. Co. 5 Rob. (La.) 423, 39 Am. Dec. 542. As to void and illegal insurances, see §§ 2506 et seq. herein.

occasioned by one of the perils in the policy to entitle the assured to recover.[20] The risk run must also correspond with that understood and intended to be run at the time of subscribing the policy in order to subject the insurers to the loss.[1] So the liability on a fire policy is simply to indemnify the assured for any loss actually sustained by him through the burning of the insured premises.[2] And as indemnity is the object of insurance, it is a rule in marine risks that where the loss is of a like nature with the specified peril, or substantially within its meaning, the underwriters are liable.[3] The loss of the voyage as to the cargo is not a loss of the voyage as to the ship.[4] And if a vessel by reason of the perils against which she is insured is unable to proceed with her original cargo, it is a loss of the voyage, though she may be capable of performing it with a lighter cargo.[5] If a cargo is insured on a canal boat against perils of the "seas, rivers," etc., these words will cover and include the perils of canal navigation.[6] So a contract of insurance must be regarded as a fire risk where the hazard is fire alone, and the subject is an unfinished vessel never afloat for a voyage and not a subject for marine navigation.[7] If it is clearly evident from the order for insurance and acceptance that neutral and belligerent risks were intended to be covered, such risks will be included.[8]

*What risks and losses insured against in case of shipments to be subsequently approved and endorsed on marine policy, etc.; distinctions; waiver.*—As we have elsewhere stated, marine insurance may be effected upon goods, merchandise, or property stipulated to be subsequently declared or indorsed upon the policy or otherwise,[8a] but it is nevertheless pertinent here to consider the point, with others, that in a Federal case a distinction is made, as to risks and losses or liability, between an open marine policy and one which is restrictive in that it stipulates that no risk is to attach to the policy until the amount and description of the same shall be approved and endorsed thereon by insurer, to be valued at the sum so indorsed, and also providing that "premiums as may be agreed upon

[20] Swan v. Union Ins. Co. 3 Wheat. (16 U. S.) 168, 4 L. ed. 361; Cleveland v. Winn, 8 Mass. 308.

[1] Norris v. Insurance Co. of North America, 3 Yeates (Pa.) 84, 2 Am. Dec. 360.

[2] Flanagan v. Camden Mutual Ins. Co. 25 N. J. L. (1 Dutch.) 506.

[3] Monongahela Ins. Co. v. Chester, 43 Pa. St. 491.

[4] Alexander v. Baltimore Ins. Co. 4 Cranch (8 U. S.) 370, 2 L. ed. 650.

[5] Abbott v. Broome, 1 Caines (N. Y.) 292, 2 Am. Dec. 187.

[6] Protection Ins. Co. v. Wilson, 6 Ohio St. 553.

[7] Eureka Ins. Co. v. Robinson, 56 Pa. St. 2, 94 Am. Dec. 65.

[8] Maryland Ins. Co. v. Bathurst, 5 Gill & J. (Md.) 159.

[8a] See §§ 1576, 1736 herein.

at the time of the indorsement to be settled monthly in cash," for in such case the policy is held not changed into an open and unrestricted policy covering all risks which the assured elects to report, even after notice of loss, notwithstanding a custom extending over a long period of time as to reporting risks when convenient in due course of business after the departure of the vessel in the manner and form hereinafter stated, and the uniform acceptance of risks by insurer.[8b]

As a premise for the conclusions in this case said stipulations are divided into three parts or conditions: (1) Approval of the amount and character of the risk; (2) An endorsement thereof upon the policy by insurer, and; (3) an agreement as to the premium at the time of the indorsement. It is also declared in respect thereto that the first is a condition precedent and is essential and vital as affecting the entire character of the contract as a distinct one with relation to each shipment and so qualifies the usual unrestricted terms of an open policy. It is further asserted, however, that the other two conditions are not so clearly essential although the third one is a condition precedent and subsidiary to the first.

In addition to what is above stated it appeared that an open policy which had been continuously renewed for many years, had been attached to the front page of a blank book with printed pages and columns for this stipulated entries, and in this there was written an agreement that indorsements thereon were to be deemed made on the policy. Thereafter indorsements were entered in new pass books issued from time to time, but the policy was left pasted in one of the old books filled with indorsements. Blank insurance orders or "slips" were also furnished by insurer, which were filled out upon receipt of information as to the name of the vessel and the amount of shipment and these were sent at intervals and frequently in batches, usually through the mails, often after the vessel had been at sea for some days, and sometimes after its arrival abroad, and although in some instances of this latter kind insurer had refused premiums no risk had been rejected prior to the one in question in this action, and in this particular instance at the time the notice of shipments was sent and received by mail, both parties knew that there had been a total loss of the goods. The premiums were, however, fixed by a schedule of rules furnished by insurer, and not at each shipment.

Accordingly the point as to the distinction between risks and losses under an open marine policy and the insurance here under consideration was decided as first above stated; and it was further held that assurer was not bound to approve a risk after report of a

[8b] See § 158 herein.

loss, in the absence of evidence of a previous approval, and that no waiver was established by the course of dealing; also that the indorsement by insurer's clerk of a slip of paper notifying insurer of a shipment to be covered in the usual way, with the amount of the premium and the check mark indicating its readiness for entry in the books, did not show an acceptance of the risk in the face of its positive rejection by insurer as soon as it learned that it was on property already lost of which insurer is notified without delay.[8c]

§ 2731. **Abortion: public policy.**—Death as the result of an abortion is not ground of recovery, it being against public policy to permit the enforcement of the claim.[9]

[8c] Delaware Ins. Co. v. S. S. White Dental Manufacturing Co. 109 Fed. 334, 48 C. C. A. 382, 30 Ins. L. J. 961 (rev'g 105 Fed. 642, certiorari denied 183 U. S. 700, 46 L. ed. 396, 22 Sup. Ct. 436), *citing* Orient Ins. Co. v. Wright, 23 How. (64 U. S.) 401, 16 L. ed. 524 (a case where insurance was upon coffee "laden or to be laden on board" etc., additional premium "to be fixed at the time of endorsement and such clauses to apply as the company may insert as the risks are successively reported;" and distinction is made as to the premium in this class of policies and the ordinary running policy in which the rate of premium to be paid is ascertained and inserted in the body of the policy at the time of its execution and the contract becomes complete and the policy attaches, etc., while in the policy in question there was something more to be done, in order to make the contract complete, than merely to declare the ship, that is the assured must pay the additional premium as fixed in respect to the particular shipment in order to make it complete and binding; holding also that unless the right to increase the rate is reserved in certain contingencies the rate cannot be thereafter varied by one of the parties if none of the contingencies exist. This case is also *considered* under § 1088, at pp. 2177, 2178 herein, and as to premium to cover additional risks to be approved, etc.: augmentation or diminution of premium, see § 1093 herein); Doville v. Sun Mutual Ins. Co. 12 La. Ann. 259; Schaefer v. Baltimore Marine Ins. Co. 33 Md. 109; Platho v. Merchants & Manufacturers Ins. Co. 38 Mo. 248; and *considering* Emery v. Boston Marine Ins. Co. 138 Mass. 398; Hartshorn v. Shoe & Leather Dealers Ins. Co. 15 Gray (81 Mass.) 240; E. Carver Co. v. Manufacturers Ins. Co. 6 Gray (72 Mass.) 214. See Petrie v. Phenix Ins. Co. 132 N. Y. 137, 30 N. E. 380 (canal cargo policy: stipulation that risk not insured unless indorsed, approved and signed by insurer or its agent: evidence held to justify submission of acceptance to jury and its verdict that risk accepted was final). See § 1736 herein.

As to last point in above text, see § 104a herein.

As to "lost or not lost" insurance retroactive, see also §§ 105–108, 1443, 1444, 1563, 1564 herein.

As to goods to be shipped from time to time: insurance not to cover more than a specified amount by any one steamer or in any one place at one time: amount of insurance and not amount of loss is meant, see Hood Rubber Co. v. Atlantic Mutual Ins. Co. 170 Fed. 939, 96 C. C. A. 99, 38 Ins. L. J. 1092, aff'g 161 Fed. 788.

[9] Hatch v. Mutual Life Ins. Co. 120 Mass. 550, 21 Am. Rep. 541, *cited* and principle applied in Burt v. Union Central Life Ins. Co. 187 U. S. 362, 366, 47 L. ed. 216, 23 Sup. Ct. 139.

Particular representations and

§ 2732. **Accident disabling ship: chartered freight.**—If an insurance is effected against loss of chartered freight under a clause in a charter party stipulating that the payment of the hire of the ship shall cease if, during the specified time, she becomes disabled by accident, and the ship sustains a damage by accident which is not discovered until after the expiration of the charter party, so that no loss of freight is sustained, no recovery can be had against the underwriters, even though renewal of the charter party is prevented by reason of delay for necessary repairs.[10]

§ 2733. **Advances: bottomry draft: entire contract: freight earned at intermediate port: salvage: owner's liability.**—If an insurance be effected on advances against a bottomry draft for the payment of which the vessel and freight are pledged, and the advances are made on an obligation of the master to pay within a specified time after arrival at the final port of destination, and the consignees at said port are directed to pay the same from the first amount of freight received, the contract is not divisible, the insurance begins when the risk begins, ends when it ends, and the lender's risk continues until the vessel reaches the final port or is lost. This contract differs from an insurance on ship or freight under a risk of this character. If freight is received at an intermediate port it does not then diminish the bottomry lender's risk on his advances, since it is not then legally available to him, and may never become so, and if the vessel founders and becomes a total loss before the final port is reached the insurers are liable, nor does the freight so earned and collected discharge the insurance pro tanto, although the bottomry lender would, however, be entitled to salvage, if any. As to the freight received, which was stated in a letter from the owner to be "only enough to pay expenses for discharging at a port of distress, and the owners got no benefit," it may be inferred that the master lawfully used it for the necessities of the voyage; nor under the German Code, article 452, does any personal liability rest upon the owner for contracts made by the master in his ordinary capacity. The perils insured against in this case were all those "of the seas which reduce the things hypothecated to a less value than the sums insured, or which prevent the collection of said draft in whole or in part." [11]

warranties; abortion; inquiries as to, see § 1987a herein.

Death caused by submission to illegal operation, see § 2616 herein.

[10] Hough v. Head, 54 L. J. Q. B. 294, 33 Week. Rep. 458, aff'd 55 L. J. Q. B. 43, 53 L. T. 809, 34 W. R. 160, 5 Asp. M. C. 505.

[11] Force v. Providence-Washington Ins. Co. 35 Fed. 767. *Cited* in Great Lakes Towing Co. v. Mill Transportation Co. 22 L.R.A.(N.S.) 769, 155 Fed. 11, 17, 83 C. C. A. 607 (a case as to the limitation of liability of a shipowner to the proportion of any and all debts and liabilities that his

If advances to a vessel on a master's draft pledging vessel and freight are insured, and the managing owner by contract attached to such a draft pledges the vessel, owners, and freight, and agrees that said draft shall be paid out of the first freight, such advances are covered by the policy even though the draft on which they are made does not pledge vessel and freight. And in such case the payment of such draft and the consummation by execution of said contract need not precede issuing the policy in order to validate it, as it is sufficient that, if prior thereto, the agreement to pay and execution of the contract were made.[12]

**§ 2734. "All risks:" general policy: war risks.**—An insurance may be in general terms by a policy covering all risks. Thus, a policy against "all risks" inserted in writing covers everything that may happen except by the fraudulent acts of the insured.[13] And a policy insuring against all marine risks is just as binding and effectual as if the risks are specified in detail.[14] So an insurance on horses on a voyage against "all risks, including death from any

individual share of the vessel bears to the whole, etc., under Act Cong. June 26, 1884, sec. 18, 23 Stat. 57, c. 121; U. S. Comp. Stat. 1901, p. 2945, and Rev. Stat. sec. 4283; U. S. Comp. Stat. 1901, p. 2943); Rudolf v. Brown (U. S. D. C.) 137 Fed. 106, 108 (a case of owner's liability for supplies; under above statutes of 1884 & 1851); The Colima (U. S. D. C.) 82 Fed. 665, 679 (a case of limitation of liability under Harter act; negligent loading, and object of statute); The Republic (Myers Excursion & Navigation Co., In re) 61 Fed. 109, 113, 9 C. C. A. 386 (a case of limitation of liability; corporate shipowners; construction, scope and object of statute); Miller v. O'Brien (U. S. D. C.) 59 Fed. 622, 623 (to point that general maritime rule is that if there be any salvage or any proceeds of any of the effects covered by bottomry the bondholders even attach thereon though ship be lost; also, liability of shipowner to contribute to payment of respondentia bond); Gokey v. Fort (U. S. D. C.) 44 Fed. 364, 365 (a case of limitation of liability; statutes of 1884, 1851 construed; collision; repairs); Laverty v. Clausen (U. S. D. C.) 40 Fed. 542, 543 (a case as to construction of limitation of liability of owners of vessels under statutes 1851, 1884); The Lykus (U. S. D. C.) 36 Fed. 919, 921 (case of advances on cargo; bottomry bond; freight); Miller v. O'Brien (U. S. D. C.) 35 Fed. 779, 781, 782, 783 (masters contract; bottomry bond; "I think that the 'obligation' that by the condition is to become void may be fairly construed as intended to mean only the personal obligation or agreement to pay the loan; leaving the pledge operative upon any salvage recoverable, in the same manner as where the saving clause is embodied in the instrument").

[12] Neall v. Union Marine Ins. Co. (U. S. D. C.) 95 Fed. 491, aff'd 115 Fed. 776, 53 C. C. A. 338. Advances: advancements by charterer and master; advances on freight; description, see § 1706 herein. Bottomry and respondentia; description, see § 1710 herein.

[13] Goix v. Knox, 1 Johns. (N. Y.) Cas. 337. But see Marcy v. Sun Mutual Ins. Co. 11 La. Ann. 748.

[14] Parkhurst v. Gloucester Fishing Ins. Co. 100 Mass. 301, 1 Am. Rep. 105, 97 Am. Dec. 100.

cause whatever," will entitle assured to recover for the loss of a horse caused by injuries sustained on the voyage owing to heavy weather.[15]

An insurance, by an attached slip, against all risks in addition to the ordinary perils insured against in the usual form of a Lloyd's policy, will cover damage to goods by damp, wetting, and insects, owing to delay in transit by reason of the transport being disorganized by a civil war in Colombia the goods being insured from Savinilla, a seaport in Colombia, to Medellin a town in the interior, the transit being partly by rail, by boat up a river, and on mules.[15a]

A general policy unaccompanied with any warranty covers war risks of all kinds and of all countries.[16] This has reference necessarily, however, to such risks only as are legal, and involves other questions, such as concealment, etc., which have been considered elsewhere.[17] Where the underwriters assume the "risks contained in all regular policies," a loss by capture is within the policy. And parol evidence is not admissible to prove that the parties understood it as covering sea risks only.[18] But a loss happening from condemnation on the ground of an attempted rescue is not within a policy on the usual risks.[19] Whether a risk is a "marine" or "war risk" is sometimes a question; as when a steamer during the Civil War was chartered by the government and was wrecked by ice in the Potomac, it was held a "marine" risk.[20] And where the insurance

[15] Coit v. Smith, 3 Johns. (N. Y.) 16.

[15a] Schloss v. Stevens, 75 L. J. K. B. 927, [1906] 2 K. B. 665, 11 Com. Cas. 270, 22 T. L. R. 774 (clause was: "Including all risk by craft or boats to and from the vessel and all risks [including fire] from the warehouse, factory or calendar while in transit by railway or any conveyances, and while in warehouse and/or shed or on wharf whilst awaiting forwarding or shipment and of transhipment and of all risks by land and by water by any conveyance until safely delivered into the consignees' warehouse or elsewhere.")

As to delay in voyage: risks and losses, see § 2760 herein.

Charter party: when duty of owner to effect insurance against war risks: damages, see Holland Gulf Stoomvart Mattschappij v. Watson Munro & Co. 13 Mar. L. C. N. S. 279. —Bailhache, J., 13 Mar. L. C. N. S. rev'd 113 L. T. 178.

[16] Barnewall v. Church, 1 Caines (N. Y.) 217, 2 Am. Dec. 180. See Parker v. Jones, 13 Mass. 173; Merchants' Ins. Co. v. Edmond, 17 Gratt. (Va.) 138; Elting v. Scott, 2 Johns. (N. Y.) 157.

[17] See chapters on Concealment, §§ 1786 et seq., and on Void and Illegal Insurances, §§ 2506 et seq. herein.

[18] Levy v. Merrill, 4 Greenl. (4 Me.) 180.

[19] Robinson v. Jones, 8 Mass. 536, 5 Am. Dec. 114.

[20] Reybold v. United States, 15 Wall. (82 U. S.) 202, 21 L. ed. 57.

*When risk is fire and not marine* under policy, although terms general average, etc., used, see United London & Scottish Ins. Co. In re (Newport Navigation Co's Claim), [1915] 2 Ch. 12, 84 L. J. Ch. 544, 20 Com. Cas. 300, 113 L. T. 400, 59 S. J. 529,

was upon a Sidmouth license from Boston to Alexandria against loss by capture or "its being destroyed by the ordinary perils of the sea, fire, or otherwise," and the vessel was boarded by a British ship of war and the license so indorsed that its value was destroyed as to any other vessel, this was held a loss within the policy.[1]

The circumstances may be such as, without direct evidence thereof, to justify the conclusion that there has been a loss by a war risk. Accordingly where a vessel left London for Havre in a seaworthy condition and was last seen on the next day off Dungeness, and two other steamers had been torpedoed on the same day off Havre, and it also appeared that some of the ship's life buoys, also a bottle containing the company's envelope with the penciled words "Oriole—torpedoed—sinking," had been picked up, it was held that an underwriter of war risks excluded by the free of capture, etc., clause was liable, but that an insurer against ordinary marine perils, war risk excluded was not liable.[1a]

If all risks are taken, this covers mutiny and insurrection if not excepted; as in case of an insurance on slaves.[2] So a policy against all risks includes the barratry of the master and mariners, even when the owner of the vessel himself appoints them.[3]

**§ 2734a. "All risks:" mortality: policy on dog.**—A policy on a dog during transit, covering all risks, including mortality, from any cause, jettison and washing overboard; but walking at the port of destination to be deemed a safe arrival, is not limited merely to mortality, but includes all risks, and walking on three legs only by reason of an injury during transit is not walking within the terms of the policy.[4]

**§ 2735. "All other perils," etc.: "all unavoidable perils:" "all such perils."**—After the enumeration of certain perils which the insurer assumes in marine risks, there follows a general clause in which the English policy reads as follows: "All other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of said goods and merchandises and ship, etc., or any part thereof."[5] This is not, however, the exact language of all policies

31 T. L. R. 424, aff'g 31 T. L. R. 261, *considered* under § 2780 herein.

[1] Perkins v. New England Marine Ins. Co. 12 Mass. 214, 215.

[1a] General Steam Navigation Co. v. Commercial Union Assur. Co. (Same v. Janson) 31 T. L. R. 630.

[2] McCargo v. Merchants' Ins. Co. 10 Rob. (La.) 334; Lockett v. Merchants' Ins. Co. 10 Rob. (La.) 339.

[3] Parkhurst v. Gloucester Fishing Ins. Co. 100 Mass. 301, 97 Am. Dec. 100, 1 Am. Rep. 105. But see §§ 2736, 2742, 2743 herein.

[4] Jacob v. Gaviller, 87 Law T. 26, 7 Coml. Cas. 116, 50 Wkly. Rep. 428.

[5] Marine insurance act 1906 (6 Edw. VII. c. 47) Sched. I.; Butterworth's Twentieth Century Stats. (1900–1909) p. 425.

using the general clause, for the form varies.[6] This clause, says Lord Ellenborough, "may have the effect of extending reasonable indemnity to many cases not distinctly covered by the special words; they are entitled to be considered as natural and operative words," and he also declares that they "comprehend and cover other cases of marine damage of like kind with those specifically enumerated and occasioned by similar cases." And the clause was held to cover a case where a vessel, being mistaken for an enemy's ship, was fired into and sank, the loss being within such a clause.[7] This language of Lord Ellenborough has been substantially adopted as a rule by textwriters both in England and in this country.[8] It is also substantially adopted by Mr. Justice Duer in a case in this country,[9] and by Lord Bramwell in an English case decided in 1887;[10] and although the words are broad enough, yet they are, to the extent above indicated, limited in their application by the specification which immediately precedes them.[11] It may be stated here, however, that Mr. Phillips, relying upon a case quoted under the preceding section,[12] is of opinion that if a clause of this character be

[6] One form used on cargo reads: "All other losses and misfortunes that have or shall come to the hurt, damage, or detriment of the said property or interest to which the insurers are liable by the rules and customs in . . . excepting such losses and misfortunes as are excluded by this policy," and on vessel the clause reads: "All other losses and misfortunes that shall come to the hurt or damage of the vessel hereby insured, or any part thereof, to which the insurers are liable by the rules and customs in . . . including the rules for adjustment printed on back hereof and the provisions of the civil code . . . excepting such losses and misfortunes as are excluded by this policy." So also in other cases the form varies.

[7] Cullen v. Butler, 5 Maule & S. 461, 4 Camp. 289, 17 R. R. 400, 1 Stark. 110, per Lord Ellenborough.

[8] 2 Arnould on Marine Ins. (Perkins' ed. 1850) *842; 2 Id. (Maclachlan's ed. 1887) 789. But see Id. (9th ed. Hart & Simey) sec. 823, p. 1031; sec. 860, p. 1073; 1 Parsons on Marine Ins. (ed. 1868) 544, 612–14; 1 Phillips on Ins. (3d ed.) 644–66, sec. 1126.

[9] Moses v. Sun Mutual Ins. Co. 1 Duer (N. Y.) 159, per Duer, J.

[10] Thames & Mersey Marine Ins. Co. v. Hamilton, 56 L. J. Q. B. 626, 12 App. Cas. 484, 57 L. T. 695, 36 W. R. 337, 6 Asp. M. C. 200.

[11] Moses v. Sun Mutual Ins. Co. 1 Duer (N. Y.) 159, per Duer, J.

See, as to this principle, Rich v. Lord, 18 Pick. (35 Mass.) 322; Vaughan v. Porter, 16 Vt. 266; Moore v. Magrath, Cowp. 9, 12, per Lord Mansfield (*cited* in Walsh v. Trevanion, 19 L. J. Q. B. 458, 2 Eng. Rul. Cas. 739, 743; Rook v. Lord Kensington, 25 L. J. Ch. 795, 14 Eng. Rul. Cas. 717, 722, 723); Lyndon v. Stanbridge, 2 Hurl. & N. 45, 51, 26 L. J. Ex. 386, 5 W. R. 590, per Pollock, C. B.; Bank of British North America v. Convilleer, 14 Moore P. C. 187, 4 L. T. 159; Regina (The Queen) v. Edmondson, 2 El. & E. 77, 83, per Lord Campbell, C. J.; Agar v. Atheneum Life Assur. Soc. 3 Com. B. (N. S.) 725, 27 L. J. C. P. 95, 4 Jur. (N. S.) 211, 6 W. R. 277.

[12] Goix v. Knox, 1 Johns. Cas. (N. Y.) 337.

written in, it has a paramount force, and includes all perils which can be legally covered.[13] The Marine Insurance Act of England now provides that: "The term 'all other perils' includes only perils similar in kind to the perils specifically mentioned in the policy." [14]

§ 2736. **Same subject: instances.**[15]—Under the decisions this clause covers a loss by collision,[16] by explosion,[17] an injury caused by the vessel's being thrown over, owing to her fastenings at her moorings giving away at the ebbing of the tide,[18] an injury caused by the vessel's being blown over while in a graving dock for repairs after discharging her cargo,[19] a loss by barratry [20] when expressly insured against,[21] a loss incidental to capture or in the nature of jettison, as where specie was sunk, thrown overboard, in shallow water to save it from capture, the act not being that of assured,[1] and a loss caused by a mob of citizens of the confederate forces during the Civil War compelling the vessel to land and taking possession of her and her cargo, whereby the cargo insured was totally lost.[2] If the policy covers "unavoidable" dangers this does not refer to the duties of those in charge of the boat or to their mere neglect but to such perils as are incident to navigation and from their nature inseparable from it, and such as are embraced in the policy,[3] nor is the necessary sale and consumption of a cargo of provisions at an intermediate port covered by the general clause.[4] And where an insurance is only upon the ship, hulls and materials, machinery and boilers, under a time pol-

[13] 1 Phillips on Ins. (3d ed.) 666, sec. 1126.

[14] Marine insurance act 1906 (6 Edw. VII. c. 41) Sched. I., r. 12; Butterworth's Twentieth Century Stats. (1900–1909) p. 425; 15 Chitty's Stats. (1902–1907) p. 907.

[15] See § 2734 herein.

[16] Caldwell v. St. Louis Perpetual Ins. Co. 1 La. Ann. 85.

[17] Perrin v. Protection Ins. Co. 11 Ohio, 147, 38 Am. Dec. 728; Citizens' Ins. Co. v. Glasgow, 9 Mo. 411.

[18] Napier v. Wood, 4 (Shaw & D.) Ct. Sess. Cas. 19.

[19] Phillips v. Barber, 5 Barn. & Ald. 161, 24 R. R. 317. See Ellery v. New England Ins. Co. 8 Pick. (25 Mass.) 14; De Vaux v. Janson, 5 Bing. (N. C.) 519, 7 Scott, 507, 2 Arn. 82, 8 L. J. C. P. 284, 3 Jur. 678.

[20] Jones v. Nicholson, 10 Exch. 28, 2 C. L. R. 1236, 23 L. J. Ex. 330.

[21] Words "all other perils," etc., are not sufficient to entitle assured to recover for a loss occasioned by barratry of the master where barratry not expressly mentioned as a risk insured against. O'Connor v. Mercantile Marine Ins. Co. 20 Nov. S. R. (8 R. & G.) 519, aff'd 9 Can. L. T. 209. See §§ 2734, 2742, 2743 herein.

[1] Butler v. Wildman, 3 Barn. & A. 398, 22 R. R. 435.

[2] Babbitt v. Sun Mutual Ins. Co. 23 La. Ann. 314; Monongahela Ins. Co. v. Chester, 43 Pa. St. 491 (the general clause in this case was "all such losses"); De Peu v. Russell, 1 Brev. (S. C.) 441, 2 Am. Dec. 676.

[3] Louisville Underwriters v. Pence, 93 Ky. 96, 40 Am. St. Rep. 176, 19 S. W. 10, 14 Ky. L. Rep. 21, per Holt, C. J.

[4] Moses v. Sun Mutual Ins. Co. 1 Duer (N. Y.) 159.

icy, and although it covers perils of the sea and all other perils, losses and misfortunes which may come to her hurt, detriment or damage, a recovery cannot be had by shipowners for loss consequent upon dealing with a cargo between the date of a collision and the date of arrival, and costs and charges for discharging the same where said collision knocked a hole in the ship's bottom, by reason of which the cargo became rotten, offensive and worthless by the action of sea water and mud, and was ordered by the authorities to be abated as a nuisance which necessitated its discharge.[5]

If insurance against perils of "the seas, fire, jettisons, and of all other perils, losses and misfortunes," etc., is effected, upon freight valued at a specified amount, on the voyage, and the vessel is chartered to carry a cargo of coal at a certain freight per ton payable on delivery, the condition of things may become such that if nothing is done spontaneous combustion and fire would follow, so that the master may be justified in putting into port for the general safety of ship, cargo, and freight, and in such case if a greater part of the cargo is, upon survey and the recommendation of the surveyors, discharged and sold and the freight thereon is thereby lost, but the remaining coal is finally delivered at the port of destination and the discharged cargo could not have been reloaded and carried with safety, the loss, if not one by fire is nevertheless a loss ejusdem generis and covered by the general words "all other perils, losses and misfortunes" etc., therefore the defendants were held directly liable for the loss of freight as a partial loss.[6]

*"Perils of the seas:" "All other perils, losses," etc.: "Institute Time Clauses:" "Inchmaree" clause.*—A loss which is not caused by a peril of the seas or a peril ejusdem generis therewith is not recoverable under an insurance on the ship by a time policy of the usual kind, against perils of the seas, all other perils, etc., and including conditions of attached "Institute" time clauses; nor is re-

[5] Field Steamship Co. Ltd. v. Burr (1898) 1 Q. B. D. L. R. 821, 78 L. T. Rep. 293, 67 L. J. Q. B. (N. S.) 588, aff'd 68 L. J. Q. B. 426 (1899) 1 Q. B. 579, 80 L. T. (N. S.) 445, 47 Wkly. R. 34, 8 Asp. M. C. 529.

[6] The Knight of St. Michael [1898] P. 30, 67 L. J. P. 19, 46 W. R. 396, 78 L. T. 90, 3 Com. C. 62, 8 Asp. M. C. 360 (*relying* in support of said view upon Stanley v. Western Ins. Co. 37 L. J. Ex. 73, L. R. 3 Ex. 71; Butler v. Wildman, 1 Camp. 123; McGibbon v. Queen Ins. Co. 10 Low. Can. Jur. 227; Nobels Explosives Co. Ltd. v. Jenkins, 1 Commer. C. 436; Porter's Ins. Law p. 123.) Gorell Barnes, J., also discussed the former and present doctrine of general average and contribution by underwriters, their direct liability, also the point of partial loss in connection therewith and particular average loss with relation to partial loss in such case. *Citing* Dickson v. Jardine, 37 L. J. C. P. 321, L. R. 3 C. P. 630; Price v. A 1 Ships' Small Damage Insurance Assoc. 58 L. J. Q. B. 269, 22 Q. B. 580, 61 L. T. 278, 37 W. R. 566, 6 Asp. M. C. 435.

covery aided by these latter clauses when they are merely an addendum to the policy covering risks not covered therein as it stood and when they also neither enlarge the character of the risks insured against in said policy nor extend or expand risks, specifically mentioned in one of such added clauses, to matters ejusdem generis by the general words in the body of the policy. This applies and precludes recovery for the loss where a ship so insured is lying in dock and sustains damage to her hull by reason of the breaking of a part of the tackle of a floating steam crane and the falling of a boiler into the ship's hold into which it is thereby being lowered.[7]

[7] Stott (Baltic) Steamers, Ltd. v. Marten, 85 L. J. K. B. 97, [1916] 1 A. C. 304, 114 L. T. 91, 21 Com. Cas. 144, 13 Asp. M. C. 200, 60 S. J. 57, 32 T. L. R. 85, aff'g [1914] 3 K. B. 1262. The Institute Time Clauses provided: "3. In port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or sail with or without pilots, to tow and assist vessel or craft in all situations, and to be towed and to go on trial trips." "7. This insurance also specifically to cover (subject to the free of average warranty) loss of or damage to hull or machinery through the negligence of master, mariners, engineers or pilots, or through explosion, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager. Masters, mates, engineers, pilots or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer." The clause in the policy was of the usual kind insuring the ship against perils of the seas, men-of-war, fire, enemies, pirates, etc., and "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the goods, merchandise, or ship." By a policy provision the conditions of the Institute Time Clauses attached were included. Clause 7 was, however, deemed the only one of importance here. Lord Atkinson said: "This condition is styled the 'Inchmaree' clause or condition. It was admittedly specially introduced after the decision of this House in the case of Thames & Mersey Marine Ins. Co. v. Hamilton Frazer & Co. (12 App. Cas. 484, 17 Q. B. D. 195, 56 L. J. Q. B. 626, 57 L. T. 695, 36 W. R. 337, 6 Asp. M. Cas. 200) to cover injuries not caused by perils of the sea properly so called, or covered by the general words of such policies covering perils akin to, or resembling, or of the same kind as perils of the sea." It was claimed that the policy should be read and construed as if this 7th condition had been inserted in the body of the policy before the general words, so that in effect the policy should be held to cover not only the risks ejusdem generis as those specifically mentioned in the body of the policy itself, but also risks ejusdem generis as those mentioned in the 7th condition but this claim was declared to be "wholly illegitimate" and that the 7th clause was merely an addendum to the policy covering risks not covered by the policy as it stood and could not by adding to it general words, such as are found in the policy itself, expand it. The case of Thames & Mersey Marine Ins. Co. v. Hamilton Frazer & Co. 12 App. Cas. 498, was held to cover the case before the court.

As to latent defects: "Inchmaree" clause, see §§ 2169a, 2784a herein.

**§ 2736a. "Any cause whatever:" nonmarine policy: war risk: total loss.**—In an English case there was a question whether war risks came within a clause, under a nonmarine policy, whereby goods sent abroad on sale or return were insured before the outbreak of war for one year against loss from "any cause whatever," while in any place or in transit anywhere in Europe except in Spain or Russia. It appeared that the property so insured, and which consisted of jewelry, was sent, in accordance with the custom of the trade, to consignees in Frankfurt and Brussels on sale or return, and some of it was placed under the consignees control in bank in the latter place which became occupied by the Germans, war having broken out. This was the only evidence of loss, and it was held that it was not sufficient proof of a total loss within the above clause: "any cause whatever" as the policy was on the jewelry itself and not on the commercial adventure.[8]

**§ 2737. "Arrests, restraints, and detainments," etc.: marine risk.**—The usual clause is "arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever."[9] This may be divided into two general parts: The first concerns what constitutes an arrest, restraint, or detention; the second concerns the point who are kings, princes, and people. In determining what is an arrest much depends upon the original design with which the act was done, as well also as upon the existing conditions as to war. An arrest as such is to be distinguished from capture, although an arrest may be a capture. In an arrest there is a temporary detention, with no design to deprive the owner of the vessel, but to liberate or restore the ship or goods detained or to pay the value thereof; whereas in capture there is the design on the part of the captor to appropriate as a prize. But it is none the less an arrest where there is no restoration or payment of value, since the apparent design in doing the act controls. There may be an arrest at sea as well as in port or harbor, but if there is an arrest at sea of a neutral vessel, and a forcible taking into a belligerent port under pretense that she is an enemy or laden with hostile effects, it is such an act of war or hostility as makes it a capture, even though there is a subsequent restoration. So the de-

[8] Moore v. Evans, 86 L. J. K. B. 495, [1917] 1 K. B. 458, [1917] W. C. & I. Rep. 107, 115 L. T. 892, 33 T. L. R. 125, rev'g 85 L. J. K. B. 802, [1916] 1 K. B. 479.

[9] Also form used by Bureau of War Risk Insurance of the United States, see Appendix B herein. Also form given under Marine ins. act 1906 (6 Edw. VII. c. 41) Sched. I.; Butterworth's Twentieth Century Stats. (1900–1909) p. 425; 15 Chitty's Stats. (1902–1907) p. 907. See Appendix C herein. The United States form, however, excepts the United States and the nations engaged in war with the enemies of the United States.

tention in a hostile country of a vessel after war declared or letter of reprisal issued against the country to which the vessel belongs is of the nature of a capture, though there is a subsequent restoration. An arrest may take place by act of the government of the country to which the ship belongs or of any power which is friendly. Such are substantially the general principles enunciated by Emerigon and adopted by Mr. Marshall, Mr. Arnould, and Mr. Maclachlan.[10]

It is said by Tilghman, C. J., in a Pennsylvania case that: "There seems to be a difference between arrests, restraints, and detainments. An arrest operates immediately on the subject arrested, so does a detainment; for it supposes the subject detained to be in the hands of the detainer. But there may be a restraint where the subject restrained is not in the hands of the restrainer. Capture includes an arrest. Capture, strictly speaking, is generally made for the purpose of condemnation; but neutrals are often arrested and carried into port for the purpose of investigation. An embargo is a detainment as well as a restraint. But a blockade may be a restraint without arrest or detainment." [11] It may also be stated here that the clause "arrests, restraints," etc., most frequently comprehends the case of an embargo, under which head other cases on this point will be noted.[12]

The words "kings, princes, and people," etc., limit the effect of the preceding words of this clause, and a mob or numbers taking control of the vessel is not within the meaning of the word "people," which means the ruling power of the country, the supreme power, whatever it be, and the words "kings, princes, and people" are said to apply to nations in their collective capacity.[13]

[10] Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 30, pp. 420 et seq.; 2 Marshall on Ins. (ed. 1810) *506 et seq.; 2 Arnould on Marine Ins. (Perkins' ed. 1850) *812 et seq.; 2 Id. (Maclachlan's ed. 1887) 765 et seq.; Id. (9th ed. Hart & Simey) secs. 832 et seq., pp. 1043 et seq. See Barker v. Blakes, 9 East, 283; Fowler v. English & Scottish Marine Ins. Co. 34 L. J. C. P. 253, 18 C. B. (N. S.) 919, 11 Jur. (N. S.) 411, 12 L. T. 381, 13 W. R. 658. See § 2748 herein.

[11] Thompson v. Read, 12 Serg. & R. (Pa.) 440, 443, per Tilghman, C. J.

[12] See §§ 2762 et seq. herein.

[13] Nesbitt v. Lushington, 4 Term Rep. 783, 2 R. R. 519, per Lord Kenyon, C. J., and Buller, J.; reported also in 2 Marshall on Ins. (ed. 1810) 508b; Simpson v. Charleston Fire & Marine Ins. Co. Dudley (S. C.) 239.

What constitutes "restraint" of kings, princes, etc.: frustration of commercial adventure, see Scottish Navigation Co., Ltd. v. W. A. Souter & Co. (Admiral Shipping Co. Ltd. v. Weidener, Hopkins & Co.) 13 Mar. L. Cas. N. S. 246, 86 L. J. K. B. 336, 350, [1917] 1 K. B. 222, 115 L. T. 812, 22 Com. C. 154, 61 S. J. 85, 33 T. L. R. 71, rev'g 85 L. J. K. B. 409, [1916] 1 K. B. 429, 675.

The "arrests and restraints of princes" etc., clause in charter party refers to the extent to which the per-

It is declared in a Massachusetts case that "restraints" and "detainments" of princes have the same meaning, and that capture is a seizure as prize with the intent or expectation of obtaining a condemnation. "I know of no difference between the import of restraint and detention. They are respectively the effect of superior force operating directly upon the vessel. So long as a ship is under restraint, so long she is detained; and wherever she is detained she is under restraint." [14]

A declaration of war is a restraint of princes, and a loss directly or proximately caused by such declaration is within the meaning of a policy insuring goods before the outbreak of war by policies in the usual form including restraints of princes.[15] And the date of the seizure before declaration of war may be important where insured property is seized by assured's own government in contemplation of war.[16] The general question, however, whether there is an

ils mentioned interfere with the obligations of the parties and their liability. F. A. Tamplin Steamship Co. Ltd. v. Anglo Mexican Petroleum Products Co. Ltd. [1916] 2 A. C. 397, 409, 86 L. J. K. B. 336, 350, 85 L. J. K. B. 1389, 115 L. T. 315, 21 Com. Cas. 299, 32 T. L. R. 677, per Lord Haldane.

When apprehension of "restraint" not sufficient of itself to justify plea of "restraint" of princes, etc.: charter party: damages: freight and cost of insurance, see Mitsui Co. Ltd. v. Watts, Watts & Co. [1916] 2 K. B. 826, 85 L. J. K. B. 1721, 115 L. T. 248, 32 T. L. 622.

[14] Richardson v. Maine Fire & Marine Ins. Co. 6 Mass. 101, 108, *109, 4 Am. Dec. 92, per Parsons, C. J.

[15] British & Foreign Marine Ins. Co. Ltd. v. Sanday & Co. [1916] A. C. 650, 85 L. J. K. B. 550, 114 L. T. 521, 21 Com. Cas. 154, 60 S. J. 253, 32 L. T. 206, 13 Asp. M. C. 289, aff'g Sanday & Co. v. British & Foreign Mar. Ins. Co. [1915] 2 K. B. 781, 84 L. J. K. B. 1625, 113 L. T. 407, 20 Com. Cas. 305, 59 S. J. 456, 31 T. L. R. 374, aff'g 31 T. L. R. 194. Lord Parmoor said: "It was argued that 'restraint,' coming in a context between the words 'arrest' and "detainments,' implied that this term in the policy did not attach and render the insurers liable unless force was either used or threatened. A similar argument was urged in the case of Miller v. Law & Accident Insurance Co. [1903] 1 K. B. 712, 720, 88 L. T. 370, 68 W. R. 420, 8 Com. Cas. 14, 9 Asp. M. C. 386, s. c. [1902] 2 K. B. 694, 71 L. J. K. B. 551, 50 W. R. 474, 7 Com. Cas. 151. In that case in consequence of a decree of the President stopping the discharge of all cattle from the United Kingdom until further notice, the captain took the vessel outside the port and transhipped the cattle. It was held by the Court of Appeal that there had been a restraint of princes, and Stirling, L. J., says: 'It seems to me that there was an active intervention of the government of the Argentine Republic, which was more or less an exercise of superior force because no officer of the army of the police force intervened.' My Lords I agree with the opinion expressed by Stirling, L. J. If the restraint in the present case has been imposed by political or executive acts, it is not the less a restraint, within the terms of the policy, because the master submits without opposition and without the presence of either actual or threatened force." See § 2996a herein.

[16] Janson v. Driefonstein Consolidated Mines, Ltd. [1902] A. C. 484, 5 B. R. C. 810 (for further citation of this case see note p. 4562 herein).

arrest or detention merely or a capture may depend upon the cessation of hostilities, as well as upon the declaration of war.[17]

Under the Marine Insurance Act 1906, of England "The term 'arrests, etc., of kings, princes and people' refers to political or executive acts, and does not include a loss caused by a riot or by ordinary judicial process."[18] It is also held in this country that such a clause applies to captures, detentions, etc., by the commissioned agents of a lawful government, and does not cover a loss caused by a mob in a foreign port.[19]

It is further asserted that these words "arrests," etc., do not have reference to legal proceedings instituted and legally conducted.[20]

The clause "arrests, restraints and detainments of all Kings" etc., in the body of the policy, covers the prohibition by the government of the port of destination of landing cargo, but if there is a warranty against capture, seizure and detention, the insurers in such case are not liable.[1] And where a vessel was boarded off the bar at Tampico, her port of destination, and ordered away by the French blockading squadron, this was held a restraint.[2] In this connection it is asserted by Mr. Chief Justice Marshall that a blockade is certainly "not 'an arrest' nor is it 'a detainment.' Each of these terms implies possession of the thing by the power which arrests or detains; and in the case of a blockade the vessel remains in the possession of the master. But the court does not understand the clause as requiring a concurrence of the three terms, in order to constitute the peril described. They are to be taken severally; and

[17] Spencer v. Franco, 2 Burr. 695, Beawes, (4th ed.) 416, *reported* in 1 Marshall on Ins. (ed. 1810) 514a, per Lord Hardwicke, C. J. See also Hamilton v. Mendes, 2 Burr. 1198, 1211, 1 W. Bl. 276, 1 Eng. Rul. Cas. 112, per Lord Mansfield.

[18] Marine insurance act 1906 (6 Edw. VII. c. 41), sched. I. r. 10 (rules of construction); Butterworth's Twentieth Century Stats. (1900–1909) pp. 425–427; 15 Chitty's Stats. (1902–1907) pp. 907, 908.

[19] McCargo v. New Orleans Ins. Co. 10 Rob. (La.) 202, 43 Am. Dec. 180.

[20] Finlay v. Liverpool & Great Western Steamship Co. 23 L. T. (N. S.) 251.

[1] Miller v. Law & Accident Ins. Soc. 62 L. J. K. B. 428, [1903] 1 K. B. 712, 88 L. T. 370, 51 W. R. 420, 8 Com. Cas. 161, 9 Asp. M. C. 386, s. c. [1902] 2 K. B. 694, 71 L. J. K. B. 551, 50 W. R. 474, 7 Com. Cas. 151.

[2] Vigors v. Ocean Ins. Co. 12 La. (O. S.) 362, 32 Am. Dec. 118, *citing* Olivera v. Union Ins. Co. 3 Wheat. (16 U. S.) 183, 4 L. ed. 365. See § 2776 herein, "Blockade."

Emerigon notes the case of an arrest before the commencement of the voyage, that is, before the ship sails, which was the commencement of the risk under the law of that country, and says the "losses and damages happened to the vessel and all expenses made for her during that time are foreign to the insurers," but that rule does not apply to the case of goods. Still, in such case, "they are at the risk of the insurers from the moment of their being laden on board the vessel:" Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 30, pp. 422, 423.

if blockade be a 'restraint,' the insured are protected against it, although it be neither an 'arrest' nor 'detainment.' " A restraint may be created by the application of external force as in case of a besieged town, or a blockading force which prevents vessels therein from coming out. It does not imply that the limitation, restriction, or confinement must be imposed by those who are in possession of the person or thing which is limited, restricted, or confined.[3]

A detention by an epidemic and consequent damages is within this clause as to arrests, detention, etc.[4]

If goods of a neutral are in a belligerent port, prevented from being forwarded by the opposing belligerent, this is within the clause.[5]

Again, if necessities of state warrant an arrest, detention, or seizure by this government of a vessel of this country, this is covered by said clause.[6] So there may be a seizure by assured's own government for purposes of imminent war so as to constitute a loss and the policy be valid, where the insurance is effected before the war with underwriters of a country subsequently engaging in war with assured's country.[7] But although there might be a technical arrest or even capture of ship or goods by the home government, the liability of assurers, or the fact of an actual or technical total loss, may depend upon the amount reimbursed by the government.[8]

The test, as will be noted, is the commencement of the risk, so that in policies on the ship where the risk commences in port the

[3] Olivera v. Union Ins. Co. 3 Wheat. (16 U. S.) 183, 189, 190, 4 L. ed. 355, per Mr. Chief Justice Marshall.

[4] Williams v. Smith, 2 Caines (N. Y.) 1, 2 Am. Dec. 209.

[5] Rodocanachi v. Elliott, L. R. 43 L. J. C. P. 255, C. P. 518, 31 L. T. 239, 2 Asp. M. C. 399.

[6] Touteng v. Hubbard, 3 Bos. & P. 291, 6 R. R. 791, per Lord Alvanley; Lorent v. South Carolina Ins. Co. 1 Nott & McC. (S. C.) 505; Hagedorn v. Whitmore, 1 Stark. 157; Green v. Young, 2 Ld. Raym. 840, 2 Salk. 444; 2 Marshall on Ins. (ed. 1810) 510a; Park on Ins. (6th ed.) 109. See § 2685 herein.

[7] Janson v. Driefonstein Consolidated Mines, Ltd. [1902] A. C. 484, 71 L. J. K. B. N. S. 857, 87 L. T. N. S. 372, 18 T. L. R. 796, 7 Com. Cas. 268, 5 B. R. C. 810, aff'g Driefonstein Consolidated Mines, Ltd. v. Janson [1901] 2 K. B. 419, 70 L. J. K. B. 881, 85 L. T. 104, 49 W. R. 660, 6 Com. Cas. 198, which aff'd [1900] 2 Q. B. 339, 69 L. J. Q. B. N. S. 771, 48 W. R. 619, 83 L. T. N. S. 79, 16 T. L. R. 438, 5 Com. Cas. 296. See Nigel Gold Mining Co. v. Hoade, 76 L. J. K. B. 1006, [1901] 2 K. B. 849, 85 L. T. 482, 50 W. R. 108, 6 Com. C. 268. See §§ 299a, 2531 herein.

[8] See § 2685 herein. "I have no doubt that in point of strict law the assured is entitled to recover as for a total loss, deducting, however, the money paid him by the arresting government from the amount of his claim under the policy," referring to goods and seizure by home government or friendly power: 2 Arnould on Marine Ins. (Maclachlan's ed. 1887) 768. See Id. (9th ed. Hart & Simey) sec. 834, pp. 1047, 1048.

rule is said to be that an arrest thereafter of the ship, even though the voyage had not commenced, would be within the clause.[9]

§ 2738. **"Arriving in port" does not cover arrival in cove.**—"Arriving in port" does not cover putting in distress into a cove which is not a "port," and taking wood and water there, in the absence of a previous intention to do so,[10] since the word "port" does not include a recess of the sea to which resort is not had for landing goods.[11]

§ 2739. **"Unlawful" arrests, restraints, detainments, etc.**—Sometimes the clause covering arrests, restraints, detainments, etc., is preceded by the word "unlawful." In such case the qualification "unlawful" extends as well to "restraints and detainments" as to "arrests," and a detainment by a force, lawfully blockading a port, is not a peril insured against by a policy containing a warranty of neutrality.[12] Where a neutral vessel laden with a neutral cargo had sailed before the institution of a blockade, but before she could get out to sea was ordered back by the blockading squadron and abandonment immediately offered, this was held an unlawful restraint, for which the insurers were liable under a policy against unlawful arrests, restraints, etc.[13] But where a blockade is lawful, this makes a restraint so far lawful that the clause as to "unlawful arrests, restraints," etc., does not cover the loss.[14]

§ 2739a. **Automatic sprinkler system: location: leakage: notice of defects.**—If a policy insures against all direct loss or damage caused by water discharged, or that may leak from the automatic system erected in that portion of the building occupied by insured, and only describes the building and its location, the terms of the policy will, nevertheless, not be extended so as to cover loss sustained by insured by reason of his premises being flooded from a broken sprinkler which is located on a floor on the fifth story of

[9] See Green v. Young, 2 Salk. 444, 2 Ld. Raym. 840; Rotch v. Edie, 6 Term Rep. 413, 3 R. R. 222; Visger v. Prescott, 5 Esp. 184, 8 R. R. 846; Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (U. S. C. C.) 312, Fed. Cas. No. 10,433; 1 Marshall on Ins. (ed. 1810) 510a.

[10] Hart v. Boston Marine Ins. Co. 26 Nov. Sco. 427, 428, 440.

[11] Hart v. Boston Marine Ins. Co. 26 Nov. Sco. 427, 428, 440.

[12] M'Call v. Marine Ins. Co. 8 Cranch (12 U. S.) 59, 3 L. ed. 487.

[13] Olivera v. Union Ins. Co. 3 Wheat. (16 U. S.) 183, 4 L. ed. 365. *Cited* in The Styria, 101 Fed. 728, 731, 41 C. C. A. 642; Andrews v. Essex Fire & Marine Ins. Co. 3 Mason (U. S. C. C.) 6, 21, Fed. Cas. No. 374; Vigers v. Ocean Ins. Co. 12 La. 364, 361, 6 La. N. S. 601, 603; Saltus v. United Ins. Co. 15 Johns. (N. Y.) 409, *522, 414, *529; Thompson v. Read, 12 Serg. & R. 440, 444. See quotation from principal case under § 2737 herein.

[14] Thompson v. Read, 12 Serg. & R. (Pa.) 440. (See quotation from this case under § 2737 herein.) See Patterson v. Marine Ins. Co. 5 Harr. & J. (Md.) 417.

the building and is not occupied by him, but the policy will be limited to sprinklers in that part occupied by him which is on the second floor.[1] A provision of a policy insuring against loss by the accidental discharge of an automatic extinguisher, that notice shall be given of "any known defect," which shall render the system more than usually hazardous, and that it shall be immediately repaired, refers to defects in the system itself, and not to those in the fasteners of shutters on the windows of the buildings, although the use of the latter in a defective condition may make possible the breaking of the apparatus and its consequent discharge.[2]

§ 2739b. **Automobile or motorcycle: "collision."**—Where an automobile has passed through the guard rail of a highway bridge and has plunged into a stream below, there is a collision with the water and bed of the stream within the intent of an insurance of an automobile from accidents caused by collision.[3] And if an automobile, including its operating equipment attached thereto, is insured against loss or damage by collision with another object, insured is entitled to recover, where he lost control of the machine and it skidded so that the rear wheels were thrust across the guttering next adjacent to the roadbed and across a grass plot two feet wide between the guttering and the sidewalk, where the rear wheel collided with a granatoid sidewalk about six inches high, which collision caused said machine to overturn and fall across the gutter and roadbed, and which operated as the proximate cause of the loss, and this applies even though the policy excludes loss or damage caused by striking any portion of the roadbed, as said sidewalk and guttering constitute no part of the roadbed; for the roadbed consists of that portion of the road intended for travel and which is between the gutters on either side and does not apply to gutters constructed for draining water from the roadbed.[4]

§ 2739c. **Automobile or motorcycle: rented or used for passenger service or for hire: temporary use.**—It is decided that the words "rented or used for passenger service of any kind or for hire" in a policy insuring an automobile, imply more than the single act of renting or using and refer to the business of carrying passengers for hire as the term "passenger service" should be construed with

[1] Bottomley v. Royal Ins. Co. 190 Mass. 73, 76 N. E. 462.

Automatic sprinkler system; particular representations and warranties, see § 1995a herein.

[2] Wertheimer-Swarts Shoe Co. v. United States Casualty Co. 172 Mo. 135, 61 L.R.A. 766, 72 S. W. 635. See § 1995a herein.

[3] Harris v. American Casualty Co. 83 N. J. L. 641, 44 L.R.A.(N.S.) 70n, 85 Atl. 1941. See § 2633a herein.

[4] Styx v. Travelers' Indemnity Ins. Co. 175 Mo. App. 171, 157 S. W. 870, 42 Ins. L. J. 1385.

As to railway "roadbed," see § 2625 herein.

the words "rented" or "used" and the rule of construction in favor of assured should govern and a too narrow and rigid interpretation should be excluded. And this applies where the machine was not kept for the purpose of being so rented or used, but was only rented on a single occasion in the absence of another car which was kept for hire and was then in use, and the owner had resumed possession of the insured car and it was in the care of the owner's chauffeur all the time, and exclusively in his sole possession and control when it was burned sometime after the temporary use had ceased, and said use in no way contributed to the loss.[5]

**§ 2740. Bank's default: money deposited in bank: vested rights upon default.**—If the "assured" be guaranteed indemnity against the loss of a sum of money deposited in the bank, and the event designated—namely, the default of payment by the bank—takes place, the insurers are liable for the loss. The contract is one of insurance, but whether the contract be deemed one of suretyship or of insurance, the right of "assured" becomes vested under the contract upon default made by the bank, and any scheme subsequently entered into between the bank and its creditors, whereby the bank under a local statute is discharged, but not by way of accord and satisfaction, does not prevent a recovery, there being no assent to such scheme by "assured," and this is so even though the discharge is binding upon him by the local statute.[6] In a Scotch

[5] Crowell v. Maryland Motor Car Ins. Co. 169 N. Car. 35, 85 S. E. 37, 46 Ins. L. J. 82, following the principle asserted in Cottingham v. Maryland Motor Car Ins. Co. 168 N. Car. 259, L.R.A.1915D, 344, 84 S. E. 274, 45 Ins. L. J. 491 (where a chattel mortgage on automobile given after the policy was issued and paid before loss was held to merely suspend the insurance) and quoting from Mears v. Humboldt Ins. Co. 92 Pa. 15, 37 Am. Rep. 647 (as to meaning of "use") and *citing* Springfield Fire & Marine Ins. Co. v. Wade, 95 Tex. 598, 58 L.R.A. 714, 93 Am. St. Rep. 870, 68 S. W. 977 (where a temporary, casual, isolated use of gasoline was held not to avoid the policy). As to effect of temporary violation of conditions, see §§ 2239, 2240 herein. When automobile is used as a "public conveyance provided for passenger service," see Fidelity & Casualty Co. v. Joiner, — Tex. Civ. App. —, 178 S. W. 806, 46 Ins. L. J. 644, *considered* under § 2876b herein.

When use with assured's permission of automobile for transportation of tourists and passengers for hire precludes recovery under stipulation that policy shall be null and void for breach of condition or warranty in fire policy that automobile shall not be used for carrying passengers. Elder v. Federal Ins. Co. 213 Mass. 389, 100 N. E. 655, 42 Ins. L. J. 524. See Orient Ins. Co. v. Van Zandt-Bruce Drug Co. — Okla. —, 151 Pac. 323.

[6] Dane v. Mortgage Ins. Corp. Lim. (Eng. C. A. 1894) 1 Q. B. D. L. R. 54, 63 L. J. Q. B. 144, 9 R. 96, 70 L. T. 83, 42 W. R. 227. In this case the money was deposited by plaintiff in the Bank of Australia; the discharge was effected under a colonial statute by agreement between the bank and the creditors aided by the court. See also Young v. Trustee

case money was loaned to an Australian bank upon a deposit receipt, and the creditor insured the deposit with an insurance company, which guaranteed that in case the debtor failed to repay the deposit within twenty-one days from the date named in the deposit receipt, it would pay the insured the amount of the deposit with interest, the insured, however, upon such payment, to hand over to the insurers "the deposit and all his rights in respect thereof." The deposit, which became due on the 15th of May, was not paid, as the bank suspended payment on the 4th of April. On the 26th of April a scheme of compromise was sanctioned by the court of Victoria, by which a new company assumed the liabilities of the bank, and this scheme the appeal court approved with some alterations on June 19th. It was held that the insurer was liable for the amount of the deposit, since the insured had, upon the failure of the bank to make the repayment as provided, satisfied the condition of the policy by offering to transfer the deposit and all his rights in respect thereof.[7]

**§ 2740a. Bankers' policy: Lloyds: loss through forged bills: fraud.**—Under an English decision it appeared that the insured were bankers carrying on business in New York and they insured under a Lloyds policy which stipulated to hold them harmless and indemnify them: "By reason of any bonds, debentures, scrip, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, cheques, banknotes, currency, coin, or other similar securities in which they are interested or the custody of which they have undertaken, and which now are or are by them supposed or believed to be or at any time during the said period of twelve months may be in or upon their own premises, or upon the premises of their bankers, or in any recognized place of safe deposit in New York or branches, or lodged or deposited in the ordinary course of business for exchange, conversion, or registration with the issuers thereof, or with any agent of such issuers, or with any persons employed to procure or manage the exchange, conversion, or registration thereof, being (while so in or upon such premises or so placed, lodged or deposited as aforesaid) lost, destroyed, or otherwise made away with by robbery, theft, fire, embezzlement, burglary or abstraction, or taken out of their possession or control by any fraudulent means, whether with or without violence, and whether from within or without, and whether by the clerks and servants of the said assured or any other person or persons, or by the negligence or fraud of the said clerks and servants." A customer had

Assets & Investment Ins. Co. Lim. (Scot. C. S. 1894) 31 Scot. L. R. 199.

[7] Laird v. Securities Ins. Co. Lim. (Ct. of Sess.) 32 Scot. L. R. 319. See § 339c herein.

bills discounted for a large amount and the bank credited said customer with the amount they had actually paid for the bills and afterwards, in the ordinary course of dealing, they allowed the customer to draw checks for the amount, which they honoured against her account. It subsequently appeared, however, that the bills were forged and worthless. It was decided that the stipulation did not give a right to recover in a case of such a character, the bankers having been induced by fraud to enter into said contract and the underwriters were, therefore, not liable.[8]

**§ 2741. Barratry defined: marine risk.**—"Barratry," says Emerigon, "is a barbarous word, and unknown to antiquity. Pasquier says it comes from 'barat,' which signifies fraud, trickery, falsehood." [9]

An act of barratry relates to acts or conduct of the master or mariners in their character as such which is fraudulent or criminal against the owners, whereby the latter are damnified. It may be committed against the owners of the cargo or ship, or against the charterers of the ship, who are owners pro hac vice. It comprehends any gross malversation in office by the master or gross criminal negligence operating in fact to the owner's prejudice, whether so intended or not, any trick, cheat, or fraud, or any crime or willful, intentional breach of known law, or willful act of known illegality against the interests and rights and to the prejudice of the owners, and without their consent, or an act in evasion of or contrary to their orders and instructions, and even willful nonfeasance may in certain cases be barratry. It also includes every breach of trust dishonestly intended to the owner's prejudice, nor in the above cases is the intention on the master's part to benefit himself an essential ingredient of the offense.[10] A mere error or defect in judg-

[8] Century Bank of the City of New York v. Young, 84 L. J. K. B. 385, 112 L. T. 484, 20 Com. Cas. 90, 31 T. L. R. 127, aff'g 110 L. T. 261, 19 Com. Cas. 178.

[9] Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 3, p. 292. But see English citations under next following note as to "trickery."

[10] *United States.* — Patapsco Ins. Co. v. Coulter, 3 Pet. (28 U. S.) 222, 7 L. ed. 659, per Johnson, J.; Macardier v. Chesapeake Ins. Co. 8 Cranch. (12 U. S.) 39, 3 L. ed. 481; Crousillet v. Ball, 4 Dall. (4 U. S.) 294, 1 L. ed. 840; Dederer v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 61, Fed. Cas. No. 3,733, per Washington, J.

*Massachusetts.*—Wiggin v. Amory, 14 Mass. 1, 7 Am. Dec. 175; Wilson v. General Mutual Ins. Co. 12 Cush. (66 Mass.) 360, 59 Am. Dec. 188; Stone v. National Ins. Co. 19 Pick. (36 Mass.) 34, 37, per Putnam, J.

*New York.* — Atkinson v. Great Western Ins. Co. 65 N. Y. 531; American Ins. Co. v. Dunham, 15 Wend. (N. Y.) 9; Walden v. Fireman's Ins. Co. 12 Johns. (N. Y.) 128; Kendrick v. Delafield, 2 Caines (N. Y.) 67.

*Ohio.*—Germania Life Ins. Co. v.

ment or negligence on the part of the master, although the result is a total loss of the property, is not barratry of the master where there has been no criminal or fraudulent intent, and even though his conduct may not have been in any way wrongful, and while it is clearly the duty of the master to do all in his power to save property committed to his charge, yet if he fails in this through an error in judgment, the underwriters are not excused because of an exception of barratry in the policy.[11] So it is held that an act "inconsistent with written instructions," and an act "not consonant to the laws of the land," are within the description of fraud upon the owners as applied to the definition of barratry. It is not confined to moral fraud; *culpa* would express the idea better than *dolus*.[12] Under the Marine Insurance Act 1906 of England, "The term 'barratry' includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner or, as the case may be, the charterer." [13]

§ 2742. **Barratry covers what: instances.**—Barratry of the master and crew covers thefts, pilferings, or embezzlements by either, and thefts by the mariners are covered, whether due care and vigilance of the master could have prevented them or not, and so also is willful destruction of property covered; [14] although it is held that a loss by embezzlement on the part of the crew does not render the insurer liable,[15] and also that stealing by the mariners other than

Sherlock, 25 Ohio St. 33, 1 Wkly. Law Bull. 26, 7 Ohio Dec. 17.

*Pennsylvania.* — Citizens' Ins. Co. v. Marsh, 41 Pa. St. 286; Wilcox v. Union Ins. Co. 2 Binn. (Pa.) 574, 4 Am. Dec. 480.

*South Carolina.* — Messonier v. Union Ins. Co. 1 Nott & McC. (S. C.) 155.

*England.*—Earle v. Rowcroft, 8 East, 126, 9 R. R. 385, 14 Eng. Rul. Cas. 345, per Lord Ellenborough; Dixon v. Reid, 5 Barn. & Ald. 597, 1 Dowl. & R. 207, 24 R. R. 481; Boehm v. Combe, 2 Maule & S. 172, 14 R. R. 611; Phyn v. Royal Exchange Assur. Co. 7 Term Rep. 505, 4 R. R. 508; Soares v. Thornton, 7 Taunt. 627, 1 Moore, 373, 18 R. R. 615; Heyman v. Parish, 2 Camp. 148, 149, 11 R. R. 688; Pipon v. Cope, 1 Camp. 434, 10 R. R. 720; Havelock v. Hancill, 3 Term Rep. 277, 1 R. R. 703; Hibbert v. Martin, 1 Camp. 538.

[11] Wolff v. Merchants' Ins. Co. 31 New Brun. 577, per Tuck, J.

[12] Patapsco Ins. Co. v. Coulter, 3 Pet. (28 U. S.) 222, 7 L. ed. 659.

[13] Marine insurance act 1906 (6 Edw. VII. c. 41) Sched. I. r. 11; Butterworth's Twentieth Century Stats. (1900–1909) p. 426; 15 Chitty's Stat. (1902–1907) pp. 907, 908. It is said, however, that "This does not profess to be an exhaustive definition." 2 Arnould on Marine Ins. (9th ed. Hart & Simey) sec. 839, p. 1054.

[14] Marcardier v. Chesapeake Ins. Co. 8 Cranch (12 U. S.) 39, 3 L. ed. 481; Stone v. National Ins. Co. 19 Pick. (36 Mass.) 34; Lawton v. Sun Mutual Ins. Co. 2 Cush. (56 Mass.) 500; American Ins. Co. v. Bryan, 26 Wend. (N. Y.) 563, 37 Am. Dec. 278, aff'g 1 Hill (N. Y.) 25; Falkner v. Ritchie, 2 Maule & S. 290.

[15] Hicks v. Fitzsimmons, 1 Wash. (U. S. C. C.) 279, Fed. Cas. No. 6,460.

petty thefts is barratry.[16] Where a policy covers barratry, the losses arising through fire originating in the negligence of the master or mariners must be borne by the underwriters.[17] If the master, without the knowledge of his owner, lades on board the vessel such goods as will subject him to condemnation for illicit traffic, it is barratry.[18] Resistance by the master and seamen of a neutral vessel of a search by a belligerent is barratry.[19] The crew of a neutral vessel captured as a prize are not obliged to navigate her. It is the duty of the captors to take charge of her with a force of their own, and if they neglect to do this they do not take sufficient possession, and the neutrals may consider her as abandoned to them. But if an insufficient force is put on board, in consequence of a promise by the neutral crew to navigate her to the destined port, they are bound by their promise, and must be considered for the purpose agreed on as acting under the captors. If in violation of this agreement they take the vessel into their own hands, it is an unlawful rescue, which is an act of barratry.[20] A fire intentionally caused by the direct act of the master and crew for barratrous purposes is barratry.[1]

An insurance against all risks or the usual risks, there being no stipulation to the contrary, includes barratry of the master and mariners, and it is immaterial that the assured was the owner of the vessel and appointed the master and mariners. Thus, barratry of the master is insured against in a policy on a vessel "lost or not lost" which does not define risks assumed by the insurers otherwise

[16] Stone v. National Ins. Co. 19 Pick. (36 Mass.) 34.

[17] Patapsco Ins. Co. v. Coulter, 3 Pet. (28 U. S.) 222, 7 L. ed. 659, *citing:*

*United States.* — Orient Mutual Ins. Co. v. Adams, 123 U. S. 67, 73, 31 L. ed. 63, 66, 8 Sup. Ct. 68, 44 Leg. Int. 504; New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. (47 U. S.) 344, 426, 12 L. ed. 465, 500; Joy v. Allen, 2 Woodb. & M. 303, 320, Fed. Cas. No. 7,552; Phoenix Ins. Co. v. Erie & Western Transportation Co. 10 Biss. (U. S. C. C.) 18, 34, Fed. Cas. No. 11,112.

*Louisiana.*—McDowell v. General Mutual Ins. Co. 7 La. Ann. 684, 685, 56 Am. Dec. 619.

*Massachusetts.*—Nelson v. Suffolk Ins. Co. 8 Cush. (62 Mass.) 477, 496, 54 Am. Dec. 770; Copeland v. New England Marine Ins. Co. 2 Metc. (43 Mass.) 432, 450.

*Mississippi.*—Natchez Ins. Co. v. Stanton, 2 Smedes & M. 340, 379, 41 Am. Dec. 592.

*New York.* — Atkinson v. Great Western Ins. Co. 65 N. Y. 531, 538; Matthews v. Howard Ins. Co. 11 N. Y. 9, 21; American Ins. Co. v. Bryan, 26 Wend. 563, 583.

[18] Suckley v. Delafield, 2 Caines (N. Y.) 222. See Hallett v. Columbian Ins. Co. 8 Johns. (N. Y.) 272; American Ins. Co. of New York v. Dunham, 15 Wend. (N. Y.) 9, aff'g 12 Wend. (N. Y.) 463, *cited* in Dole v. New England Marine Ins. Co. 2 Cliff. (U. S. C. C.) 394, Fed. Cas. No. 3,966.

[19] Brown v. Union Ins. Co. 5 Day (Conn.) 1, 5 Am. Dec. 123; Dederer v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 61, Fed. Cas. No. 3,733.

[20] Wilcocks v. Union Ins. Co. 2 Binn. (Pa.) 574, 4 Am. Dec. 480.

[1] Waters v. Merchants' Louisville

than by a clause that they "are not in any case to be held to pay for any loss or damage in consequence of restraint, seizure, or detention by any legal or illegal power whatsoever, or for any loss, damage, or accident which may happen or occur to any vessel while she may be under such restraint, seizure, or detention;"[2] although acts of barratry, such as misconduct of the master and crew, by which the vessel is lost are held to be at the risk of the owner, and not within the terms of the policy unless expressly insured against,[3] and a loss by fire caused by barratrous acts is not covered when the policy contains no clause as to barratry.[4] Putting on board secretly by the captain contraband goods, whereby the vessel and cargo is condemned, is barratry.[5] An act of the master in violation of the laws of the land, as by trading with an enemy, is barratry.[6] Insurers are liable for barratry of second mate succeeding to command of a vessel while on her voyage by the death of the master and first mate, under a policy insuring against the barratry of the mariners but not against that of the master.[7] The fraudulent conversion by the master of the cargo to his use and absconding is barratry, even though the master is consignee or supercargo.[8] The sale or disposal by the master of any of the ship's furniture, tackle, outfits, etc., for his own use and benefit is barratry.[9] So also is the fraudulent sale and purchase by the master of the vessel,[10] or a fraudulent sale and application of the proceeds to his own use by the master, even though a part owner,[11] or deviating and selling

Ins. Co. 11 Pet. (36 U. S.) 213, 9 L. ed. 69, 1 McLean (U. S. C. C.) 275, Fed. Cas. No. 17,266.

[2] Parkhurst v. Gloucester Fishing Ins. Co. 100 Mass. 301, 97 Am. Dec. 100, 1 Am. Rep. 105; Oliver v. Mutual Commercial Marine Ins. Co. 2 Curt. (U. S. C. C.) 277, 291, Fed. Cas. No. 10,498.

[3] Citizens' Ins. Co. v. Marsh, 41 Pa. St. 286; St. Louis Ins. Co. v. Glasgow, 8 Mo. 713, 41 Am. Dec. 661. See §§ 2734, 2736, 2743 herein.

[4] Waters v. Merchants' Louisville Ins. Co. 11 Pet. (36 U. S.) 213, 9 L. ed. 69, *cited* in Dole v. New England Mutual Marine Ins. Co. 2 Cliff. (U. S. C. C.) 394, 433, Fed. Cas. No. 3,966.

[5] Baltimore Ins. Co. v. Taylor, 3 Har. & J. (Md.) 198.

[6] Earle v. Rowcroft, 8 East, 126, 9 R. R. 385, 14 Eng. Rul. Cas. 345.

[7] Tate v. Protection Ins. Co. 20 Conn. 481, 52 Am. Dec. 350.

[8] Cook v. Commercial Ins. Co. 11 Johns. (N. Y.) 40, 6 Am. Dec. 353; Earle v. Rowcroft, 8 East, 126, 9 R. R. 385, 14 Eng. Rul. Cas. 345; Kendrick v. Delafield, 2 Caines (N. Y.) 67.

[9] Lawton v. Sun Mutual Ins. Co. 2 Cush. (56 Mass.) 500.

[10] Steinbach v. Ogden, 3 Caines (N. Y.) 1.

[11] Phœnix Ins. Co. v. Moog, 78 Ala. 284, 304, 305, 56 Am. Rep. 31; Hutchins v. Ford, 82 Me. 363, 368, 369, 19 Atl. 832; Voisin v. Commercial Mutual Ins. Co. 41 N. Y. St. Rep. 884, 62 Hun (N. Y.) 4, 16 N. Y. Supp. 410, per Daniels, J.; Jones v. Nicholson, 10 Exch. 28, 23 L. J. Ex. 330, 2 C. L. R. 1236. See Wilson v. General Mutual Ins. Co. 12 Cush. (66 Mass.) 360, 59 Am. Dec. 188. But see § 2743 herein.

the vessel by the captain.[12] Continuous acts of smuggling which reasonable diligence could have prevented is not covered.[13] But the barratry in case of smuggling may be immaterial where there is a warranty against seizure which constitutes the basis of loss.[14] Putting to sea for an intermediate port in an unseaworthy condition, barratry of the master and mariners being insured against, is not such an act as renders the owners of goods insured liable.[15] Fraudulent collusion with the enemy, whereby the ship is captured, is barratry.[16] So there may be barratry where part of the transportation is by land.[17] A deviation to enable the master to commit an act of barratry does not release the insurer.[18]

The fraudulent acts of the master, acting in conspiracy with others and loading the vessel with cases of dirt and shipping it as valuable cargo, and afterward boring holes in the ship and then abandoning the vessel at sea, the purpose being to obtain insurance moneys thereon, is a barratrous act covering the loss of cargo on board.[19] The fraudulent act of the master in sailing to a blockaded port is barratrous.[20] If the master so uses turpentine on board as to clearly violate his express duty, he is subject to the loss arising therefrom, as where it was used to increase the head of steam and took fire and burned the vessel, under an act of Congress requiring turpentine to be secured upon steamboats in metallic safes or metal apartments.[1] If a policy is against perils of the sea and barratry of the master, the barratry of the master is no defense to insurer from its liability for a loss from stranding by a peril of the sea and a subsequent barratrous sale.[2] So where in order to secure advances of money made to a person to enable him to become part

[12] Dixon v. Reid, 5 Barn. & A. 597, 1 D. & R. 207, 24 R. R. 481; Millaudon v. New Orleans Ins. Co. 11 Mart. (La.) 602, 13 Am. Dec. 358; Toulmin v. Inglis, 1 Camp. 421, 10 R. R. 715; Hucks v. Thornton, Holt N. P. 30, 40, 17 R. R. 594; Toulmin v. Anderson, 1 Taunt. 227.

[13] Pipon v. Cope, 1 Camp. 434, 10 R. R. 720.

[14] Cory v. Burr, 8 Q. B. D. 313, 52 L. J. Q. B. 657, 9 Q. B. D. 463, 8 App. Cas. 393, 49 L. T. 78, 31 W. R. 894, 5 Asp. M. C. 109.

[15] Brioso v. Pacific Mutual Ins. Co. 4 Daly (N. Y.) 246.

[16] Arcangelo v. Thompson, 2 Camp. 620, 12 R. R. 758.

[17] Boehm v. Combe, 2 Maule & S. 172, 17 R. R. 611.

[18] Roscow v. Corson, 8 Taunt. 684, 21 R. R. 507.

[19] Voisin v. Commercial Mutual Ins. Co. 41 N. Y. St. Rep. 884, 62 Hun (N. Y.) 4, 16 N. Y. Supp. 410. See Voisin v. Commercial Ins. 66 N. Y. Supp. 638, 32 Misc. 393 (as right of consignee to recover in such case), aff'd 70 N. Y. Supp. 147, 60 App. Div. 139.

[20] Goldschmidt v. Whitmore, 3 Taunt. 508.

[1] Citizens' Ins. Co. v. Marsh, 41 Pa. St. 286; Act of Congress Aug. 30, 1853.

[2] New Orleans Ins. Co. v. E. D. Albro Co. 112 U. S. 506, 28 L. ed. 809, 5 Sup. Ct. 289, *cited* in Meyer v. Great Western Ins. Co. 104 Cal. 381, 387, 38 Pac. 82.

owner of a ship and be appointed captain, a mortgage of said share of the ship is effected on the ship to cover the mortgagee's interest upon instruction to the mortgagor and the co-owners of the ship, by the ship's husbands as well in their own names as for and in the names of all and every person or persons to whom the same should appertain, or in all against certain risks including perils of the sea and barratry of the master and mariners, it was held that if the mortgagee had nothing to do with the appointment of the captain, the mortgagor, it constituted no defense to an action by the mortgagee's executors that the ship was wilfully cast away by the captain, for if it had been so cast away recovery could be had for loss by perils of the sea; and even in case of said mortgagees taking part in such appointment, then as regards barratry recovery could be had.[3]

**§ 2743. Barratry, what losses are not covered: general rules.**—Although, as stated in the preceding section, mere nonfeasance may amount to barratry, yet acts done through negligence, unless so gross as to be per se evidence of fraud, are not barratrous, nor are those acts barratrous which proceed from mere errors of judgment or from incompetence or ignorance of the master, nor those which are merely accidental and which are not willful, nor done for some fraudulent or known unlawful purpose, and which involve no criminal or willful or fraudulent violation of that duty which is due to the owners. Not every illegal act is a criminal one. There may be an ignorant breach of blockade, or ignorant violation of a foreign law; there may be a mistake as to what is meant by the instructions, or a doubt as to his exact line of action within those instructions, and such acts are not barratrous. But fraud whereby the master seeks his own benefit or advantage to the prejudice of the owner's interest is not in such sense a necessary element; it is sufficient that it be any unlawful act of known criminality or of gross malversation, as stated in the preceding section. If, however, the act be in fact to the master's interest, it is fraud or evidence thereof.[4]

[3] Small v. United Kingdom Marine Mutual Ins. Assoc. (1897) 2 Q. B. L. R. 42, 311, 66 L. J. Q. B. 736, 46 W. R. 24, 76 L. T. 828, 2 Com. Cas. 133, 269, 8 Asp. M. C. 293.

[4] *United States.*—Patapsco Ins. Co. v. Coulters, 3 Pet. (28 U. S.) 222, 234, 7 L. ed. 659; Dederer v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 61, Fed. Cas. No. 3,733, per Washington, J.

*Massachusetts.*—Wiggin v. Amory, 14 Mass. 1, 7 Am. Dec. 175.

*New York.* — Atkinson v. Great Western Ins. Co. 65 N. Y. 531; Grim v. Phœnix Ins. Co. 13 Johns. (N. Y.) 451, 457; Vos v. United Ins. Co. 2 Johns. Cas. (N. Y.) 187.

*South Carolina.* — Messonier v. Union Ins. Co. 1 Nott & McC. (S. C.) 155.

*England.*—Phyn v. Royal Exch.

Barratry of the master and crew of a steamboat is not covered by a policy unless specially stipulated,[5] and though the act of the master be barratry, there can be no recovery unless it produces or is the cause of the loss, and the loss must happen within the time of the policy;[6] and the act must be committed within the time limit of the policy, and does not cover a seizure and condemnation to the government after the expiration of said period of time, and even though the forfeiture relates back to the time of the infraction of the law; the object is to prevent frauds on the government.[7]

§ 2744. **Barratry, what losses are not covered: instances.**—The master's failure to repair or to reship cargo is not barratry,[8] nor is an unintentional violation of a blockade.[9] Emerigon places at the charge of the insurers against barratry the damages occasioned through the desertion of sailors.[10] But if a vessel captured and libeled as prize is deserted by the crew, it is not barratry if not done malo animo.[11] Acts of misconduct committed with the owner's consent or by the owner himself are not barratry,[12] and where the master charters a vessel and mans and victuals her at his own cost, he is the owner pro hac vice, and no act of his will amount to barratry.[13] But where the insured charters the vessel

Assur. Co. 7 Term Rep. 505, 4 R. R. 508; Bottomley v. Bovill, 5 Barn. & C. 210, 212, 7 D. & R. 702, 4 L. J. (O. S.) K. B. 237, 29 R. R. 221; Earle v. Rowcroft, 8 East, 126, 129, 9 R. R. 385, 14 Eng. Rul. Cas. 345; Todd v. Ritchie, 1 Stark. 240, 18 R. R. 768, per Lord Ellenborough; Heyman v. Parish, 2 Camp. 149, 11 R. R. 688; Everth v. Hannam, 6 Taunt. 375, 2 Marsh. 74, and cases in the first note under last section.

[5] St. Louis Ins. Co. v. Glasgow, 8 Mo. 713, 41 Am. Dec. 661; Fulton v. Lancaster Ins. Co. 7 Ohio 5, pt. 2; Howell v. Cincinnati Ins. Co. 7 Ohio 276, pt. 1; Gazzam v. Ohio Ins. Co. Wright (Ohio) 202; Citizens' Ins. Co. v. Marsh, 41 Pa. St. 386. See also O'Connor v. Merchants' Marine Ins. Co. 20 Nov. S. R. (8 R. & G.) 514, aff'd 9 Can. L. T. 209, *considered* under § 2736, note 21 herein, see §§ 2734, 2742 herein.

[6] Swan v. Union Ins. Co. 3 Wheat. (16 U. S.) 168, 4 L. ed. 361; Lockyer v. Offley, 1 Term Rep. 260, 1 R. R. 194; Patapsco Ins. Co. v. Coulter, 3 Pet. (28 U. S.) 222, 7 L. ed. 659.

[7] Maiatigui v. Louisiana Ins. Co. 4 La. (N. S.) 413, 28 Am. Dec. 129. See Lockyer v. Offley, 1 Term Rep. 260, 1 R. R. 194.

[8] Stewart v. Tennessee Marine & Fire Ins. Co. 1 Humph. (20 Tenn.) 242.

[9] Everth v. Hannam, 6 Taunt. 375, 2 Marsh. 74; Dederer v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 61, Fed. Cas. No. 3,733, per Washington, J.

[10] Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 8, p. 310.

[11] Messonier v. Union Ins. Co. 1 Nott & McC. (S. C.) 155. Desertion is a criminal offense: Rev. Stats. U. S. sec. 4596. See United States v. Mason, 34 Fed. 129. For forfeiture of wages for desertion, see The Rothemay, 34 Fed. 80; Disbrow v. Walsh Brothers, 36 Fed. 607.

[12] Ward v. Wood, 13 Mass. 539; Stamma v. Brown, 2 Strange, 1173, 1247, *cited* 8 East, 136, 9 R. R. 389; Citizens' Ins. Co. v. Marsh, 41 Pa. St. 286.

[13] Hallett v. Columbian Ins. Co. 8

excepting certain portions, the charters to pay the master and mariners, the charterers are not owner pro hac vice,[14] although where the master hires the vessel by parol for a term he is owner, and cannot commit barratry.[15] And a master may have such an equitable interest in a ship, as where he has given his note and pledged the vessel as collateral for purchase money, as to be so far the owner that he cannot commit barratry.[16] So where the master is also the owner the insurer is not liable for loss by barratry by him,[17] and the acts of the charterer in smuggling goods are those of the owner.[18] So where the master, who was general owner, let the ship on freight to insured for the voyage, the master retaining possession and command, it was held a mere contract of affreightment, and that the freighter was not the owner, and the master was not in a position to commit barratry.[19] One who hires the ship for the voyage and has exclusive control, possession, and navigation of the ship is the owner, and cannot commit barratry.[20]

The fact that the master is part owner has been held to make his acts not barratry,[1] although the better law seems to apply only to sole ownership.[2] But the fraudulent sale and purchase of a vessel by the master does not make him owner so far as barratrous acts are concerned.[3] The English rule, according to Mr. Arnould, turns upon the test (1) of the construction of the charter-party, and (2) whether at the time of loss the effectual and substantial control over the ship, master, and mariners is in the charterer for the purposes of the voyage, even though the master and mariners are in the pay and service generally of the general owner; and he adds, in most cases the question has been as to the charterer's liability to third parties or the general owner's lien for freight, and it is decided in effect, in cases noted by Mr. Arnould, that if an act which causes the loss is done by or with the privity of the general owner, and the owner for the voyage has no knowledge thereof and does not con-

Johns. (N. Y.) 272; McIntyre v. Bowne, 1 Johns. (N. Y.) 229.

[14] McIntyre v. Bowne, 1 Johns. (N. Y.) 229.

[15] Taggard v. Loring, 16 Mass. 336, 8 Am. Dec. 140.

[16] Barry v. Louisiana Ins. Co. 11 Mart. (La.) 630.

[17] Steinbach v. Ogden, 3 Caines (N. Y.) 1.

[18] Hobbs v. Hannam, 3 Camp. 93, 13 R. R. 764.

[19] Marcardier v. Chesapeake Ins. Co. 8 Cranch (12 U. S.) 39, 3 L. ed. 481; Ross v. Hunter, 4 Term Rep. 33, 2 R. R. 319. But see Vallejo v. Wheeler, Cowp. 143, Lofft. 645.

[20] Marcardier v. Chesapeake Ins. Co. 8 Cranch (12 U. S.) 39, 3 L. ed. 481. See Soares v. Thornton, 7 Taunt. 627, 1 Moore, 373, 18 L. R. 615.

[1] Wilson v. General Mutual Ins. Co. 12 Cush. (66 Mass.) 360, 59 Am. Dec. 188; Harris v. Mercantile Ins. Co. 17 How. Pr. (N. Y.) 188.

[2] See § 2742 herein, "Barratry covers what."

[3] Steinbach v. Ogden, 3 Caines (N. Y.) 1.

sent thereto, this is an act of barratry, even though the general owner hires and victuals the master and mariners.[4] A deviation is not barratrous unless accompanied with fraud or crime, or willfully done for the purpose of ultimately benefiting the master, or done for his own private purposes,[5] and a deviation compelled by a mutinous crew is not a deviation as to the master.[6]

§ 2745. **Bilging: marine risk: "all other perils," etc.**—If the ship is thrown upon her beam ends, and her seams are opened and water enters, but no plank or timber is broken, this is not "bilging" within the meaning of that term as used in a marine policy.[7] Damage caused by her bilging where a ship is placed in a dock for repairs, occasioned by her tackling giving away accidentally in being taken out of the dock, is recoverable under the general clause as to all other perils, etc., the cause of the loss being alleged in a special count.[8]

§ 2746. **Birth of issue.**—Bunyon mentions insurances of this character as existing in England in cases of companies specially authorized to effect such contracts, the principal elements upon which the insurance is based being the chances of having issue dependent upon age, health, and other circumstances. We shall not, however, treat of this subject, because the practice of insurances in this country does not warrant so doing.[9]

§ 2747. **Breach of promise of third party does not render insurer liable.**—The insurer is not liable for losses arising from a breach of promise by a third party.[10]

[4] 2 Arnould on Marine Ins. (Perkins' ed. 1850) *838; 2 Id. (Maclachlan's ed. 1887) 787, *noting* Vallejo v. Wheeler, Cowp. 143, Lofft, 645. See also Id. (9th ed. Hart & Simey) secs. 854 et seq., pp. 1067 et seq.; Soares v. Thornton, 7 Taunt. 627, 1 Moore, 373, 18 R. R. 615.

[5] Earle v. Rowcroft, 8 East, 126, 139, 9 R. R. 385, 14 Eng. Rul. Cas. 345, per Lord Ellenborough; Phyn v. Royal Exch. Co. 7 Term Rep. 505, 4 R. R. 508. And see cases on this point under section "Barratry covers what."

[6] See Scott v. Thompson, 1 Bos. & P. (N. R.) 181, 186, 8 R. R. 780, per Sir James Mansfield; Vallejo v. Wheeler, 1 Cowp. 143, 154, Lofft, 645, per Lord Mansfield; Elton v. Brogden, 2 Strange, 1264, 9 Eng. Rul. Cas. 413.

[7] Ellery v. Merchants' Ins. Co. 3 Pick. (20 Mass.) 45, 46.

[8] De Vaux v. J'Anson, 8 L. J. C. P. 284, 7 Scott, 507, 2 Arn. 82, 3 Jur. 678, 50 R. R. 786; 5 Bing. (N. C.) 519; Phillips v. Barber, 5 Barn. & Ald. 161, 24 R. R. 317.

As to injury to ship consequent upon breaking of part of tackle, etc., see Stott (Baltic) Steamers, Ltd. v. Marten, *considered* at end of § 2736 herein.

[9] Bunyon on Life Ins. 98.

[10] Parsons v. Massachusetts Ins. Co. 6 Mass. 197, 4 Am. Dec. 115.

**§ 2748. Capture or seizure: marine risk.**[11]—"Capture," as that word is used in marine policies,[12] involves, as the principal factor, the taking of the ship with intent to deprive the owner of her. This may be done in the act of war, or in a spirit of depredation by pirates, or by way of reprisals. It may be by a declared enemy lawfully commissioned and according to the laws of war, or by authority of a belligerent or of a de facto government recognized as a belligerent, and includes takings which are unlawful and unjustifiable by or contrary to the municipal laws of the country in which the contract is to be made and performed, and which are unlawful and unjustifiable by the fundamental and supreme law of the country of which the de facto government is actually a part. The term is sufficiently broad to comprehend every species of capture at sea; that is, every species of arrest, seizure, or detention which may lawfully be covered by the policy. Strictly speaking, however, a distinction exists between capture, properly so called, the object of which is to seize the vessel and cargo, and arrests and detentions, wherein the object is not to deprive the owner of her, but to take only contraband goods or enemies' effects on board of her. Another division is into just or unjust capture, or rather lawful and unlawful capture, the former being made by a declared enemy and according to the laws of war, and the latter being that made against the rules established by the law of nations. But whether a capture is just or unjust, lawful or unlawful, and whether or not the property in the thing insured be changed by the capture, cannot avail the insurers as a defense, for they are responsible, without regard to such facts. And in so far as the word is capable of a double meaning, the true rule of exposition is said to be, in the absence of a contrary intent expressed, to interpret it as having been used by the parties in the fullest and most comprehensive sense.[13]

[11] As to excepted risks and losses: warranted free from capture, etc., see §§ 2684–2690 herein.

As to risks and losses: arrests, restraints, etc., see §§ 2737–2739 herein.

As to abandonment and total loss: arrests, restraints, etc., see §§ 2996 et seq. herein.

[12] The policies issued by the Bureau of War Risk Insurance of the United States use the words "takings at sea." See Appendix B herein. The same words are also used in the English policies among the risks assumed, used also in form given under marine ins. act 1906 (6 Edw. VII. c. 41) sched. I.; Butterworth's Twentieth Century Stats. (1900–1909) p. 425; 15 Chitty's Stats. (1902–1907) p. 207. See Appendix C herein. The United States form, however, excepts the United States and the nations engaged in war with the enemies of the United States.

[13] *United States.*—Mauran v. Alliance Ins. Co. (Mauran v. Ins. Co.) 6 Wall. (73 U. S.) 1, 18 L. ed. 836; Rhinelander v. Insurance Co. of Pennsylvania, 4 Cranch (8 U. S.) 29, 2 L. ed. 540.

*Maine.*—Levy v. Merrill, 4 Greenl. (4 Me.) 180.

*Maryland.* — Barney v. Maryland Ins. Co. 5 Har. & J. (Md.) 139.

*Massachusetts.*—Dole v. New England Marine Ins. Co. 6 Allen (88 Mass.) 373, per Bigelow, C. J.

*Pennsylvania.* — Monongahela Ins. Co. v. Chester, 43 Pa. St. 491.

That insurer liable whether capture lawful or unlawful, see Dole v. New England Mutual Marine Ins. Co., *cited* above; Radliffe v. United Ins. Co. 7 Johns. (N. Y.) 38; Marsh v. Muir, 1 Brev. (S. C.) 134, 2 Am. Dec. 648; Goss v. Withers, 2 Burr. 683, 694, 695, 2 Ld. Ken. 325, 1 Eng. Rul. Cas. 1; Pollard v. Bell, 8 Term Rep. 440, 5 R. R. 404; Powell v. Hyde, 5 El. & B. 607, 25 L. J. Q. B. 65, 2 Jur. (N. S.) 87, 4 W. R. 51; Bird v. Appleton, 8 Term Rep. 562, 5 R. R. 468, 13 Eng. Rul. Cas. 547; Price v. Bell, 1 East, 663. That it includes piracy, see Dole v. New England Mutual Marine Ins. Co., *cited* above; Dean v. Hornby, 3 El. & B. 180, 23 L. J. Q. B. 129, 2 C. L. R. 1519, 18 Jur. 623, 2 W. R. 156, 97 R. R. 439.

Emerigon says a "capture is when one makes himself master of a ship in the act of war or in the spirit of depredation and with design to deprive the true owner of her;" that it includes "taking or seizing by way of reprisals;" and he distinguishes "two kinds of captures, one of which the object is to seize, the other of which the object is to take only enemies' effects or contraband goods found on board. The first is an absolute capture, properly so called. The second appears, then, not to fall within the definition I have given of capture. . . . We may distinguish, too, a just capture from an unjust one. A just capture is that which is made by a declared enemy according to the laws of war; Secundum jus gentium. Unjust capture is that which is made against the rules established by the law of nations. Whether a capture be just or unjust, the insurers are responsible." He also adds that it covers captures by friends or enemies, declared or not declared, "for whoever commits a depredation upon another is a pirate, and becomes an enemy:" Emerigon on Ins. (Meredith's ed. 1850) c. xii. secs. 18, 27, 36, pp. 353, 412, 440: *citing* on last point Casaregis, Roccus, The Rota of Genoa, Scaccia, Valin and Pothier. Mr. Marshall says: "Capture is when a ship is subdued and taken by an enemy in open war or by way of reprisals, or by a pirate, and with intent to deprive the owner of it. Capture may be with intent to possess both ship and cargo, or only to seize the goods of the enemy or contraband goods which are on board. The former is a capture of the ship in the proper sense of the word; the latter is only an arrest and detention without any design to deprive the owner of it. Capture is deemed lawful when made by a declared enemy, lawfully commissioned and according to the laws of war, and unlawful when it is against the rules established by nations. But for every loss occasioned by capture, whether lawful or unlawful, the insurer is liable, the words of the policy being sufficiently comprehensive to include every species of capture to which ships at sea can ever be exposed." 1 Marshall on Ins. (ed. 1810) *495. See also 3 Kent's Commentaries, 304; 2 Arnould on Marine Ins. (Perkins' ed. 1850) *808 et seq.; 2 Id. (Maclachlan's ed. 1887) 761 et seq.; Id. (9th ed. Hart & Simey) sec. 829, p. 1038, sec. 905, pp. 1127 et seq.; 1 Parsons on Ins. (ed. 1868) 575 et seq. See §§ 2684–2692 herein.

"The ship is lost by capture even though she be never condemned at all nor carried into any port or fleet of the enemy and the insurer must pay the value." Goss v. Withers, 2 Burr 683, 1 Eng. Rul. Cas. 1, 2 Ld. Keny. 325, *quoted*, per Lord Halsbury, in Anderson v. Marten [1908] L. R. App. Cas. 334, 77 L. J. K. B. N. S. 950, 99 L. T. N. S. 254, 24 T. L. R. 775, 52 S. J. 680, 13 Com. Cas. 321, 5 B. R. Cas. 66, case affirms [1908] 1 K. B. 601, 77 L. J. K. B. N. S. 569, 98 L. T. N. S. 146, 24 T. L. R. 208, 13 Com. Cas. 205, 10 Asp. M. L. C. 605.

A capture has also been held to include a mutinous seizure by passengers;[14] a loss by an insurrection of slaves;[15] the taking of a neutral ship and cargo by a belligerent jure belli; also the taking forcibly by a friendly power in time of peace, and even a taking by the government itself; nor is it necessary that the commission should issue from a lawful government.[16] So a capture is included under a policy on risks "the same as those contained in all regular policies of insurance."[17] And the fact that the vessel is seized and condemned, although the acts are based on a mistake of fact, constitutes a "taking at sea."[18] Insurer is also liable if a vessel is seized and condemned under an unlawful claim of right by the government making the seizure, where said claim of right is denied by the United States; for the master is not in such case bound to abandon under threat or warning of such illegal capture.[19]

It is a loss by capture and not a seizure in port, under a policy "no risk in port taken but sea risk," where the vessel is taken about two leagues from land and about four leagues from the port of destination, and the ship is there taken possession of by the captors, a prize master and crew being put on board.[20]

Emerigon says that insurers are not liable for capture arrived through fault of the captain, unless they have made themselves guarantors against barratry of the master.[1] And in an English case the assured was permitted to recover a loss as for capture, though there might have been a recovery for barratry, it appearing that the master conspired with the captor to effect the capture.[2]

An interesting point arose in an English case in that there was a change of ownership of the goods seized by reason of payment by the underwriters, between the dates of the seizure and the claim.

[14] Kleinwort v. Shepard, 1 El. & E. 447, 28 L. J. Q. B. 147, 5 Jur. (N. S.) 863, 7 W. R. 227.

[15] McCargo v. New Orleans Ins. Co. 10 Rob. (La.) 202, 43 Am. Dec. 180.

[16] Mauran v. Alliance Ins. Co. (Mauran v. Ins. Cos.) 6 Wall. (73 U. S.) 1, 18 L. ed. 836.

[17] Levy v. Merrill, 4 Greenl. (4 Me.) 180. Whether a capture is a loss by perils of the sea in case of a bottomry bond, see Appleton v. Crowninshield, 3 Mass. 443.

[18] Lozano v. Janson, 2 El. & E. 160, 28 L. J. Q. B. 337, 5 Jur. (N. S.) 1401, 7 W. R. 654.

[19] Williams v. Suffolk Ins. Co. 13 Pet. (38 U. S.) 415, 10 L. ed. 225, *cited* in Gloucester Ins. Co. v. Younger, 2 Curt. (U. S. C. C.) 338. Fed. Cas. No. 5,487; Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 382, 41 Am. Dec. 592. Upon the point of legality or illegality of capture as not affecting right of assured to recover, see Goss v. Withers, 2 Burr. 683, 694, 1 Eng. Rul. Cas. 1, per Lord Mansfield.

[20] Duval v. Commercial Ins. Co. 10 Johns. (N. Y.) 278. See also Levi v. Allnutt, 15 East, 267; Black v. Marine Ins. Co. 11 Johns. (N. Y.) 287.

[1] Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 18, p. 354.

[2] Arcangelo v. Thompson, 2 Camp. 620, 12 R. R. 758.

Said goods were shipped before the war by neutral shippers to their own order on board a British vessel and under an option they were to be delivered at Hamburg to a German firm, as agents of the shippers, for sale. German underwriters at Hamburg insured the goods against war risks. They were seized and sold under an order of court. The property in the goods had not passed from the neutral shippers at the time of the seizure, thereafter the German agents of the shippers made claim against the underwriters for a total loss which was paid in full. It was admitted that the German underwriters became thereby the owners of the goods. About a year later a claim was made for the release of the proceeds of the sale under the Court order. The point therefore rested upon the position that at the time of the seizure the property in the goods was in the neutral shippers and at the time of the claim in said underwriters, who were the real claimants. The claim of the latter was disallowed and the proceeds of the sale condemned as enemy property.[3]

For the purpose of further showing what is subject to, and what constitutes capture or seizure, and inasmuch as the principles underlying the law governing naval prize are of considerable value upon this subject in marine insurance, we have briefly considered in the appended note certain important prize cases or decisions, and have also noted therein some other matters relevant thereto including definitions of "captor," "capture," etc., under the English Prize Court Rules of 1914.[4]

[3] The Palm Branch, 86 L. J. P. 17 [1916] P. 230, 2 P. Cas. 281, 115 L. T. 657, 32 T. L. R. 725.—Evans, P. The question raised in this case was declared to be a different one from that in The Miramichi, 84 L. J. P. 105, [1915] P. 71, 1 P. Cas. 13, and The Odessa, 84 L. J. P. 112, [1915] P. 52, 1 P. Cas. 163, [1916] 1 A. C. 145, 85 L. J. P. C. 49, 1 P. Cas. 554, and the views expressed in those cases were adhered to. Transfer flagrante bello, when invalid, see The Benito Estanger, 176 U. S. 568, 44 L. ed. 592, 20 Sup. Ct. 489.

[4] Outbreak of hostilities: an enemy's goods on a British ship are liable to be seized, even though the cargo consists of oil which has been pumped into tanks on shore for safe custody after being brought into a British port. The Roumanian, 85 L. J. P. C. 33, [1916] 1 A. C. 124, 1 P. Cas. 536, 114 L. T. 3, 13 Asp. Mar. C. 208, 60 Sol. J. 58, 32 T. L. R. 98; Judgment, 84 L. J. P. 65, [1915] P. 26, affirmed; The Miramichi, 84 L. J. P. 105, [1915] P. 71, approved; The Ooster Eems (1784) 1 C. Rob. 284n, 1 Eng. P. C. 136n, disapproved, as not of value as an authority; Brown v. United States, 8 Cranch (12 U. S.) 110, 3 L. ed. 504, distinguished.

Goods shipped at a Turkish port by a Turkish subject on board a British ship to his own order and discharged into a bonded warehouse are the proper subject of maritime prize where they are still in bond after the commencement of hostilities. The Eden Hall, 85 L. J. P. 119, [1916] P. 78, 2 P. Cas. 84, 114 L. T. 566, 13 Asp. Mar. C. 306, 60 Sol. J. 418.—Evans, P.

An assignment may be a cover to an enemy interest and a belligerent

*Acts which increase or decrease the risk of capture, etc.: enforceability of agreements for the latter purpose.*—The policy may be avoided by acts which increase or decrease the risk of capture and

right will override a neutral claim when regarded only as a debt. The right of capture depends upon the proprietary interest in the thing captured at the time of the capture and is not affected by the secret liens or private engagements of the parties, therefore prize courts have rejected liens, of bottomry bonds, of mortgages, for supplies, etc. So where it appeared that neutral commission merchants shipped a cargo on a Spanish vessel on a voyage commenced before war was declared, and while proceeding to Havana she was captured by a vessel of the United States in May 1898; and the invoices stated that the said goods were shipped 'to order, for account and risk, and by order of the parties noted below," who are, in addition to the consignor, the vessel owners and other subjects of the enemy, while the bills of lading stated that the goods are taken "for account of whom it may concern," and there is no charter party, said property will be deemed to be that of the consignees during the voyage, so as to be subejct to capture, especially so when no claim to any part of the cargo is made by the consignor. In said case, however, a British company doing business in London laid claim to the cargo on the ground that they had advanced money for its purchase to a citizen of Montivideo and had received bills of lading covering the shipments, but it was held that the vessel was an enemy vessel and that the presumption that the cargo was enemy's property could only be overcome by evidence clear and positive to the contrary. The Carlos P. Roses, 177 U. S. 655, 44 L. ed. 929, 20 Sup. Ct. 803.

*Enemy mail ships* are also held liable to capture as prize of war as no rule of international law exempts them therefrom, especially so where she is an armed vessel. The Panama, 176 U. S. 535, 44 L. ed. 577, 20 Sup. Ct. 480. See The Peterhoff, 5 Wall. (72 U. S.) 28, 18 L. ed. 564. See The Olinde Rodrigues, 174 U. S. 510, 537, 43 L. ed. 1065, 1076, 19 Sup. Ct. 851.

In a recent English case *goods from German factories shipped by parcel post* on a Danish vessel at Copenhagen before the Reprisals Order in Council of March 11, 1915, are held by the international law of prize, of enemy origin and continue enemy's property since the property of goods sent by sea only passes on actual delivery and when diverted into a British port and ordered discharged they may be detained and sold and the proceeds detained until the conclusion of peace. The United States, 86 L. J. P. 52, [1917] P. 30, 116 L. T. 19, 33 T. L. R. 134.—Evans, P. See §§ 2569a, 2737 herein.

*Wireless installation: wireless telegraph.* Although a hospital ship, constructed and adopted solely and wholly as such is entitled to protection from capture during hostilities under articles of the Hague Convention (Convention X of the Hague Conference, 1907, Arts. 1, 8), still where a German steamship fitted out as a hospital ship is not only unsuitable for use as such, but is undoubtedly fitted and intended for signalling purposes obviously to be used very largely in excess of the requirements of a bona fide hospital ship, and which has an abnormal number of signal apparatus and signal lights, and she is also seen to be acting in a very suspicious manner off the enemy's coast, while many of her documents are destroyed by the captain, she may upon capture be lawfully condemned as prize; and this is so although the Hague Convention provides that a wireless installation shall not take away the protection as above

detention according to the common practice of the belligerent; nor is it necessary that such increase of risk should be that of rightful

stated, for said Convention does not justify sending secret code messages. The Ophelia, 85 L. J. P. 169, [1916] 2 App. Cas. 206, 2 P. Cas. 150, 114 L. T. 1067, 32 T. L. R. 502, aff'g [1915] P. 129, 84 L. J. P. 131.

As to submarine sound-signaling apparatus, see § 2569a herein.

*Capture within territorial waters of neutral.* In a case decided in 1916, a steamship flying a neutral flag was captured in the Strait of Magellan while carrying coal and other supplies for German warships, and it was held that no proposition of international law was clearer, or more surely established, than that a capture within the territorial waters of a neutral, is as between enemy belligerents, for all purposes rightful, and that only the neutral State concerned can question the validity of the capture. It can only be declared void as to the neutral State and not as to the enemy. The Bangor, 85 L. J. P. 218, [1916] P. 181, 2 P. Cas. 206, 114 L. T. 1212, 32 T. L. R. 590, —Sir Samuel Evans, Pres. *citing* The Anne, 3 Wheat. [16 U. S.] 435, 4 L. ed. 428; The Lilla, 2 Sprague [U. S. D. C.] 177, Fed. Cas. No. 8,348; The Sir William Peele, 5 Wall. [72 U. S.] 517, 18 L. ed. 696; The Adela, 6 Wall. [73 U. S.] 266, 18 L. ed. 821. It was also said in the principal case that: "It was contended by counsel for the shipowners that this well-established rule of international law had been modified by the Hague Conference of 1907. Convention XIII. Assuming for the purpose of this judgment that Convention XIII. is binding, it is clear that the Convention was only directed to the relations between neutral Powers and belligerent Powers, and was only intended to apply to questions between neutral Powers and belligerent Powers as such. Its provisions were not intended to deal with any question between belligerents, and did not affect the rule relating to capture in territorial waters of a neutral State, as between two belligerent Powers, where the neutral State did not intervene." Id. 220.

It is held that the character of a Spanish merchant vessel which is enemy's property lying in the harbor, was not changed by the capitulation of Santiago, nor by the President's proclamation of July 13, 1898, as to the rights of private property nor by the cessation of active military operations, so as to exempt said vessel from capture for military purposes by the military authorities. Herrera v. United States, 222 U. S. 558, 56 L. ed. 316, 32 Sup. Ct. 179; Diaz v. United States, 222 U. S. 574, 56 L. ed. 321, 32 Sup. Ct. 184.

As to detention, subsequent seizure as prize, and condemnation of enemy vessel lying at port at outbreak of hostilities, and continuing to use it as port of refuge after offer of safe conduct, and after expiration of time limit, see The Pindos, 85 L. J. P. C. 209, [1916] 2 A. C. 193, 2 P. Cas. 146, 114 L. T. 960, 32 T. L. R. 489.

As to detention of merchant ship which is in enemy port at beginning of hostilities, see Arts. 1–4. Hague Convention given in Vol. 10 Amer. Jour. of Internat. L. (1916) pp. 242 et seq. See also 32 T. L. R. 98, 103.

As to law of freight in prize proceedings (neutral vessels), see article "Prize Cases in the English Courts Arising Out of the Present War" by Russell T. Mount, 17 Columbia L. Rev. pp. 185–207.

*Under the English Prize Court Rules* 1914 (Vol. III. Statutory Rules & Orders 1914 [Published by authority]), " 'Captor' shall mean any person taking or seizing, or having taken or seized, any ship or goods as prize, and shall (for the purpose of proceeding in any cause or matter) include the captor's solicitor (if any), or the proper officer of the Crown,

capture in accordance with the law of nations.[5] In connection, however, with the above, what is said in a Federal circuit court case is pertinent here, and that is, that the fundamental rule "requires the holder of an insurance policy to have regard for the interests of the insurer, and to act in good faith so as not to incur a loss by unnecessary exposure of the insured property to perils which are obvious," and accordingly it is held that where a vessel is insured against war risks only and the policy covers those risks excluded by the warranty free of the capture, seizure, or detention clause, then, in such case, even though the owner of the vessel gave the master a letter of special instructions appointing for the ship a direct course deemed the most safe to prevent her capture, but she was caught in floating ice, unusual at that season and was compelled to deviate and was captured, said facts constitute no defense although false documents are carried, for the adoption of customary and reasonable means to promote the success of the adventure and to avoid known dangers does not afford a ground of exemption of insurer from his agreement under the policy terms; and this

and shall include recaptor; 'Capture' shall include recapture; 'Cause' shall mean any prize proceeding instituted by a writ; 'Claimant' shall mean any person who shall assert a claim to ship or goods taken or seized as prize, or to compensation, and shall (for the purposes of proceedings in any cause or matter) include the claimants solicitor (if any), . . . 'Defendant' shall (for the purposes of proceedings in any cause or matter) include the defendant's solicitor (if any); . . . 'Month' shall mean calendar month; 'Owner' shall mean any person to whom by operation of law the property in a ship seized or taken as prize shall, in whole or part, have passed, and shall also include any person intervening in a cause on behalf of an owner, or intervening and claiming or alleging an interest in such ship; . . . 'Ship of war' shall include armed ship. 2. Unless the contrary intention appears, the provisions of these Rules relative to ships shall extend and apply, *mutatis mutandis*, to goods and freight (if any) due or to grow due; and for such purpose the term 'ship' when used in these Rules shall also mean 'goods' and freight." "Procedure," under The Prize Court Rules 1914, Ord. I. Interpretation Statutory Rules & Orders, 1914, and amendments, Vol. III. pp. 105–213. By Order of Council, Aug. 5, 1914, also "Provisional" Order Sept. 30, 1914. See also "Manual of Emergency Legislation" p. 256. Id. pp. 366, 367.

As to validity of Orders in Council and "extent and binding force upon English Prize Courts of 'Orders in Council,'" see note under § 2569a herein.

As to Convention between the United Kingdom of Great Britain and France relating to prizes captured during the present Great European War, signed at London, November 9, 1914; ratifications exchanged December 21, 1914 (Great Britain Treaty Series, 1915, No. 2) see 10 Amer. Jour. of Internat. Law (1916) Suppl. pp. 20 et seq. As to Accession of Russia on March 5, 1915, to said Convention (Great Britain Treaty Series, 1915, No. 4); Id. p. 26.

[5] Livingston v. Maryland Ins. Co. 7 Cranch (11 U. S.) 506, 3 L. ed. 421.

especially applies where measures taken to conceal the ship's destination do not increase the risk of capture, as in case of permission to run blockade, and also in view of the fact that said letter and other papers were surrendered.[6]

Again, although we have elsewhere considered the question of what the underwriter is bound to know as to political perils,[7] the necessity of disclosure as to contraband goods, belligerent risks, ships' papers, false clearance, etc.,[8] and also the law as to neutrality and national character,[9] still the following decision is especially relevant and of force here as it is directly in point as to acts done to decrease the risk of capture and the enforceability of agreements entered into for that purpose the facts upon which this decision was rendered were these: one Duffy, an American citizen engaged in commerce and domiciled at Buenos Ayres, shipped a cargo of hides and lard to Gibraltar. Buenos Ayres was then at war with Brazil. The brig on which the cargo was shipped was an American vessel and the Captain was a citizen of the United States and was also part owner of the vessel. In order to protect the cargo from capture from the Brazilians it was shipped as the property of one De Valengin and the bill of lading and other papers relating to it were made out in his name. The brig was captured on her voyage by a Brazilian cruiser, and was wrecked and the vessel and cargo totally lost, near Monte Video, while in possession of the captors, who were endeavoring to carry her into port, De Valengin being the ostensible owner of the cargo, he, with the consent of Duffy, prosecuted a claim for remuneration from the Brazilian government, insisting that the property belonged to him, that it was neutral property and therefore unlawfully captured and after his death his administrator finally recovered such compensation. In a suit by Duffy against said administrator, it was claimed that the agreement between De Valengin and Duffy to claim remuneration from the Brazilian government on the ground that the property was neutral, when in truth it was Duffy's and therefore belligerent and liable to capture by the law of nations, was fraudulent and immoral; and that the courts of justice of this country would not assist a party to recover money on such an agreement. It was held, however, that a contract of insurance on property covered as neutral, when it was in fact belligerent, is not invalid when its true char-

[6] Northwestern Steamship Co. v. Maritime Ins. Co. (U. S. C. C.) 161 Fed. 166.

As to change of voyage: deviation, etc., see chap. LXVI. (§§ 2365 et seq.) herein.

As to "liberty to run blockade:" seizure, see § 2142a herein.

[7] See § 1808 herein.

[8] See §§ 1818, 1832, 1833 herein.

[9] See §§ 2122 et seq. herein.

acter and the means taken to protect it have been fairly represented to the insurer, and Mr. Chief Justice Taney who delivered the opinion of the court declared: "It has been frequently held, that the device practiced in this case, of covering the property as neutral when in truth it was belligerent, is not contrary to the laws of war, or the laws of nations. And contracts made with underwriters in relation to property thus covered, have always been enforced in the courts of a neutral country, when the true character of the property and the means taken to protect it from capture, have been fairly represented to the insurer. The same doctrine has always been held where false papers were used to cover the property; provided the underwriter knew or was bound to know that such stratagems were always resorted to by persons engaged in that trade. And if such means may be used to prevent a capture, there can be no good reason for condemning with more severity, the continuation of the same disguise after the capture, in order to prevent the condemnation of the property, or to procure compensation for it, when it has been lost by reason of the capture. It is true the court of the capturing nation would never enforce contract, of that description; but they have always been regarded as lawful in the courts of a neutral country." [10]

§ 2749. **Cargo: taking on board additional cargo: marine risk.**—Whether the insurers are discharged by reason of the vessel's taking on additional cargo depends upon whether there is a departure from the contract of insurance or from the voyage insured, rather than upon the point of increase of risk.[1] We have seen elsewhere that a general policy on goods covers such general goods of assured as are on board at the time of loss, and includes substituted goods; that is, shifting or successive cargoes.[2]

§ 2750. **Carriers: liability of warehousemen: conflict of laws.**—If warehousemen are required under an agreement with carriers to insure goods warehoused in good and solvent companies, this does not render such warehousemen insurers of the goods, but if under such agreement a compress company is to insure cotton deposited with it by carriers for compression, and it was customary for ship-

[10] De Valengin v. Duffy, 14 Pet. (39 U. S.) 282, 10 L. ed. 457.

[1] Maryland Ins. Co. v. Le Roy, 7 Cranch (11 U. S.) 26, 3 L. ed. 257, per Johnson, J. See chapter on Deviation.

[2] See chapters on description of property and subject-matter, §§ 1732 et seq. herein; Hill v. Patten, 8 East, 373, 377, 1 Camp. 72, 9 R. R. 469, 13 Eng. Rul. Cas. 595, per Lord Ellenborough; Tobin v. Hartford, 34 L. J. C. P. 37, 13 Eng. Rul. Cas. 598, 13 Com. B. (N. S.) 791, 17 C. B. (N. S.) 528, 10 Jur. (N. S.) 859, 10 L. T. 817, 12 W. R. 1062.

As to goods to be shipped from time to time: amount of insurance limited, etc., see paragraph at end of note 8c, under § 2730 herein.

pers to store their cotton with such company under permits from the carriers, the shippers being given bills of lading upon receipt of storage receipts issued by the company, said company is obligated to insure after the issuance of the bills of lading and so long as the cotton is held by it.[3] But a compress company which agrees to insure cotton against loss by fire for the benefit of carriers and owners, can be held liable only to such extent as there was a breach of the contract to carry insurance and for such damages only as are consequent upon or result therefrom. And an advancement of money to assured for the loss of property in possession of a bailee who had failed to comply with his agreement to procure insurance on it, which recognizes insurer's liability for the loss, constitutes a payment so as to prevent a recovery for the bailee's failure to procure insurance, whether the advancement was a loan to be repaid upon recovery from the bailee, or was borrowed from a third person on insurer's credit, or was provided for in the insurance contract.[4] A carrier's liability on a collateral contract to procure insurance on the property of shippers, is, however, not covered by a policy "to cover the liability of the insured as carriers and warehousemen." [5] The consignees of goods residing in Boston contracted with a transportation company in New York for the carriage of the goods from New York to Boston, and the delivery to them at Boston. The defendant's connecting carriers residing at Massachusetts received the goods from the New York transportation company. On her arrival at Boston the goods were demanded but refused, because delivery was not then convenient, and the same afternoon they were unloaded and placed in defendant's warehouse, too late for delivery. The same night the warehouse and goods were burned up, and it was held that defendants were liable for the goods, although under Massachusetts decisions a railroad company under similar circumstances would not have been liable.[6]

[3] Lancaster Mills v. Merchants' Cotton Press Ins. Co. 89 Tenn. 1, 24 Am. Rep. 586, 14 S. W. 317. Bill of lading; carrier's liability for loss by fire; negligence. See Merchants Cotton Press & Storage Co. v. Insurance Co. of North America, 151 U. S. 368, 373, 38 L. ed. 195, 14 Sup. Ct. 367; Insurance Co. of North America v. Lake Erie & W. R. Co. 152 Ind. 333, 53 N. E. 382.

[4] Deming v. Merchants' Cotton Press & Surety Co. 90 Tenn. 306, 13 L.R.A. 518, 17 S. W. 89.

As to subrogation, see §§ 3545 et seq. herein.

[5] Minneapolis, St. Paul & S. Ste. Marie Railroad Co. v. Home Ins. Co. 55 Minn. 236, 22 L.R.A. 390, 56 N. W. 815.

[6] Faulkner v. Hart, 82 N. Y. 413, 37 Am. Rep. 574.

Mutiny justifies a deviation and permits a recovery of expenses thereby occasioned. Tweedy Trading Co. v. Western Assur. Co. (U. S. D. C.) 168 Fed. 835, case aff'd 179 Fed. 103, 102 C. C. A. 397, 39 Ins. L. J. 1342.

§ 2750a. **Carriers: insurance against derailment during transportation of goods: auto truck.**—Where upon the margin of a transportation certificate of insurance, it was stipulated for insurance only against loss or damage by fire, collision or derailment on land, and marine perils while on ferries and transfers, and the goods were shipped by auto truck, and the hind wheels of the truck, during said transportation, skidded into the gutter and the truck capsized, it was held that such skidding was not a "derailment" within the meaning of policy, as that word was used only in connection with transportation by rail as distinguished from transportation by vehicles over land by other means than by rail and also in distinction from transportation by water.[7]

§ 2751. **Collision: marine risk: generally.**—Concerning collisions generally, in determining upon which vessel lies the fault of the collision the following points are important: 1. The character of the vessels, as whether the collision is between steamships or steam vessels, or between tugs, tows, and canal-boats, or between steam and sailing vessels or steam vessels and small craft, or between sailing vessels; 2. The relative situation of the vessels, as whether one vessel is at anchor or at the pier, or both vessels are pursuing their respective courses, involving also the question of right of way; 3. The negligence or mistakes of one or both the vessels, involving the question of sudden change of course, the observance of the usual rules of navigation, and the requirements as to signals, lights, and lookouts; 4. The surrounding circumstances, such as the compelling force of the tides and of currents, the perils of the sea, imminent danger, fogs, the necessity of changing course in extremis, the locality, whether river, harbor, or entrance thereto or open sea, the time and the character of circumstances of navigation necessary, as well as the degree of speed with reference to the kind of vessel, and all the attending circumstances. The fault may be that solely of the injured vessel, or the injury may be occasioned by the fault of the other vessel, or both vessels may be in fault, or neither; as in this last case, where there is some extraneous compelling force or peril of the sea, or some extraordinary and some unavoidable accident occasioning the collision, upon the determination of which facts rests fixing the loss upon the proper party.[8]

[7] Graham v. Insurance Co. of North America, 220 Mass. 230, 107 N. E. 915.

[8] For cases covering these general points, see in 32 Fed.: The Hackensack, p. 800; The America, p. 845; The Ogemaw, p. 919. In 33 Fed.: The Alaska, p. 107, aff'd 130 U. S. 201, 32 L. ed. 923, 9 Sup. Ct. 46, 527; The Ada A. Kennedy, p. 623; The Osceola, p. 719; The Wm. Craft, p. 847, and other cases. In 34 Fed.: The Secancus, p. 68; The Martello, p. 71; The Manhasset, p. 408; The Frank P. Lee, p. 480; The Atlas, p. 543; The Britannia, p. 546, aff'd 153

We have noted below certain authorities and although they are not insurance decisions still they are pertinent here, not only as illustrating what is stated above, but also in respect of their bear-

U. S. 130, 38 L. ed. 660, 14 Sup. Ct. 795; The Baltimore, p. 660; The Belle, p. 669; The City of Albany, p. 812; The St. Johns, p. 814; The John Cottrel, p. 907; The Pomona, p. 919, and other cases. In 35 Fed.: Van-Dyke v. The Bridgeport, p. 159; McCormick v. The Gladys, p. 160; The Eliza S. Pottor, p. 220; Union Ins. Co. v. The Bridgeport, pp. 222, 224; The City of Truro, p. 317; McAvoy v. The Mignon, p. 319; The Susquehanna, p. 320; Case v. The Susquehanna, p. 325; The Sammy, p. 327; The W. J. McCaldin, p. 330; The Gibson, p. 333; The Alaska, p. 555; The Morrisania, p. 558; The Osceola, p. 559; The City of New York, p. 604, aff'd 147 U. S. 72, 37 L. ed. 84, 13 Sup. Ct. 211; The Baltimore, pp. 613, 614; The Nettie, p. 615; The Farragut, p. 617; The Drew, p. 789; Pomona, p. 921, and other cases. In 36 Fed.: The Marion W. Page, p. 329; The Sammie, p. 568; The Mary Powell, p. 598; Ocean S. S. Co. v. The Talisman, p. 600; the Mercedes, p. 602, and other cases. See, also, The Woodrop Sims, 2 Dod. Adm. 83, 85, per Lord Stowell; The Sappho, 9 Jur. 560; Chappel v. Bradshaw (Md.) 13 Atl. 50; Reeves v. Ship Constitution, Gill. (U. S.) 579; Fed. Cas. No. 11,659; Tacoma Mill Co. v. The Blue Jacket, 3 Wash. Ter. 581, 19 Pac. 151; Philadelphia & Reading R. R. Co. v. Adams, 89 Pa. St. 31, 33 Am. Rep. 721; Hoffman v. Union Ferry Co. 47 N. Y. 176, 7 Am. Rep. 435; Austin v. New Jersey Steamboat Co. 43 N. Y. 75, 3 Am. Rep. 663; 2 Parsons on Contracts (7th ed.) 428, 435, *308 et seq.

Emerigon says: "There are three kinds of collision: that which happens from casualty, that which happens by the fault of someone, and that which happens without it being possible to ascertain by whose fault:" Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 14, pp. 327 et seq. See Abbott on Shipping (6th ed.) 228 et seq.; 2 Arnould on Marine Ins. (Perkins' ed. 1850) *803 et seq.; Id. (Maclachlan's ed. 1887) 23, 24, n. 730, 756, 757; Id. (9th ed. Hart & Simey) secs. 827 et seq., pp. 1034 et seq., where the following language of Lord Stowell (in the Woodrop Sims, 2 Dod. Adm. 83, 85) is quoted: "There are four possibilities under which a loss of this sort may occur: 1. It may happen without blame being imputable to either party, as where a loss is occasioned by a storm or by any other vis major; in that case the misfortunes must be borne by the party on whom it happens to light, the other not being responsible to him in any degree; 2. A misfortune of this kind may arise when both parties are to blame, where there has been a want of due diligence and skill on both sides; in such a case the rule of law is, that the loss must be apportioned between them as having been occasioned by the fault of both; 3. It may happen by the misconduct of the suffering party alone; and then the rule is, that the sufferer must bear his own burden; 4. It may have been the fault of the ship which ran the other down, and in this case the injured party would be entitled to an entire compensation from the other." And see upon these several points the cases above *noted* in the 32d, 33d, 34th, 35th, and 36th Fed. Rep. As to entrance into New York harbor and international rules of navigation, see The Excelsior, 33 Fed. 554. See Marsden's Law of Collisions at Sea (ed. 1880), containing extracts from the merchants' shipping acts; International Register of 1863 and 1880; and local rules for the Thames, etc.; The "collision clause" article criticising Xenos v. Fox, 46 Law Times, 125.

ing upon the principles underlying the collision clauses in policies considered under the next following sections. It should also be borne in mind that not every collision occasioning damage to the shipowner is covered by the running down clause in marine insurance. The policy may, however, stipulate for full indemnity as appears in a Federal decision hereinafter considered.[9]

[9] See last preceding note. Acts of negligence which do not contribute to the accident as a proximate cause, do not render a ship liable, even under the American as distinguished from the English rule of liability. The Curtin, 217 Fed. 245, 133 C. C. A. 519, aff'g 205 Fed. 989. If faults of vessel coming out of dense fog are glaring and numerous, the court should not be very astute to discover contributory fault on part of other vessel. The Persian, 224 Fed. 441, 140 C. C. A. 135. Where sufficient officers and crew on deck when collision impending to perform all necessary duties more need not be there. La Normandie, 58 Fed. 427, 7 C. C. A. 285.

Duty of master to observe reasonable care and prudence not only against present dangers, but against impending perils, and to take reasonable measures of precaution; when cannot set up defense of inevitable accident; unsafe anchorage. The Adventuress (U. S. D. C.) 214 Fed. 834. Inevitable accident; collision caused by vessel drifting from moorings; degree of prudence and care exercised such as circumstances reasonably required, The E. M. Peck, 228 Fed. 481, 143 C. C. A. 63, rev'g 201 Fed. 599. Collision when due to inevitable accident from breaking of steamer's tiller rope, and not from steamer's fault. The Olympia, 61 Fed. 120, 9 C. C. A. 393. What constitutes inevitable accident; collision in dense fog; steam vessels; both in fault; failure to listen to signals. The Bayonne, 213 Fed. 216, 129 C. C. A. 560. What is not inevitable accident; collision of tug and barge, with steamer lying at dock. The J. N. Gilbert, 222 Fed. 37, 137 C. C. A. 575. Inevitable accident construed; test of ordinary care and maritime skill. The Jumna, 149 Fed. 171, 79 C. C. A. 119, aff'g 140 Fed. 743.

Schooner and steamship crossing; changing location of lights; acts done in extremis. The Furnessia, 154 Fed. 348, 83 C. C. A. 126, aff'g 137 Fed. 955. Failure at sea to keep proper lookout and sound fog signals frequently; location of side lights. Palmer v. Merchants' & Miners' Transportation Co. (U. S. D. C.) 154 Fed. 683. What is keeping a "proper lookout" under art. 29, inland rules act, June 7, 1897, c. 4, 30 Stat. 102, Comp. Stat. 1913, sec. 7903; collision of steam vessels in fog, signals. The Tillicum (U. S. D. C.) 217 Fed. 976. Failure of sailing vessel to show torchlight when meeting steamer, when immaterial. Bigelow v. Nickerson, 70 Fed. 113, 17 C. C. A. 1, 30 L.R.A. 336. Absence of green light, when immaterial. The Robert Graham Dun, 70 Fed. 270, 17 C. C. A. 419, aff'g 63 Fed. 167. Speed of steamer where proper light not shown by other vessel. The Kaiserin Maria Theresa, 149 Fed. 97, 78 C. C. A. 691, rev'g 125 Fed. 145.

Obligation of steamer to reduce speed on entering fog bank and neglect to do so puts fault on her for collision. The Saale, 63 Fed. 478, 11 C. C. A. 302, aff'g 59 Fed. 716. Sailing vessel with efficient fog horn, when not in fault for collision in fog, the horn having become disabled. The Trave, 68 Fed. 390, 15 C. C. A. 485.

Harbors and navigable coast waters connecting directly with the ocean are within International Rules

A vessel is "in collision," within the meaning of an insurance

of 1885, article 21, requiring steamers to keep to starboard side. See Rev. Stats. sec. 4233; The Victory, 68 Fed. 395, 15 C. C. A. 490, aff'g 63 Fed. 631; The Britannia, 153 U. S. 130, 38 L. ed. 660, 14 Sup. Ct. 795; The John King, 49 Fed. 469, 1 C. C. A. 323. Collision; as to navigation on harbors, lakes, and inland waters and navigation on great lakes, as affected by International Rules of 1885, and Revised Statutes, section 4233, see The North Star, 62 Fed. 71, 10 C. C. A. 262. Crossing courses; right of way; rules of navigation for rivers and harbors, 30 Stat. 96, U. S. Comp. Stat. 1901, p. 2885; The Pembroke (U. S. D. C.) 150 Fed. 193. Rules of navigation of inland waters as to narrow channels and collision construed; fault of tugs in collision with steamship. The Santa Maria (U. S. D. C.) 227 Fed. 149. Altering course to starboard so that each shall pass on port side of the other; navigation of great lakes, rules, act Feb. 8, 1895, c. 64, sec. 1, 28 Stat. 645, U. S. Comp. Stat. 1901, p. 2891, The William Chisholm, 153 Fed. 704, 82 C. C. A. 562. Varying from compass course which would keep steamer near center of channel; starboard crossing rule; stopping and navigating with caution. The City of Lowell, 152 Fed. 593, 81 C. C. A. 593, rev'g 139 Fed. 901, act June 7, 1897, c. 4, 30 Stat. 96, U. S. Comp. Stat. 1901, p. 2880. Vessel not at fault under Inland rules, but at fault for violating local rule. N. Y. Laws 1882, sec. 757, c. 410, requiring vessels navigating in East River, between Battery and Blackwell's Island to keep as near channel as possible. The Ashley, 221 Fed. 423, 137 C. C. A. 221, modifying 209 Fed. 965. East River, New York is not a narrow channel within article 25 of the Inland Rules and the only regulation as to navigation is section 757, c. 410, L. 1882, N. Y., which requires vessels to go up and down as near as possible in center of stream; duty of tugs with long tows in tidewaters. The Wrestler (The Wyomissing) 232 Fed. 448, 146 C. C. A. 442.

When tug colliding with anchored vessel is solely in fault. The P. I. Nevins, 67 Fed. 158, 14 C. C. A. 355. Obstruction of navigable channels of passage of other vessels; when vessel not in fault for anchoring; collision at night; when lights sufficient. The John McCullough (The Begonia) (U. S. D. C.) 232 Fed. 637.

Collision between tugs due to fault of towing tug changing course. The John I. Timmins, 233 Fed. 748, 147 C. C. A. 514. When tug, colliding with overtaking ferryboat by being swept against it by current and having incompetent wheelmen, is in fault. Long Island Ry. Co. v. Killieu, 67 Fed. 365, 14 C. C. A. 418. Collision between tug with tow and schooner; speed of latter immoderate and in that respect in fault; necessity of slacking speed in foggy weather; tug a total loss. 16 International Rules; The Oceania Vance, 233 Fed. 77, 147 C. C. A. 147, aff'g 217 Fed. 973. As to the degree of skill required of a towing vessel, see The S. S. Wilhelm, 59 Fed. 169, 8 C. C. A. 172, 16 U. S. App. 356. Ferryboat colliding with boat in tow of tug lying near pier and holding herself against ebb-tide; ferryboat in fault. Cornell Steamboat Co. v. The Jersey City, 51 Fed. 527, 2 C. C. A. 365, aff'g 44 Fed. 112, steamer with tow held in fault in collision with anchored vessel sounding fog bell, The W. H. Gilbert, 232 Fed. 547, 146 C. C. A. 505. Duty when transporting long and unwieldy tows; dredges excavating channel. The Wyomissing, 232 Fed. 451, 453, 146 C. C. A. 442. Collision between propeller and tug, case where both in fault in keeping too near piers and want of vigilant lookout, failure of

policy, when the circumstances can be fairly described, within the

tug in not keeping head to tide in crossing propeller's bows. The Amos v. Barstow, 66 Fed. 366, 13 C. C. A. 15. Where tug and vessel anchored outside boundaries prescribed by regulations of secretary of navy, both held in fault, for sinking of vessel in tow. Riley v. The Richmond, 63 Fed. 1020, 12 C. C. A. 1. Steamer and barge in tow, both with full view on clear day, both in fault. The Plymouth, 232 Fed. 687, 146 C. C. A. 613.

Proximate cause of collision with moored vessel was careless and negligent handling of moving vessel coupled with failure to have pilot on board familiar with river, winds and currents. The Yucatan, 226 Fed. 437, 141 C. C. A. 267. When vessels navigating Hudson unduly encroach upon rights of ferryboats by keeping too near ends of piers. The Princeton, 67 Fed. 557, 14 C. C. A. 527. Steamer colliding with yacht moored at wharf, steamer liable. The Elberon, 70 Fed. 720, 17 C. C. A. 357. Vessel moored at wharf, Revised Stats. sec. 4233, rule 12, requiring light, when not applicable. Denty v. The Martin Dallman, 70 Fed. 797, 17 C. C. A. 419. Small steamer moored at private wharf struck by large river steamer while landing, latter in fault. The John C. Fisher, 50 Fed. 703, 1 C. C. A. 624. Steamer at pier with stern projecting only a comparatively few feet, tugs towing dry dock held in fault for collision. The Crown of Galicia, 232 Fed. 305, 146 C. C. A. 348; New York City Charter, sec. 879, Laws 1901, c. 466, construed as to its being unlawful to obstruct harbor water by lying at exterior ends of wharves except at their own risk of injury from vessels entering or leaving any adjacent dock or pier. The Allemania, 231 Fed. 942, 146 C. C. A. 138.

Collision; as to loading cargo from lighter when ship not liable for the loss. New York Lighterage & Towing Co. v. The Hogarth, 70 Fed. 872, 17 C. C. A. 470. Cargo owners not responsible for fault of vessel in colliding. The Victory, 68 Fed. 395, 15 C. C. A. 490.

Collision of tug and sailing vessel, burden of proof on steamer as to fault of other vessel. Bigelow v. Nickerson, 70 Fed. 113, 17 C. C. A. 1, 30 L.R.A. 336. Schooner tacking unnecessarily across steamer's bow in narrow channel, steamer not in fault. The Philadelphia, 61 Fed. 862, 10 C. C. A. 127. Steamer and schooner meeting at night in open sea, when steamer in fault for collision in not allowing sufficient margin for passing. Henderson v. The City of St. Augustine, 68 Fed. 393, 15 C. C. A. 488, aff'g 52 Fed. 237. Collision of steamer with schooner at night, former in fault. The Ann J. Trainor, 152 Fed. 1021, 82 C. C. A. 332, aff'g 144 Fed. 896. Schooner with gasoline motor engine by whose power she is being propelled, her sails being furled, is a steam vessel as to collision with another steam vessel for the purposes of the applicable Inland Rules; contributory fault. The Machigonne, 230 Fed. 777, 145 C. C. A. 87. Change of course, imminent danger, sailing vessel. Bigelow v. Nickerson, 70 Fed. 113, 17 C. C. A. 1, 30 L.R.A. 336. Collision between sailing vessels, one sailing free and the other close hauled, change of course. The Robert Graham Dun, 70 Fed. 270, 17 C. C. A. 90, aff'g 63 Fed. 167. Where fault of one vessel is greater than that of the other, both being in fault, the degree of fault of each measures the liability. The Victory, 68 Fed. 395, 15 C. C. A. 490. Fishing steamers, both in fault; collision in fog. Inland rules act June 7, 1897, c. 4, sec. 1, 30 Stat. 99, Comp. St. 1913, sec. 7889, construed; fog signals, stopping engines, etc. . The Amagansett, 220 Fed. 827, 136 C. C. A. 437. See also The Beaver, 219 Fed. 134,

ordinary use of language, as amounting to a collision.[10] There is also a collision, in an admiralty sense, within the exception "free from particular average unless the vessel be . . . in collision," even though the vessel is at rest and moored when she is run into, and the same effect should be given the particular average clause whether the case is one of stranding or collision.[11]

**§ 2752. What does and does not constitute collision generally: instances.**—A loss by collision without any fault on either side is a loss by perils of the sea.[12] So a policy against the peril of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew.[13] So also where the collision

135 C. C. A. 32, aff'g 197 Fed. 866. Collision in fog between steam and sailing vessels, former guilty of faults; failure to stop engines, etc., under art. 16, of Inland Rules. The Delaware, 213 Fed. 214, 129 C. C. A. 558. Fault of both vessels. The Caldy, 153 Fed. 837, 83 C. C. A. 19, aff'g 123 Fed. 802. Collision on Lake Huron during heavy fog; both vessels in fault; failure to respond to passing signals; violation of navigation rule 26, applicable to Great Lakes, act Feb. 8, 1895, c. 64, sec. 1, 28 Stat. 649, Comp. Stat. 1913, sec. 7936D. Pittsburgh Steamship Co. v. Duluth Steamship Co. 222 Fed. 834, 138 C. C. A. 260. Both vessels in fault; steamer and schooner; The Mary P. Mosquito (U. S. D. C.) 145 Fed. 960.

Limitation of liability under Rev. Stat. 4283; U. S. Comp. Stat. 1913, sec. 8021, applies to motor boat owner whose vessel is properly manned and equipped at the time of the accident and where the same occurs without his privity or knowledge he is not liable, nor is the negligence of those in charge of the navigation of the vessel to which he was not privy and of which he had no knowledge imputable to him. The Alota (U. S. D. C.) 228 Fed. 1006. Right to limit liability exists only where fault was without the privity or knowledge of the owner; duty of owner of sunken craft to immediately mark it as personal and cannot be delegated. Act March 3, 1899, c. 425, sec. 15, 30 Stat. 1152; Comp. Stat. 1913, sec. 9920. The Drill Boat No. 4 (U. S. D. C.) 233 Fed. 589. Steamship using channel of Havanna harbor and properly equipped, with full crew and licensed pilot, and using all means to prevent collision with lighter is not in fault. The Metis, 224 Fed. 902, 140 C. C. A. 346, aff'g 212 Fed. 798.

[10] London Assurance Co. v. Companhia de Moagens do Barreiro, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. 785. *Cited* in Packard v. Metropolitan Life Ins. Co. 72 N. H. 1, 3, 54 Atl. 287.

[11] London Assurance v. Companhia de Moagens do Barriero, 15 C. C. A. 379, 68 Fed. 247 (*citing* The Granite State, 3 Wall. (90 U. S.) 310, 18 L. ed. 179, aff'd 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. 785); 1 Parsons on Marine Ins. 632; Harman v. Vaux, 3 Camp. 429, 14 R. R. 773, per Lord Ellenborough, C. J.; Roux v. Salvadore, 7 L. J. Ex. 328, 3 Bing. (N. C.) 266, 4 Scott, 1, 2 Hodges, 209, 43 R. R. 638; 1 Eng. Rul. Cas. 46. Thames & Mersey Marine Ins. Co. v. Pitts, [1893] 1 Q. B. 476, 5 R. 168, 68 L. T. 524, 41 W. R. 346, 7 Asp. M. C. 302.

[12] Peters v. Warren Ins. Co. 14 Pet. (39 U. S.) 99, 10 L. ed. 371, 3 Sum. (U. S. C. C.) 389, Fed. Cas. No. 11,035; Buller v. Fisher, 3 Esp. 67; Peake's Add. Cas. 183, 4 R. R. 902.

[13] Liverpool & Great Western Steam Co. v. Phenix Ins. Co. ("The

results through the gross negligence of the other vessel,[14] or where the insured vessel is injured by collision, whether her own crew have been vigilant or careless.[15] A steamboat going west through Hellgate with the flood tide may without fault take the east channel after one whistle to a tug going up that channel, and where the latter loses one boat of her tow by collision, owing to her failure to go to the starboard side, she having answered the steamer's one whistle with one whistle, the tug is in fault.[16]

An impairment of the seaworthiness of a vessel by contact with another, is not necessary to constitute the affair a collision within the meaning of an insurance policy, when as a result of the impact cracks are made from one-half inch to one and three-quarter inches wide for a distance of eleven feet in the iron plating of the vessel's bulwarks.[17]

If a vessel insured against collision with any object but not against perils of the sea runs against a snag and springs a leak, which is temporarily repaired, and while being towed into port for repairs the leak is so far enlarged by the motion through the water that she begins to sink and is run aground and abandoned, the insurers are liable for a loss of the ship under the collision clause.[18]

Vessels may also be in collision, although but one of them is in motion while the other is at a wharf fully loaded and ready to proceed upon her voyage.[19] So the words "actual collision between any tug and any vessel" cover damage caused to a tug by striking upon an anchor attached to a schooner's bows by twenty or thirty fathoms of chain as said anchor is part of the ship.[20] So policies

Montana") 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. 469. *Cited* in Richelieu & Ontario Navigation Co. v. Boston Marine Ins. Co. 136 U. S. 408, 421, 34 L. ed. 398, 403, 10 Sup. Ct. 934; American-Hawaiian Steamship Co. v. Bennett & Goodall, 207 Fed. 510, 125 C. C. A. 172, 42 Ins. L. J. 1783, 1787; Pennsylvania Ry. Co. v. Manheim Ins. Co. 56 Fed. 301, 303; Earnmoor Steam Ship Co. v. Union Ins. Co. 44 Fed. 374, 376; Hutchins v. Ford, 82 Me. 363, 371, 19 Atl. 832.

[14] Smith v. Scott, 4 Taunt. 125, 126, 13 R. R. 568.

[15] Buller v. Fisher, 3 Esp. 67; Peake's Add. Cas. 183, 4 R. R. 902; Mathews v. Howard Ins. Co. 11 N. Y. 1, rev'g 13 Barb. 234, per Denio, J.; Street v. Augusta Ins. Co. 12 Rich. (S. C.) 13, 75 Am. Dec. 714; Hale v. Washington Ins. Co. 2 Story (U. S. C. C.) 176, 184, Fed. Cas. No. 5,916.

[16] Union Ins. Co. v. The Bridgeport, 35 Fed. 222, 224. See notes under § 2751 herein.

[17] London Assurance Co. v. Companhia de Moagens do Barreiro, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. 785.

[18] Reischer v. Borwick (Eng. C. A. 1894) 2 Q. B. 548, 63 L. J. B. 753, 9 R. 558, 71 L. T. 238, 7 Asp. M. C. 493.

[19] London Assurance Co. v. Companhia de Moagens do Barreiro, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. 785, *cited* in Cline v. Western Assurance Co. 101 Va. 496, 503, 44 S. E. 700.

[20] Margetts & Ocean Accident & Guarantee Corp. In re, [1901] 2 K.

against "the risk of collision sustained" or against "loss sustained by collision with another vessel" mean the same thing, namely, collision with another vessel.[1] And if a vessel is anchored at the proper place where boats are usually anchored, or is lying on well-known anchorage ground out of the regular course of vessels, and where it may reasonably be expected that vessels are liable to be lying, steamboats or tugs with tows are in fault for collision, and liable for damage to the anchored vessel.[2] But the injury to a vessel from striking some portion of a vessel wrecked several hours before, and which is never raised, and the cost of raising which would have exceeded her value, is not from collision with another vessel within the meaning of marine insurance. It was also declared in the case holding as above that if a vessel is temporarily aground, or at anchor, or at her dock, and is run into by another vessel, this is a collision with another vessel within the meaning of marine insurance. But the court, per Lathrop, J., evidently distinguishes as to the first point, an English decision as follows: "So it may be true, as was decided in Chandler v. Blogg,[3] that a vessel strikes another vessel which is at the time under water, and resting on the bottom, this is a collision within the meaning of the policy, if the vessel is raised within a few hours. Mr. Justice Bingham, in this case adopted the view that 'collision' when used alone, without other words, meant two navigable things coming into contact; and that the sunken vessel, though she could not be navigated at the time, was still navigable, as she was raised within a few hours." The court also considers the case of Richardson v. Burrows,[3a] and says: "Though not reported . . . it was an action to recover for a partial loss of wheat shipped on a small schooner, which sailed from Lynn to England for Caen in France. During the night the vessel struck something which caused damage to the cargo. What the object was did not appear, but it was probably some old sunken wreck, or possibly floating wreck. After the evidence was in, Lord Coleridge inquired whether there were any cases of collision. None were referred to. Lord Coleridge ruled that he should hold that the word 'collision' meant collision with another ship, and did not mean either a rock or a sand bank or floating wreck. The jury were then discharged by consent, and judgment given for defendant. The case was decided December 16, 1880. While this is a nisi prius

B. 792, 70 L. J. K. B. 762, 85 L. T. 94, 49 W. R. 669, 9 Asp. M. C. 217.

[1] Burnham v. China Mutual Ins. Co. 189 Mass. 100, 109 Am. St. Rep. 627, 75 N. E. 74.

[2] Orison v. The Syracuse, 35 Fed. 367; The Drew, 35 Fed. 789. See The Mary Powell, 36 Fed. 598; The Nettie, 35 Fed. 615.

[3] (1898) 1 Q. B. 32, 67 L. J. Q. B. 336, 77 L. T. 524, 8 Asp. M. C. 349, 3 Com. Cas. 18.

[3a] *Cited* in Lowndes on Marine Ins. 199.

decision, it is of some weight."[4] Again, a ship does not "come into collision with any other ship or vessel" by running foul of the nets of a fishing vessel where said ship does not at any time come into contact with the hull of said fishing vessel which was, when sighted, a mile away.[5] So under a Virginia decision the striking a sunken or floating obstruction does not constitute a collision under an insurance of a ship and machinery and against loss or damage by the breaking of machinery caused among other things by collision.[6] Under a Federal decision if an insured vessel, under the running down clause, which is running alongside of another, but is entirely independent thereof as to ownership, management and navigation, and through concurrent negligence of both, another and smaller vessel was caused by the suction of the insured vessel to collide with still another vessel, said insured vessel is not in collision where she was not at the time of the disaster in contact with any other vessel and she herself sustained no injury, but was held responsible solely because her negligence contributed to placing the other vessels in a position which rendered collision inevitable. "The word 'collision' as used in marine insurance can no longer be limited to that fortuitously injurious contact of navigating vessels which is its obvious and national signification."[7] It was declared in this case, per Hough, Dist. J., in substantially the following words, that a tug and tow are regarded as one vessel, so also as to vessels which are so united under a single control that an impulse carelessly or negligently given to the controlling craft must be communicated to the other, both must be regarded as an entity, but if the control be but intelligently exerted, as in case of a flagship over a flotilla, or if there be no control at all there can be no collision without an injurious contact between the vessel insured and some other object.[8]

[4] Burnham v. China Mutual Ins. Co. 189 Mass. 100, 109 Am. St. Rep. 627, 75 N. E. 74, 34 Ins. L. J. 1005.

[5] Bennett Steamship Co. v. Hull Mutual Steamship Protecting Soc. Ltd. 83 L. J. K. B. 1179, [1914] 3 K. B. 57, 111 L. T. 489, 12 Asp. M. C. 522, 19 Ann. Cas. 353, 30 T. L. R. 515, aff'g 82 L. J. K. B. 1003, [1913] 3 K. B. 372. The clause was: "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship herein insured, the company will pay the assured such proportion of three fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship hereby insured."

[6] Cline v. Western Assur. Co. 101 Va. 496, 44 S. E. 100.

[7] Western Transit Co. v. Brown (U. S. D. C.) 152 Fed. 476, aff'd 161 Fed. 869, 88 C. C. A. 617.

[8] *Considering* The Niobe, 7 Asp. M. C. 89 (1891) A. C. 401, 17 Ct. of Sess. Cas. (4th Ser.) 1016, 65 L. T. 502.

Under another decision in the Federal District Court it is held that actual contact between the insured vessel and another is necessary under the running down clause and said clause does not apply where the tow of the insured vessel is in collision with another vessel, notwithstanding said insured vessel has been held liable for the damages therefor.[9]

Under an English decision where there was insurance upon the hull and machinery under a time policy, which contained on an attached slip the *Institute Time Collision Clause* which provided that "if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay, by way of damages, to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship hereby insured, and in cases in which the liability of the ship has been contested or proceedings have been taken to limit liability with the consent in writing of this company, the company will also pay a like proportion of three fourths of the costs which the assured shall thereby incur or be compelled to pay." It was held that if by the negligent navigation of the insured vessel a collision with another vessel occurs and by reason of such collision the vessel with which the one insured was so in collision is thereafter herself forced into collision with a third vessel the negligent navigation of the insured vessel having set in force the final collision it was within the terms of said collision clause, the owners of the insured vessel having been held liable for the damage caused to both vessels, a recovery could be had against the underwriters for three-fourths of the damage they had been compelled to pay.[10]

In a New York case it appeared from the evidence that the master of a tugboat, regardless of the risk of attempting to take a tow through a field of too heavy or dangerous ice rammed it through in the night time, and it was held that injury sustained by reason thereof was not a collision within the intent of the policy. The court, per Parker, C. J., said: "Unquestionably, the injured may recover where the collision is due to the design of the master of another vessel or floating object; but when the master of the vessel insured designedly takes the chance of running into a perfectly

[9] Coastwise Steamship Co. v. Ætna Ins. Co. (U. S. D. C.) 161 Fed. 871, *considering* the Western Transit Co. case and also the Niobe case.

[10] France, Fenwick & Co. v. Merchants' Marine Ins. Co. 84 L. J. K. B. 1905, [1915] 3 K. B. 290, 113 L. T. 299, 20 Com. Cas. 227, 31 T. L. R. 321, aff'g 84 L. J. K. B. 138 (1914) 3 K. B. 827.

apparent obstruction, although with the hope and expectation that the vessel will successfully meet the encounter, the contact is not a collision within the meaning of the term as employed in this contract. Collision, in its strict nautical and legal acceptation, originally meant the impinging upon one another of vessels while being navigated, but in course of time and by common usage, the application of the term has been so far extended, in this country, at least, as to include the impact of a vessel with other floating objects. . . . However, whether the term be treated by the courts as so fixed in character as to be restricted in its meaning to the coming together of two vessels, as is the rule in France, or so flexible as to include a variety of floating objects other than vessels, the idea of accident, so far as the insured is concerned, underlies it." [11]

Under a warranty to be free of particular average unless the vessel be in collision, the term "collision" covers loss by a breaking in the ship's bulwarks, caused by her being struck by a scow on her return to dock because of trouble with her engine after she, being fully loaded, has cast off her moorings, and in such case the saving force to the insurers of the exception ceases to operate at once the collision takes place, without regard to the fact whether the subsequent loss arises from the collision or not.[12] And in a decision here wherein the contract was interpreted according to the English law it is decided that the clause "free from particular average unless the vessel be . . . in collision," as construed in England, makes an insurer liable, if the vessel is once in collision during the adventure after the goods are on board, for any loss covered by the general words in the policy, although it is not the result of the collision, and but for the collision would have been within the exception contained in the memorandum, and free from particular average as therein provided.[13] In a Massachusetts case insurer was not to be liable for any partial loss on the vessel or freight unless it amounted to a certain per cent, etc., and by a marginal clause it

[11] Newtown Creek Towing Co. v. Ætna Ins. Co. 163 N. Y. 114, 57 N. E. 302, 29 Ins. L. J. 1039, rev'g 48 N. Y. Supp. 929, 23 App. Div. 152. A case of "Towers' liability" policy; clause was: against "loss and damage arising from or growing out of any accident caused by collision and, or stranding, to any other vessel, or vessels, their freight and cargoes for each or any of them, for which said steam tug or its owners may be legally liable."

[12] The Liscard (Companhia de Moagens do Barreiro) v. London Assur. Co. (Same v. Manheim Ins. Co.) 56 Fed. 44, aff'd 68 Fed. 247, 15 C. C. A. 379, and 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. 785.

[13] London Assurance Co. v. Companhia de Moagens do Barreiro, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. 785, *cited* in Ursula Bright Steamship Co. v. Amsinck, 115 Fed. 242, 245; De Farconnet v. Western Ins. Co. 110 Fed. 405, 413; International Navigation Co. v. Atlantic Mutual Ins. Co. 100 Fed. 304, 318.

was stipulated that the risk was covered of loss by collision, "according to the decisions of the courts" of that state "prior to 1853, provided" that the liability should not exceed the above specified amount. In a case decided prior to said date[14] it was held that underwriters insuring a vessel against perils of the sea were bound to pay assured the amount paid by him to the owners of another vessel for damages suffered in collision with the vessel insured occasioned by the negligence of the master and crew of the latter, and the court declared that as the decision referred to had been reaffirmed, the policy irrespective of the marginal clause would have covered a loss by collision, even if inflicted by the insured vessel she was compelled, under such circumstances, to pay for it as well as for the loss suffered by herself; but as the insured vessel had been in collision and was herself alone in fault and the loss did not amount to the per cent specified there could be no recovery for the amount paid therefor by the owner.[15]

In determining, however, the question of insurer's liability, reference must be had to the exact terms of the contract, and if it is stipulated that the insurance is to fully indemnify assured for loss and damage arising from or growing out of any accident caused by collision or stranding resulting from any cause whatever to any other vessel or vessels for which the steamer, or its owner may be legally liable, such provision covers damages recovered by a scow owner against an insured tug by reason of other vessels having run into a sunken scow causing a total loss after she had been found drifting by the tug and had been taken in tow by her and moored to a slip, and the tug owner with full knowledge that the scow had sunk had left her in that unsafe place without doing anything to warn other vessels of her location, and the question of towage or salvage service is unimportant in this connection.[16]

A loss by fire caused by a collision is held to be covered by a policy insuring against fire except fire arising from certain causes, collision not being excepted, although such a policy does not cover loss from collision.[17]

**§ 2753. Collision with "piers or stages or other structures," when not stranding.**—Under a collision contract of reinsurance "against

[14] Nelson v. Suffolk Ins. Co. 8 Cush. (62 Mass.) 477, 54 Am. Dec. 770n, decided in 1852. *Cited* in The Barnstable, 181 U. S. 464, 470, 45 L. ed. 954, 21 Sup. Ct. 684, a case of libel by the owners of a schooner against a steamship for a collision whereby the schooner became a total loss, damage was caused by negligence of charterers in possession and navigating ship.

[15] Whorf v. Equitable Marine Ins. Co. 144 Mass. 68.

[16] Ferguson v. Providence-Washington Ins. Co. (U. S. D. C.) 125 Fed. 141, aff'd 137 Fed. 1018, 70 C. C. A. 62, 670, 679.

[17] Howard Fire Ins. Co. v. Nor-

risk or loss or damage through collision with any other ship . . . or piers or stages or similar structures," the vessels during a heavy gale struck and were wrecked on the toe of the breakwater of Holyhead harbor, being driven by the force of the wind and sea against a sloping bank or mound called the toe of said breakwater while endeavoring to clear its end, it being made by a deposit of a number of large boulders forming said toe, behind which the wall of the breakwater was built. The vessels were totally lost, and the underwriter having paid therefor, sought recovery under this reinsurance, and it was held that the loss was by collision, and not by stranding; that the words "pier," "breakwater," and "toe" all denoted one and the same structure, within the expression "piers or stages or similar structures;" that "striking against" and "collision" could not be distinguished; that it was not necessary to constitute a collision that the upper works of the ship must strike some one of the things referred to in said clause, and it was none the less a collision because the keels of the vessels struck the toe, and therefore a recovery could be had.[18]

§ 2754. **Collision as loss by perils of the sea: proximate cause: damage to other vessel.**—Peters v. Warren Insurance Company,[19] decides that a loss by collision without fault on either side is a loss by perils of the sea. And also that the underwriters are liable for the injury and repairs to the vessel.[20] It therefore involves the discussion of the principles underlying proximate and remote cause. The facts were briefly these: By the law of a foreign port, to the

wich & New York Transportation Co. 12 Wall. (79 U. S.) 194, 20 L. ed. 378; Germania Life Ins. Co. v. Sherlock, 25 Ohio St. 33, 1 Wkly. Law Bul. 26, 7 Ohio Dec. 17.

[18] Union Marine Ins. Co. v. Borwick, [1895] 2 L. R. Q. B. D. 279, 281, per Matthew, J.; 64 L. J. Q. B. 679, 15 R. 546, 73 L. T. 156, 8 Asp. M. C. 71, 1 Com. Cas. 87. See London Assurance Co. v. Companhia de Moagens do Barreiro, 68 Fed. 247, 15 C. C. A. 379, aff'd 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. 785 (as *noted* under § 2751 herein); Cline v. Western Assur. Co. 101 Va. 496, 44 S. W. 100.

As to necessity of contact with another vessel. See also § 2752 herein.

[19] 1 Story (U. S. C. C.) 463, Fed. Cas. No. 11,034, 3 Sum. (U. S. C. C.) 389, Fed. Cas. No. 11,035, aff'd 14 Pet. (39 U. S.) 99, 10 L. ed. 371. See also §§ 2751, 2752, 2755 herein.

[20] Peters v. Warren Ins. Co. 14 Pet. (39 U. S.) 99, 10 L. ed. 371, *cited* in General Mutual Ins. Co. v. Sherwood, 14 How. (55 U. S.) 352, 364, 14 L. ed. 452, 457; Waring v. Clarke, 5 How. (46 U. S.) 441, 503, 12 L. ed. 226, 255; Hale v. Washington Ins. Co. 2 Story (U. S. C. C.) 176, 185, Fed. Cas. No. 5,916; King v. Shepherd, 3 Story (U. S. C. C.) 349, 361, Fed. Cas. No. 7,804; Peters v. Warren Ins. Co. 1 Story (U. S. C. C.) 463, 468, Fed. Cas. No. 11,034; Edwards v. The Robert F. Stockton, Crabbe, 580, 582, Fed. Cas. No. 4,297; Sherwood v. General Mutual Life Ins. Co. 1 Blatchf. 251, 252, Fed. Cas. No. 12,776; Van Hern v. Taylor, 7 Rob. (La.) 201, 202, 41 Am. Dec. 279; Matthews v. Howard Ins. Co. 13 Barb. (N. Y.) 234, 242.

operation of which the vessel insured was subjected at the time of accidental collision, it was decreed that the collision was not the result of carelessness on either side, and the loss was a general average to be borne equally by both parties, and by the apportionment assured was obligated to pay two thousand six hundred dollars in satisfaction of the decree. The opinion of the supreme court, sustaining Mr. Justice Story, was unanimous that the collision was the proximate cause of the loss and the contribution not the cause, but a consequence, and that the insurers were liable for the amount so paid.

The doctrine of this case is directly contrary to the decision given by Lord Dunham, C. J., in an English case shortly prior thereto, where the owner endeavored to recover as for a particular average loss as by perils of the sea, under substantially the same facts, or at least so far the same that the cases may be considered as resting on the same basis. The English decision holds that the insurers were not liable for the excess, as the obligation to pay was not a necessary or proximate effect of the perils of the sea.[1] In line with the decision of the United States supreme court are other cases and authority of great weight,[2] while the doctrine of the English case seems to be that now in force in England.[3] And the latter is the doctrine favored here by such writers of authority as Mr. Phillips[4] and Mr. Parsons.[5] It will be seen upon examination of the decision that in the cases other than that of Peters v. Warren Insurance Company, first above noted, the insured was obligated to pay the damage, on the ground of negligence or fault of the officers and

[1] De Vaux v. Salvador, 4 Ad. & E. 420, 6 Nev. & M. 713, 5 L. J. K. B. 134, 1 H. & W. 751, 43 R. R. 374, 14 Eng. Rul. Cas. 305. But see Heard v. Holman, 11 Jur. (N. S.) 544, 12 L. T. (N. S.) 455, 19 C. B. (N. S.) 1, 34 L. J. C. P. 239, 13 W. R. 745.

[2] Hale v. Washington Ins. Co. 2 Story (U. S. C. C.) 176, Fed. Cas. No. 5916, denied in General Mutual Ins. Co. v. Sherwood, 14 How. (55 U. S.) 351, 14 L. ed. 452, rev'g 1 Blatchf. (U. S. C. C.) 251, Fed. Cas. No. 12,776; General Mutual Ins. Co. v. Sherwood, 14 How. (55 U. S.) 351, 14 L. ed. 452, rev'g 1 Blatchf. 251, Fed. Cas. No. 12,776; Walker v. Boston Ins. Co. 14 Gray (80 Mass.) 288; Blanchard v. Equitable Safety Ins. Co. 12 Allen (94 Mass.) 386; Nelson v. Suffolk Ins. Co. 8 Cush. (62 Mass.) 477, 54 Am. Dec. 770; Matthews v. Howard Ins. Co. 11 N. Y. 1, 9, rev'g 13 Barb. 234. But see Street v. Augusta Ins. Co. 12 Rich. L. (S. C.) 13, 75 Am. Dec. 714.

[3] 1 Arnould on Marine Ins. (Maclachlan's ed. 1887) 24; 2 Id. 729, 730. *Examine* also 2 Arnould on Marine Ins. (Perkins' ed. 1850) *800, *806; Id. (9th ed. Hart & Simey) sec. 792, p. 987, sec. 821, p. 829; Judicature act, 36 & 37 Vict. c. 66, sec. 25, subsec. 9.

[4] 2 Phillips on Ins. (3d ed.) 66, 170 et seq., 177 et seq., 201; secs. 1137, 1272, 1416, 1436.

[5] 1 Parsons on Marine Ins. (ed. 1868) 551 et seq., 554.

crew of the insured vessel. But the negligence or the collision must be the proximate cause of the loss, and the collision being the proximate cause it is a loss for which insurers are liable, and neither the damages or amount of contribution can be the proximate cause, but must be a direct legal consequence of the peril. If a peril insured against causes the loss, and the remote cause is the negligence of the master and crew, the underwriters are nevertheless liable, without regard to the fact whether or not the policy covers barratry; therefore, the question of negligence ought to be eliminated.[6] Again, such damages or amount of contribution may be fairly considered as incident to a peril insured against, attributed thereto, and falling as a legal consequence thereof.[7] And the assertion of the principle in Peters v. Warren Insurance Company [8] seems most reasonable that, if the thing insured becomes by law directly chargeable with any expense, contribution, or loss, in consequence of a particular peril, then that peril is the cause of such expense.[9]

But a case of this kind is to be distinguished from that where a ship damaged by collision seeks port for repairs, and in discharging and reshipping the goods for that purpose they are damaged by the necessary handling and by the delay. In such case the collision cannot be considered the proximate cause of the damage to the goods by said handling and delay.[10] It is also held that the insurance of barges against collision with other vessels is not a ground for recovery of damages for detention during repairs, as such damages are not within the rule as to proximate cause as they are too remote.[11]

§ 2755. **Collision: running down clause.**—The liability of the insurers under what is known as the "running down clause" will depend largely upon the exact terms used. It generally provides for the payment by the insurers of a specified proportionate sum, usually three-fourths, which the insured shall become liable to pay,

[6] Natchez Ins. Co. v. Stanton, 10 Miss. (2 Smedes & M.) 340, 41 Am. Dec. 592; Waters v. Merchants' Louisville Ins. Co. 11 Pet. (36 U. S.) 213, 9 L. ed. 691, 1 McLean, 279; Walker v. Maitland, 5 Barn. & Ald. 171, 24 R. R. 320.

[7] See McCargo v. New Orleans Co. 10 Rob. (La.) 202, 43 Am. Dec. 180, as to consequences incident to perils insured against. See also Magoun v. New England Marine Ins. Co. 1 Story (U. S. C. C.) 157, Fed. Cas. No. 8,961; Perry v. Ohio Ins. Co. 5 Ohio, 305.

[8] 14 Pet. (39 U. S.) 99, 10 L. ed. 371.

[9] See 3 Kent's Commentaries, 301n.

[10] Pink v. Fleming (C. A.) 59 L. J. Q. B. 559, 25 Q. B. D. 396, 63 L. T. 413, 6 App. M. C. 554. See Emery v. Huntington, 109 Mass. 431, 12 Am. Rep. 725.

[11] Shelbourne & Co. v. Law, Investment & Insurance Corp. [1898] 2 Q. B. 626, 79 L. T. (N. S.) 278, 67 L. J. Q. B. 944, 3 Com. Cas. 304, 8 Asp. M. C. 445.

and shall pay, for damages or injuries sustained by another ship by collision through accident or negligence with the insured vessel; and where a vessel, having collided with another, was sold under a decree of admiralty to pay the damage and proceeds of her sale, and the amount paid was two thousand one hundred pounds, the vessel being sold for less than her value, which was three thousand pounds, it was held that under such a clause as the above, insurers were only liable for three-fourths of the two thousand one hundred pounds.[12] And under a clause so providing it is also held where shipowners had not paid over to the other ship half the amount of the damage sustained by collision, but had only allowed it on account by deducting it from half the amount or damage to their own ship, this was not a sum which the owners had become liable to pay and had paid[13] nor, so it is held, does it cover demands for personal injuries.[14] But where a vessel is collided with and sunk by a tug having a ship in tow, and both the tug and tow are found liable in damages therefor, the tow may recover the same from the insurers under a like clause as the above, even though the tow herself was not directly in collision.[15] Again, where under this clause the insured is sued for damages for a collision, but

[12] Thompson v. Reynolds, 26 L. J. Q. B. 93, 7 El. & B. 172, 3 Jur. (N. S.) 464. See § 2752 herein.

As to collision or running down clause in connection with constructive total loss, see Fireman's Fund Ins. Co. v. Globe Navigation Co. 236 Fed. 618, — C. C. A. —.

As to "'full protection policy' introduced by certain Liverpool insurance companies," see 2 Arnould on Marine Ins. (9th ed. Hart & Simey) sec. 796, p. 994.

[13] London S. S. Ins. Co. v. Grampian S. S. Co. 24 Q. B. D. 663, 59 L. J. Q. B. 549, 62 L. T. 784, 38 W. R. 651, 6 Asp. M. C. 506.

[14] Taylor v. Dewar, 5 B. & S. 58, 33 L. J. Q. B. 141, 10 Jur. (N. S.) 361, 10 L. T. 267, 12 W. R. 579. But see Coey v. Smith, 22 Ct. Sess. Cas. (N. S.) 955.

[15] McCowan v. Baine (H. of L. Eng. 1891) App. Cas. 401, 65 L. T. 502, 7 Asp. M. C. 89, 28 Scot. L. R. 943, 17 Ct. Sess. Cas. (S. C.) 1061, Lord Bramwell dissenting. It was said in this case that the clause ought to cover all damages consequent upon an actual collision for which assured is liable, and that the court could not adopt a construction which would narrow the meaning of the term "collision" to direct contact between the two hulls or some part of the ship's structure, but that the clause extended to injuries caused by the impact of the hull of the insured ship or of her boats or steam launch, even though the latter were not insured as parts of the ship, and that the words also covered an indirect collision, such as the driving of another vessel by impact therewith against the injured ship, or if a tug were towing barges and a barge were driven against any other vessel owing to the improper navigation of the tug, thereby causing damage to the other vessel, that the insurers would be liable, even though there had been no impact of the tug itself with the injured ship: Id. per Lord Selborne.

[16] Xenos v. Fox, 4 L. R. C. P. 665, aff'g 3 L. R. C. P. 630; 38 L. J. C. P. 351, 17 W. R. 893.

successfully defends and obtains judgment, the insurers are not liable for expenses of defending the claim.[16]

**§ 2755a. Collision: sums paid for removal of obstructions: statutory commissioners.**—Underwriters are held not liable for any moiety or sum paid directly or indirectly to any person causing an obstruction consequent upon a collision to be removed, and this applies where the insured owners of a vessel had paid a sum as damages to the owners of another vessel, which had sunk by reason of a collision, for which both vessels were to blame, and commissioners, acting under statutory powers, had caused the obstruction to be removed, for which removal the owners of the sunken vessel had paid, and the policy provided that the collision clause should not extend to any sum which the assured might become liable to pay, or should pay for removal or obstructions under statutory powers.[17]

**§ 2756. Confounding of goods by breaking open of packages, etc.: marine risk.**—If by a peril of the sea bales, packages, etc., containing goods of the same character but having distinctive marks of ownership are so disturbed as to break open, and the goods are so scattered and confounded that the several ownerships are indistinguishable, this is not of itself a loss at the charge of the insurers where the goods still retain, although commingled, the form and substance of that particular kind of merchandise, as in the case of cotton, and there still remains in the several owners their proportionate ownership in the whole property.[18]

[17] Tatham v. Burr (1898) App. Cas. L. R. 382. See Burger v. Indemnity Mutual Marine Assur. Co. [1900] 2 Q. B. 348, 69 L. J. Q. B. 838, 82 L. T. N. S. 831, Com. Cas. 315, 48 W. R. 643, 9 Asp. M. C. 85.

[18] So held in Spence v. Union Marine Ins. Co. L. R. 3 C. P. 427, 37 L. J. C. P. 169, 18 L. T. 632, 16 W. R. 1010. This decision is explained and distinguished in a bill of lading case under a clause of exemption of liability for "inaccuracies, obliteration or absence of marks, members, or description," etc., where there was a shortage of delivery and the question was of liability for unmarked goods and apportionment among consignees. Sandeman & Sons v. Tyzack & Branfoot Steamship Co. Ltd. [1913] App. Cas. 680, 83 L. J. P. C. 23, 109 L. T. 580, 29 T. L. R. 694, 57 S. J. 752. And it is asserted, per Viscount Haldan, L. C., that said Spence case was a claim against insurer as for a total loss, and that the consignee who claimed in the action had to establish his total loss and "failed for obvious reasons" and it, therefore, presented no real analogy to the Sandeman case. It is also declared per Lord Moulton, that in said Spence case the participating parties "were judged to possess the mixed mass in proportion to the probable amounts of their contributions to it. The fact is that the conclusions of the courts in such cases, though influenced by certain fundamental principles, have been little more than instances of cutting the Gordian knot—reasonable adjustments of the rights of parties in cases where complete justice was impracticable of attainment. I doubt whether even the fundamental principles

§ 2757. **Contingent liability of insurer: carrier: construction of policy.**—If the policy provides that in case goods insured are lost, damaged, or destroyed while in care of a common carrier the insurer shall advance the assured an amount equivalent to the insured value of the goods, pending an investigation and determination whether the carrier is liable for the loss at common law, and, if the carrier is liable, then such amount as shall be received from the carrier is to be paid the company in discharge of said advance, and the bill of lading to the carrier provides that it shall have the full benefit of any insurance on the goods, the policy is in effect a provision for contingent liability of the insurer, who is liable, if the carrier is not; and if the carrier be found liable, the money paid by the insurer will be held simply as an advance pending the determination of the point of liability of the insurer, or carrier, and the latter has no right to insurance money.[19] And the taking of an obligation by an insurer, in complying with its contract to, in case of loss, advance money to the assured, pending the collection of the claim from the one primarily liable, for a return of the money, not if the insurer was not liable, but in case some other person should prove to be so, will be held to be a concession of liability on the part of the insurer.[20]

§ 2758. **Conversion: recovery and disposal of property by underwriter.**—If the policy makes it incumbent upon the underwriter in case of loss to recover, save, and dispose of the insured property for the benefit of all concerned, he has the right of possession where a loss occurs, and cannot be held liable for a conversion in so taking and disposing of the property.[1]

§ 2759. **Decayed, rotten, etc.: marine risks.**—If articles of merchandise, decayed, rotten, or otherwise, are damaged by reason of the intrinsic nature or proper or inherent vice of the article, and it appears that the loss was so occasioned, the insurer is not liable therefor except he so stipulates.[2] And if a vessel is old and decayed,

. . . would be strictly adhered to in extreme cases where they would lead to substantial injustice. . . . If the judgment be carefully read, it will in my opinion, appear that the court . . . did not purport or intend to make any addition to the law as to the effect of commixtio as previously enunciated by recognized authority."

[19] Gulf Coast & Santa Fe Ry. Co. v. Zimmerman, 81 Tex. 605, 17 S. W. 239.

[20] Deming v. Merchants' Cotton-Press & Surety Co. 90 Tenn. 306, 13 L.R.A. 518, 17 S. W. 89.

[1] Schuyler v. Phœnix Ins. Co. 56 Hun (N. Y.) 493, 31 N. Y. St. Rep. 659, 10 N. Y. Supp. 205, aff'd 134 N. Y. 345, 32 N. E. 25, 22 Ins. L. J. 150, 48 N. Y. St. Rep. 213 (two judges dissenting).

[2] Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 9, who says: "Losses proceeding from the proper vice of the subject and its intrinsic nature, ex vitio rei et intrinseca ejus natura, are not at the charge of the

but nevertheless her condition is such that she may be run for some time, the insurer is not obligated to make good that which is decayed and rotten unless she sustains a loss by a peril insured against, which is of such a nature that repairs cannot be made so that the decayed and rotten parts may be used as before the accident.[3]

§ 2760. **Delay in voyage.**—The insurers guarantee only the safe arrival of goods. They do not guarantee speedy arrival nor arrival in time of an advantageous market, nor do they incur loss from delay in the voyage, unless the delay is produced by a peril insured against or the cargo be subject to deterioration by mere lapse of time;[4] and in case of an insurance on passage money the insurers do not contract that the vessel shall deliver her passengers within a given time.[5] Nor does an insurer on freight guarantee that it shall be earned in any stated time, and is not liable under an insurance of freight for loss thereof earned by detention of the ship by sea perils. It is sufficient that the freight be earned.[6] Under

insurers:" Taylor v. Dunbar, L. R. 4 C. P. 206, 38 L. J. C. P. 178, 17 W. R. 382; Boyd v. Dubois, 3 Camp. 133; 1 Phillips on Ins. (3d ed.) 618, sec. 1089.

[3] Hyde v. Louisiana State Ins. Co. 2 Mart. N. S. (La.) 410, 14 Am. Dec. 196, per Porter, J.

[4] Salisbury v. Marine Ins. Co. 23 Mo. 553, 66 Am. Dec. 687. See Bradford v. Levy, Ryan & M. 331, 2 C. & P. 137, 31 R. R. 657; Tatham v. Hodgson, 6 Term Rep. 656.

When delay in transit by reason of the transport being disorganized by civil war and consequent damage to goods by damp, wetting, and insects, renders insurer liable, see Schloss v. Stevens, 75 L. J. K. B. 927, [1906] 2 K. B. 665, 11 Com. Cas. 270, 22 T. L. R. 774, *considered* under § 2734 herein.

As to war risks and clause excluding claims arising from delay: sue and labor clause: expenses, see Wilson Bros. Bobbin Co. v. Green, 86 L. J. K. B. 713, [1917] 1 K. B. 860, *considered* under § 2818 herein.

As to delay under strike clause: charter party: refusal of crew to sail owing to fear of submarines, see Williams Brothers, Ltd. v. Naamlooze Vennootschap Berghuys Kolenhandel, 86 L. J. K. B. 334, 21 Com. Cas. 253.

As to delay preventing discharging: strike clause: charter party: demurrage: meaning and construction of clause, see Central Argentine Railway, Ltd. v. Marwood, 84 L. J. K. B. 1593, [1915] A. C. 981, 113 L. T. 786, 13 Asp. M. C. 153.

As to charter party: time charter: "restraint" of princes: delay beyond that contemplated, see Scottish Navigation Co., Ltd. v. Souter & Co. (Admiral Shipping Co., Ltd. v. Weidert, Hopkins & Co.) 13 Mar. L. Cas. N. S. 246, 86 L. J. K. B. 336, 350, [1917] 1 K. B. 222, 115 L. T. 812, 22 Com. Cas. 154, 61 S. J. 85, 33 T. L. R. 71, rev'g 85 L. J. K. B. 409, 1181, [1916] 1 K. B. 429, 675.

[5] Howard v. Astor Mutual Ins. Co. 5 Bosw. (N. Y.) 38. See Marks v. Nashville Marine & Fire Ins. Co. 6 La. Ann. 127; Willis v. Cooke, 5 El. & B. 641, 25 L. J. Q. B. 16, 1 Jur. (N. S.) 1164, 4 W. R. 54, and *examine* Gibson v. Bradford, 24 L. J. Q. B. 159, 4 El. & B. 586, 1 Jur. (N. S.) 520, 3 W. R. 183, 99 R. R. 633.

[6] Mayo v. Maine Fire & Marine Ins. Co. 4 Mass. 374. See McGaw v. Ocean Ins. Co. 23 Pick. (40 Mass.) 405; Everth v. Smith, 2 Maule & S. 278, 5 M. & L. 6, 15 R. R. 246.

a policy "at and from" a foreign port unreasonable delay in commencing the voyage after making the policy, whereby the risk is materially varied, avoids the contract.[7] We have already considered the question of delay in connection with deviation, as well as what is reasonable and unreasonable delay, justified or not justified by the purposes of the voyage.

§ 2761. **Electrical machinery and fixtures: electric lighting: fire risk: knowledge of insurers.**—If a building and the electrical machinery and fixtures therein used for generating and transmitting electricity for electric lighting are insured against loss by fire, it will be assumed that the insurers in making the contract did so with a knowledge of the purposes for which the machinery was used, and that they understood at the time that electricity would be transmitted from the dynamos, and would be a powerful force in and about the building. They must also be presumed to have contemplated the effects which fire would naturally produce in connection with the electrical machinery and apparatus used. Therefore, where a fire in a remote part of the building caused a circuit, whereby there was an increase of electric current brought into the dynamo, producing a resistance which being transmitted to other machinery caused a strain and a breaking to pieces of the same and other injuries, the insurers were held liable.[8] A clause providing that the insurance does not cover any loss or damage to property caused by "electric current whether artificial or natural" cannot be added to the Wisconsin Standard fire policy, which is also a statute providing for insurance against all direct loss or damage by fire except as henceforth provided and which also contains certain exceptions including lightning, but provides that liability for direct damage by lightning may be assumed "by specific agreement hereon," and said policy and statute also forbid attaching thereto any additional provision, etc., and, therefore, all direct loss by fire caused by an electric light current is recoverable.[9] If insurance is effected on a building and machinery used for generating electricity, and thereafter a fire occurs in the building which is speedily extinguished, but as a result of the fire, in a part of the building remote therefrom, what is known as a "short circuit" was produced, from which machinery was greatly damaged, this is

[7] De Wolf v. Archangel Marine Bank & Ins. Co. 43 L. J. Q. B. 147, L. R. 9 Q. B. 451, 39 L. T. 605, 22 W. R. 801, 2 Asp. M. C. 273, 13 Eng. Rul. Cas. 609; Mount v. Larkins, 8 Bing. 108, 1 M. & Scott, 165, 1 L. J. C. P. 20, 1 Dowl. P. C. 262, 34 R. R. 631.

[8] Lynn Gas & Electric Co. v. Meriden Fire Ins. Co. 158 Mass. 570, 35 Am. St. Rep. 540, 29 L.R.A. 297, 33 N. E. 690.

[9] Wausau Telephone Co. v. United Fireman's Ins. Co. 123 Wis. 535, 101 N. W. 1100.

a damage by fire within the meaning of the policy. The fire was a direct and proximate cause of the damage according to the meaning of the words, "direct and proximate cause." [10]

§ 2762. **Embargo, what constitutes.**—An embargo, as already briefly noted, is within the clause as to "arrests, restraints, detainments," etc. Although a war measure used generally in time of war, or to avert threatened hostilities under a power vested in the government, it is nevertheless also a commercial measure, having for its avowed object the protection of commerce and the avoiding of war. It may prohibit the departure of ships or particular vessels or goods from any or all ports of the country. It may be imposed for the purpose of facilitating or manning of a fleet, or to conceal the progress of an expedition intending to sail from a particular port, in which and like cases it is a military instrument, and partakes of the nature of war. It springs from temporary causes, may be limited to a certain period, or may be indefinite as to time. Emerigon says the word in Spanish signifies seizure and sequestration, but it is taken there in France "for a general prohibition to let any vessel go out of port until a new order." It is generally construed as a mere suspension, and not as a condemnation of trade.[11]

§ 2763. **Embargo: effect upon charter party.**—It is held that a detention or embargo does not break up the voyage under a charter party, nor determine a contract of affreightment and that the voyage must be prosecuted after the embargo is removed.[12]

[10] Lynn Gas & Electric Co. v. Meriden Fire Ins. Co. 158 Mass. 570, 20 L.R.A. 297, 35 Am. St. Rep. 540, 33 N. E. 690.

[11] Gibbons v. Ogden, 9 Wheat. (22 U. S.) 1, 6 L. ed. 23, per Marshall, C. J.; Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (U. S. C. C.) 312, Fed. Cas. No. 10,433; 2 Marshall on Ins. (ed. 1810) 508a; Emerigon on Ins. (Meredith's ed. 1850) c. xii. secs. 30, 31, pp. 420, 425 et seq.; 3 Story's Commentaries, 340, 346; 2 Arnould on Marine Ins. (Perkins' ed. 1850) *814; 2 Id. (Maclachlan's ed. 1887) 766; Blackstone's Comm. 270; 1 Kent's Comm. (5th ed.) 281, sec. 13. "An interdiction of trade is not always the result of a general permanent law. It is not infrequently a temporary restraint, having no relation to commerce or revenue, but imposed or enacted with a sole view to political objects. Such is the character of an embargo, general or special—a prohibition of the departure of all or of particular vessels from all or some of the ports of the country in which it is laid. This prohibition, whether limited to a certain period or indefinite as to time, as it springs wholly from temporary causes, is always regarded as temporary in its nature. Hence, it is construed as a mere suspension of the trade that it prohibits, not as a condemnation of the trade as in itself unlawful; and this distinction has in some cases important effect upon the construction of the policy." 1 Duer on Marine Ins. (ed. 1845) 350, 351, sec. 39. See Appendix G herein.

[12] Hadley v. Clarke, 8 Term Rep. 259, 4 R. R. 641.

**§ 2764. Embargo: domestic and foreign.**—Under a general policy a domestic embargo equally with a foreign one is a peril insured against, and is an arrest, restraint, or detainment; for an insured may be indemnified against acts of his own government where it is not the object of the policy to violate the law, or where the loss does not arise from assured's violation of the law. An insurance against loss from an embargo which the government of the parties may impose in the future is not against the policy of the law, and is valid.[13]

If the insurance be upon a neutral ship "at and from" an enemy's port, and an embargo is there laid, the assured may give notice of abandonment. It is covered by the clause as to arrests, etc., and if the embargo continue, there may be an abandonment and recovery as for a total loss.[14]

**§ 2765. Embargo: acts of foreign assured's own government.**—Some question has arisen whether, where the assured is a foreigner, he can be indemnified as to acts of his own government. It is declared to be the law that an insured foreigner cannot be indemnified against the hostile acts of his own government.[15] But there is a distinction between an embargo in times of peace between the countries of assured and assurer and an embargo laid by reason of existing or threatened hostilities.[16] In this country the rule seems to be that an embargo by the government of a foreign assured is as much within the contemplation of the contract as any other embargo, and that an innocent assured cannot be held a party to the peaceful legislative acts of his own government, or to have such an actual participation therein as to be precluded thereby from seeking a remedy under a policy effected with an underwriter here; pro-

[13] Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (U. S. C. C.) 312, Fed. Cas. No. 10,433; McFee v. South Carolina Ins. Co. 2 McCord (S. C.) 503, 13 Am. Dec. 757; Lorent v. South Carolina Ins. Co. 1 Nott & McC. (S. C.) 505; Green v. Young, 2 Ld. Raym. 840, 2 Salk. 444; Hagedorn v. Whitmore, 1 Stark. 157; Touteng v. Hubbard, 3 Bos. & P. 291, 302, 6 R. R. 791.

That further performance of contract made impossible and illegal by outbreak of war and placing of embargo on goods which are the subject matter of contract, see Edward Grey & Co. v. Tolme & Runge (No. 1) 59 L. J. 218, 31 T. L. R. 137, s. c. (No. 2) 31 T. L. R. 551.

[14] Rotch v. Edie, 6 Term Rep. 413, 425, 3 R. R. 422, also reported in 2 Marshall on Ins. (ed. 1810) 511a. See Francis v. Ocean Ins. Co. 6 Cow. (N. Y.) 404, per Sutherland, J.

[15] Touteng v. Hubbard, 3 Bos. & P. 291, 302, 6 R. R. 791, per Lord Alvanley, C. J.; Glaser v. Cowie, 1 Maule & S. 52, 54; Lubbock v. Potts, 7 East, 449, per Lord Ellenborough; Eden v. Parkinson, 2 Doug. 732; Barker v. Blakes, 9 East, 283, 9 R. R. 558; Thelluson v. Fergusson, 1 Doug. 361. See c. xi. herein.

[16] Aubert v. Gray, 32 L. J. Q. B. 50, 3 Best & S. 163, 9 Jur. (N. S.) 714, 7 L. T. 469, 11 W. R. 27, 14 Eng. Rul. Cas. 139.

vided, however, there is no intentional violation by assured or his agents of the laws of his own country, and perhaps if the case is such as to give rise to a fair presumption that the risk was not contemplated by the parties, the presumption should be overcome by proof. The above conclusions are at least fairly deducible from the authorities cited below. The English rule is thus stated by Mr. Maclachlan: "The assured is not to be identified with the acts of his own government unless the existence of hostilities between it and the government of the insurer renders any such contract of indemnity incompatible with that highest law—salus populi—under the insurer's givernment," which is less restricted than Mr. Arnould's rule, and more in accord with that believed to exist in this country; and as asserted in the last edition of the latter's treatise an embargo may be by the home or foreign government on British or foreign property.[17]

**§ 2766. Employee's fidelity: fidelity guaranty: contract guaranty.**[18]—(a) *Preliminary statement.* Inasmuch as certain principles underlying fidelity guaranty involve in some degree the obligations and liabilities of sureties, we have noted briefly, in addition to such cases as are strictly those of insurance, several important decisions concerning sureties involving principles somewhat analogous to those applicable to contracts of insurance of this character, although what is stated under the next subdivision of this section as to this contract being one of insurance and indemnity should be considered in applying these "surety" cases.[19]

(b) *Nature or purpose of fidelity guaranty: construction.*—In order to determine what constitutes a risk or loss under this contract

[17] Francis v. Ocean Ins. 6 Cow. (N. Y.) 404, per Sutherland, C. J.; McBride v. Marine Ins. Co. 5 Johns. (N. Y.) 299, per Kent, C. J.; Odlin v. Insurance Co. of Pennsylvania, 2 Wash. (U. S. C. C.) 320, Fed. Cas. No. 10,433, per Washington, J. See 1 Duer on Marine Ins. (ed. 1845) 352, 353; 2 Duer on Marine Ins. (ed. 1846) 589–96, where the English rule and that in this country and the cases under the rules are fully discussed; note to 2 Marshall on Ins. (ed. 1810) 508b, 509b, where Park on Ins. (6th ed.) 609–14, is quoted at length; 1 Phillips on Ins. (3d ed.) 494 et seq., secs. 913–15, 1060; 2 Arnould on Marine Ins. (Perkins' ed. 1850) 779 et seq.; 2 Id. (Maclachlan's ed. 1887) 737, 738; Id. (9th ed. Hart & Simey) secs. 833, 834, pp. 1046 et seq.

[18] As to representations and warranties: guaranty insurance, see § 2002a herein.

[19] At the time of writing the first edition of this treatise the then comparatively few guaranty insurance decisions justified the insertion of certain analogous points as to sureties and while these have been retained in this edition nevertheless some of the later guaranty insurance cases, considered under this and other sections herein, so far discuss such analogous "surety" principles as are applicable that it is unnecessary for us to enter upon any extended review here of additional authorities relating strictly to sureties as such.

the nature or purpose thereof constitutes an important factor. We have seen that it has been settled after much discussion by at least the weight of authority, that the bonds or contracts of those companies which guarantee the fidelity of employees and which make the business one for profit, are essentially insurance contracts, especially so where the terms of the contract itself closely resemble the essential elements of an insurance contract, and this applies even though the attitude of "surety" is assumed in form; therefore the rights and liabilities of the parties are governed in case of ambiguity by the rules of construction applicable to insurance rather than by the rule strictissimi juris which determines the rights of ordinary guarantors or sureties without pecuniary consideration.[20]

Another point to be considered in connection with risks and losses is that fidelity guaranty insurance is a contract of indemnity;[1] and inasmuch as obtaining full indemnity is the general purpose it should not be defeated except by limitations which are expressly and clearly set forth without ambiguity in the contract.[2]

[20] See §§ 206c, 221b, 222a, 339–339b herein.

See also the following cases:

*United States.* — Dominion Trust Co. v. National Surety Co. 221 Fed. 618, 137 C. C. A. 342, 46 Ins. L. J. 77. *Examine* Pacific County v. Illinois Surety Co. (U. S. D. C.) 234 Fed. 97, 98.

*Illinois.*—City Trust, Safe Deposit & Surety Co. v. Lee, 204 Ill. 69, 68 N. E. 485, aff'g 107 Ill. App. 263.

*Indiana.* — United States Fidelity & Guaranty Co. v. Poetker, 180 Ind. 255, L.R.A.1917B, 984, 102 N. E. 372, 42 Ins. L. J. 1394, 1400 (rule applied to bonds of president and cashier of bank required to give bonds under Burns' Annot. Stat. 1908, sec. 3331).

*Kentucky.*—American Bonding Co. of Balt. v. Ballard County Banks Assignee, 165 Ky. 63, 176 S. W. 368.

*New York.*—National Surety Co. v. Stallo, 156 N. Y. Supp. 988, 171 App. Div. 206, 47 Ins. L. J. 341 (rule applied to application: guardianship bond).

*Ohio.*—Livingston v. Fidelity & Deposit Co. of Md. 76 Ohio St. 253, 81 N. E. 330, 36 Ins. L. J. 699, 704–5.

*Oklahoma.* — Southern Surety Co. v. Tyler & Simpson Co. 30 Okla. 116, 120 Pac. 936.

*Tennessee.*—Louisville & N. R. Co. v. United States Fidelity & Guaranty Co. 125 Tenn. 658, 148 S. W. 671.

*Texas.* — National Surety Co. v. Murphy-Walker Co. — Tex. Civ. App. —, 174 S. W. 997; Griffin v. Zuber, 52 Tex. Civ. App. 288, 113 S. W. 961.

*Wisconsin.* — Whinfield v. Massachusetts Bonding & Ins. Co. 162 Wis. 1, 154 N. W. 632; First National Bank of Crandon v. United States Fidelity & Guaranty Co. of Md. 150 Wis. 601, 137 N. W. 742, 41 Ins. L. J. 1893.

As to distinction between contracts of indemnity and suretyship or guaranty: a case where bond was to indemnify a surety company from loss on its bond to indemnify for loss occasioned by employee whose fidelity was guaranteed, see Hall v. Equitable Surety Co. — Ark. —, 191 S. W. 32.

[1] See § 27h herein.

That guaranty insurance is a contract of indemnity, see also definition thereof in § 12 herein; People (ex rel. Gosling) v. Potts, 264 Ill. 122, 106 N. E. 524.

[2] Dominion Trust Co. v. National Surety Co. 221 Fed. 618, 137 C. C. A. 342, 46 Ins. L. J. 77, 79. *Examine*

Again, in the construction of bonds for the faithful performance of duties or obligations reference should be had to the hazards against which security is sought, as well as to the situation of the parties, the principal as well as the surety, and also the character of the employment or trust.[3] So the rule of construction against insurer and in favor of assured will also apply in determining whether, in view of the nature of the employment and the character of the bond, a shortage constitutes an embezzlement and whether the state statute or the Federal law under which the employment was held should govern; accordingly it is decided that the latter laws which impose a liability upon such employees will control.[4]

(c) *Validity and binding obligation of fidelity guaranty: modification, restrictions or limitations.*—There is no doubt that in insurance of an employee's fidelity the parties may make such terms and conditions as are valid under the law and which they may agree upon, and the terms of the contract, including those matters which constitute a part thereof, must govern in all cases, and will bind the parties thereto to the extent of the obligations validly assumed. This proposition is fully sustained by the authorities under this entire section and elsewhere herein.[5]

As to including what constitutes a part of the contract in applying the above rule, it is determined that where a bond of a cashier of a state bank insures against pecuniary loss by reason of his fraud or dishonesty amounting to embezzlement or larceny, and said bond is given under the requirements of a statute the obligors are bound in the performance of the conditions which the statute declares it shall contain, even though they are not specifically mentioned or provided for in the bond itself, nor have the sureties any

John Church Co. v. Aetna Indemnity Co. 13 Ga. App. 826, 80 S. E. 1093.

[3] Rochester City Bank v. Elwood, 21 N. Y. (7 Smith) 88 (action on bond: nonsuit and nominal damages: judgment reversed and new trial granted).

Fidelity guaranty insurance: construction: place of contract. See Dixie Fire Ins. Co. v. American Bonding Co. 162 N. C. 384, 78 S. E. 430; Grand Lodge Ancient Order United Workmen v. Massachusetts Bonding & Ins. Co. — R. I. —, 94 Atl. 859. See § 231b herein.

[4] Griffin v. Zuber, 52 Tex. Civ. App. 288, 113 S. W. 961 (action was brought by sureties on the bond of a Postmaster to recover of a fidelity guaranty company the amount of shortage in the Postmaster's accounts under a bond agreeing to "indemnify and keep indemnified the said assured to the extent of" a specified sum "from and against any and all loss which they might be put to, incur or suffer by reason of any personal act or acts of larceny or embezzlement committed by the said Postmaster," etc.).

[5] See §§ 2190, 2531b herein.

What is part of policy, see §§ 185–198 herein.

power to change the character or legal effect thereof. In other words the statutory conditions are imported into the contract the same as if expressed therein in so many words; and the obligations of sureties or guarantors for hire are more especially within the application of and reason for the rule than are those of personal sureties who have bound themselves for accommodation without pecuniary reward.[6]

A fidelity guaranty contract may also by mutual agreement be modified and new terms be substituted for the original stipulations in which case the parties will be bound by the contract as modified.[7]

So a bond given by a subagent to a general agent may be modified to cover a continuance of the agency under a new agreement contemporaneous with that under the bond.[8]

Limitations or restrictions are generally assented to and specified by the parties whereby the character, nature and extent of the acts done by the employee for which assurer will indemnify assured, and the contract in such case is only binding within the terms thereof and will not be extended beyond the restrictions where there is no ambiguity; as where the restriction is to loss sustained by "personal dishonesty amounting to larceny or embezzlement of the employee" it will not cover acts which are not those specified but which amount more nearly to forgery by the employee, even though assured's loss is as complete as if money had been stolen or embezzled.[9] But an employer cannot enlarge the liability of one insuring him against loss as fixed by the terms of the bond by establishing rules for the conduct of his business.[10]

Whether validity of bond depends upon signature of employee as condition precedent, see § 178a herein, also § 54b herein, and see note to subdiv. (ee) this section.

[6] United States Fidelity & Guaranty Co. v. Poetker, 180 Ind. 255, L.R.A.1917B, 984, 102 N. E. 372, 42 Ins. L. J. 1394; Burns' Ann. Stat. 1908, sec. 3331 (bond in this case was held an "official bond" under the statute Id. sec. 1278). *Compare* Adams v. Williams, 97 Miss. 113, 30 L.R.A. (N.S.) 855, 52 So. 865 (official bond of treasurer of levee board: additional conditions in bond do not invalidate).

When official bonds are valid and void, see note 82 Am. Dec. 760–64. See Absmuths v. Bowyer, 39 Okla. 376, 50 L.R.A.(N.S.) 1060 and note, 135 Pac. 413 (not void: bond not required by law but issued).

As to common or statutory law as part of contract, see §§ 194 et seq., 1916, subdivs. (e), (f), (j), 2002a herein.

[7] Rice v. Fidelity & Deposit Co. 103 Fed. 427, 43 C. C. A. 270.

As to alteration and modification of policy, see §§ 265–276a herein.

[8] New York Life Ins. Co. v. Hamlin, 100 Wis. 17, 75 N. W. 421.

[9] Dominion Trust Co. v. National Surety Co. 221 Fed. 618, 137 C. C. A. 42, 46 Ins. L. J. 77.

[10] Great Northern Express Co. v. National Surety Co. 113 Minn. 162, 31 L.R.A.(N.S.) 775 and note, 129 N. W. 127.

(d) *Nature or extent of liability: generally.*—It is declared that as to the nature or extent of liability that the position of one who insures the fidelity of an employee is not only that of an insurer, but in some sort that of a surety as well, and in both or in either of these capacities his liability is primary and direct.[11]

(e) *Reinsurance of surety insurer: liability of reinsurer to original reinsurer where former is mere surety.*—Where a surety company transfers or turns over practically to another company its entire business and good will, and the transferee company assumes the same and agrees to assume and fulfil all obligations and liability under bonds issued by the transferring company and to adjust all losses and litigations, such reinsurer is liable to the original insured in an action on a bond issued by the transferring surety company.[12] Another phase is presented as to reinsurance of sureties and that is: If an obligation reinsuring a surety on a bond of a foreign corporation, to enable it to transact business in the state so stipulates, the policy holders of said foreign corporation are entitled to enforce directly against said reinsurer whatever liability is imposed under its policy upon the original insurer, and this applies where the latter becomes insolvent. In the case so deciding it appeared that a foreign corporation for the purpose of engaging in business in Texas filed its bond with the Commissioner of Insurance and Banking payable to the commissioner in a certain sum as required by statute with a guaranty company as surety. The obligation of defendant upon which the suit against it was based and which was filed with the bond in the insurance department, recited that it had reinsured the surety company against all liability as surety on said bond, which was attached and made a part thereof; also that it was further agreed that the contract of reinsurance should run to and inure for the benefit of said commissioner and to any and every party who might be a beneficiary under the bond and that an original action or actions against the reinsurer might be maintained upon the bond and its contract just as if the reinsurer had signed said original bond. A judgment in

[11] Champion Ice Manufacturing & Cold Storage Co. v. American Bonding & Trust Co. 115 Ky. 863, 25 Ky. L. Rep. 239, 103 Am. St. Rep. 356, 75 S. W. 197, 32 Ins. L. J. 808, 814, per Settle, J. The court nevertheless asserts and applies the rule above stated, under subdiv. (b) herein that the contract is one of insurance to be construed against insurer in case of ambiguity.

[12] United States v. Brent (U. S. D. C.) 236 Fed. 771 (contract guaranty: sub-contractor).

As to relations between parties, and between insured and reinsurer, see § 117 herein.

When suit may be brought against reinsurer: rights of original insured, see §§ 135 et seq. also § 132 herein.

the lower court for plaintiff was, however, reversed, but proof of the reinsuring obligation where it was sought to charge reinsurer the liability primarily resting upon said foreign insurance company to its policy holders, was by means of the copy of said instrument certified by said commissioner and it was held that inasmuch as said document was not of such a character as was required or permitted to be recorded the commissioner's certificate could give it no legal authenticity.[13]

In a Federal case, peculiar in that it is declared that the precise question had never been passed upon in any reported decision, it is held that where an insurance company reinsures its risks and the reinsurer under its contract reinsures the risk with others to a certain per cent there is as to a defendant reinsurer, who is one of the said reinsuring companies, no privity between it and four other reinsuring companies, whether those originally bound or one who came in afterwards by taking the place of another who had canceled his risk, and even though they all had contract relations with the first reinsurer each was wholly independent of the others, so that in an action by the original reinsurer the liability of defendant reinsurer is not dependent upon the extent to which the substituted reinsurer became liable, or whether it became liable at all. In connection with this point other points were decided, but it is necessary for a clear understanding of what was determined to state the facts which the circuit court of appeals held controlling, although it excluded other facts which the lower court considered in reaching its conclusion which was reversed; said facts were as follows: A French society and body corporate consisting of about seventy

[13] Southwestern Surety Ins. Co. v. Anderson, 106 Tex. 46, 155 S. W. 1176, 42 Ins. L. J. 1083 (bond filed under Act of March 20, 1909, art. 4870–1; Acts 31st Leg. c. 102) rev'g 152 S. W. 816. The court, per Phillips, J., said: "(2) There can be no doubt that this contract inured to the benefit of holders of policies of the Farmers' & Merchants' Ins. Co." (the foreign company which filed the bond with the state) "and that Anderson was entitled thereunder to directly enforce against the plaintiff in error whatever liability his policy imposed upon that company; but under no law was it authorized to be filed in the office of the Commissioner of Insurance & Banking and it therefore evidenced only a common law obligation. "(3) While available to every beneficiary of the statutory bond to which it refers, for the enforcement of all demands protected by that instrument, its terms plainly demonstrate that primarily it was a contract of indemnity to the Republic Guaranty & Surety Co. against loss by reason of its suretyship upon that bond. A surety upon such a bond may, of course, protect itself by this character of reinsurance of its liability, to inure at the same time to the beneficiaries of the bond, but the statute makes no provision for the filing of such a contract in the insurance department; and otherwise the Commissioner is not its legal custodian." See this case also near end of subdiv. (gg) herein.

exchange brokers in Paris, which is designated for brevity as the Broker's Society, insured each of its members against three-fourths of the loss not exceeding a specified sum in any one case or a maximum of a smaller sum occasioned by theft or embezzlement of his employees. It effected reinsurance with the plaintiff, likewise a French corporation for five years, against any loss not exceeding in a single case a quarter of a million francs and not more than the difference between that amount and the maximum of a million francs for which the Broker Society might be liable to any of its members, ninety per cent or more of the risk assumed by plaintiff was by agreement to be reinsured in at least three other companies, approved by the Broker's Society. The reinsurers were to countersign the policy and accept its articles, though plaintiff remained liable to the original insurer for full performance of his contract. One-fifth of this risk so assumed was reinsured for the same period with defendant, a Maryland corporation. By an agreement between them this reinsurance was canceled three years after the date of plaintiff's reinsurance of said Broker's Society, subject, however, to prior incurred losses. During a period covering a few days over four years from the date of said first reinsurance by plaintiff, although said fact was unknown by any of the parties at the time of said cancelation, an employee embezzled an amount, nearly one half of which was taken before the date of cancelation and the balance thereafter. Before the expiration of the five year period of plaintiff's contract the entire amount embezzled was "known and declared" so that the latter became liable to said society for three-fourths the aggregate amount less the quarter of a million francs, that is, plaintiff was liable for defalcations, both before and after said cancelation, if said losses constituted a single embezzlement and amounted to over a third of a million francs, but as to defendant, the cancelation operated to discharge him from all liability for future embezzlements covered by plaintiff's policy, especially so in view of the fact that such cancelation was expressly "subject to losses incurred prior to said date;" and as to the loss which occurred prior to said date, inasmuch as plaintiff was not liable therefor because the amount thereof was not a loss constituting a single embezzlement amounting to over one third of a million francs, therefore defendant was not liable therefor as the latter's liability could not be increased or affected by embezzlements or thefts committed after its said release by cancelation. The court, per Knapp, C. J., said: "Clearly the defendant was a mere surety, and it is well settled that liability in such cases cannot be enlarged by implication. The plaintiff was at liberty to hold the defendant for the full five years of its contract. It could refuse a release altogether or allow it upon conditions which would have bound the defendant to

contribute for such a loss as was actually suffered. It saw fit to cancel the defendant's contract of reinsurance on a certain date, subject only to prior losses, and except as to those losses it has no legal claim against the defendant." Another point was that although the defendant received and retained its share of three full premiums for the three years its reinsurance was in force, still it carried its share of the risk during that period and was then released, therefore the contention was not sustained that defendant was equitably bound to contribute in proportion to the time it was on the policy, and its percentage of the risk which plaintiff had been compelled to pay.[14]

(f) *"Embezzlement" or "larceny" generally, under guaranty insurance clauses containing these words.*—In determining what constitutes embezzlement or larceny, the language of the bond with whatever words of limitation or restriction are used must be considered, and also those circumstances, if any, to which the undertaking relates. The certainty or extent of the pecuniary loss sustained is not the determinative test, for the acts of the employee may make the loss as complete as if he had stolen or embezzled money and still the insurer not be liable.[15] And in deciding that there was no embezzlement by a cashier of a bank the court in a Missouri case considers as important the point that there was no intent on the part of said cashier to convert the funds of the bank to his own use.[16] The contract also stipulates for indemnity of the

[14] United States Fidelity & Guaranty Co. v. French Mutual General Society of Mutual Ins. Against Theft, 212 Fed. 620, 129 C. C. A. 156, 44 Ins. L. J. 86 (rev'g French Mutual General Society of Mutual Ins. Against Theft v. United States Fidelity & Guaranty Co. 203 Fed. 558, 42 Ins. L. J. 865) certiorari denied (mem.) 234 U. S. 758, 34 Sup. Ct. 676, 58 L. ed. 1579, Woods, C. J., (dissenting) said: "I am unable to concur in the reasoning and conclusion of the majority opinion, because, in the settlement of insurance, it gives to the defendant, as a reinsurer as of the date of the cancelation of its policy, the entire benefit of the required deduction of one fourth of the risk carried by the insured employer and of the 250,000 francs carried by the original insurer, the Brokers Society, whereas, construing all the contracts together, it seems to me clear that these deductions should be made for the proportionate benefit of all the reinsurers at the date of the ascertainment of the entire loss. Even if the latter construction of the contract be regarded doubtful, it should be preferred, since it produces a fair equality of burden, while giving the defendant the benefit of the entire deductions, results in an inequality of burden which could not have been in contemplation either when the defendant's contract was made or when it was canceled. Elaboration is not attempted because it would be a mere repetition of the full and strong reasoning of the district judge."

[15] Dominion Trust Co. v. National Surety Co. 221 Fed. 618, 137 C. C. A. 42, 46 Ins. L. J. 77, 79.

[16] Farmers' State Bank v. Title Guaranty & Trust Co. 133 Mo. App. 705, 113 S. W. 1147, 38 Ins. L. J. 262.

obligee, and the language adopted as descriptive of the acts for which that indemnity is guaranteed must be considered; and the fact that the employee gained nothing financially by his acts of fraud and dishonesty amounting to larceny or embezzlement is of no avail where the motive for an intention to gain by said acts exists and they are done under an agreement with another whereby the employee is promised financial benefit from the wrongful transaction which causes a loss to assured within the terms of the guaranty.[17] Nor is it necessary that there should have actually been a misapplication of money for himself by a clerk to render a surety liable on a bond for the faithful performance by the clerk of his duty, for if the employee aids another in defaulting, the sureties are liable.[18]

The preceding statements are based upon decisions in fidelity guaranty cases, but it is necessary in considering questions relating to "embezzlement" or "larceny" as those words are used in the bonds of this class of insurers, to resort to statutory law, at least so, after ascertaining by construction of the contract the extent, if any, to which they are intended to govern insurers liability; for in certain cases, as will hereinafter appear, when used in connection with other words the courts have refused in effect to give them force, for the reason that the said terms "embezzlement" or "larceny" are held not to restrict the right of indemnity contemplated by the guaranty, while under other decisions they have been given full force and effect as restricting insurer's liability to what is technically meant by said words as defining an offense or crime, or, to be more explicit, to such fraud or dishonesty only as amounts to the offense or crime of embezzlement or larceny. The importance, therefore, of giving the statutory definitions of these terms is apparent, and although it goes without saying that the meaning or construction of the words "embezzlement" or "larceny" depends upon no principle governing insurance contract law, still the application of their meaning or construction when ascertained is involved under fidelity guaranty insurance contracts. In view, therefore, of what is above stated we have given in the appended note citations of authorities with only brief mention of the essentials, gist or gravamen of these offenses or crimes, together with definitions thereof, noting also the distinctions between them. We will state here, however, that the essentials of the term "embezzlement,"

[17] Rankin v. United States Fidelity & Guaranty Co. 86 Ohio St. 267, 99 N. E. 314, 41 Ins. L. J. 1753. See Mo. App. case near end of subdiv. (g) herein.

[18] London, Brighton and South Coast Railway Co. v. Goodwin, 3 Exch. 736, 6 Railw. Cas. 177, 18 L. J. Ex. 337 (principal and surety).

embodied in the definition thereof, in similar or like relations to those sustained under fidelity insurance bonds, are generally: (1) The existence of some fiduciary relation, or some relation of employment, trust or confidence, express or implied: (2) money, or property must have come into a person's care, custody or control, or he must have been intrusted therewith by virtue of such employment, or fiduciary, trust or confidential relation: (3) The money or property must be that of another: (4) There must be a wrongful, fraudulent, or unlawful appropriation or conversion of said money or property by the person in possession or control thereof by virtue of such relation of employment, trust or confidence: and (5) Intent to so fraudulently, wrongfully, or unlawfully appropriate it to his own use.[19] In North Carolina there is an embezzlement

[19] Although the citations in this note are of decisions which appear to cover similar or like relations as those sustained between employer and employee, or as exist in other positions of a fiduciary character under fidelity guaranty insurance contracts, still, caution should be exercised in applying in any case, any decision based upon statutes of other states which are various in their provisions and adapted to various contingencies and in some instances are dependent upon still other statutes.

*United States.*—Wooddell v. Territory, 187 Fed. 739, 109 C. C. A. 487 (Pen. Code Ariz. 1901, sec. 460, essentials of embezzlement are, being intrusted with, or having in possession or control property for use of another, and fraudulently appropriating it to any use or purpose not in due or lawful execution of trusts); Jewett v. United States, 100 Fed. 832, 41 C. C. A. 88, 53 L.R.A. 568 (U. S. Rev. Stat. sec. 5209, as to wilfully misapplying bank funds: "wilful misapplication" covers embezzlement).

*Alabama.*—Barr v. State, 10 Ala. App. 111, 65 So. 197 (Code 1907, sec. 6828, offense is complete if defendant embezzled or fraudulently converted to his own use money which came into his possession by virtue of his employment though money belonged to another than employer); Wall v. State, 2 Ala. App. 157, 56 So. 57 (Code 1907, sec. 7161, form 49: "embezzles" has technical meaning: essentials are a breach of duty or trust in respect of property, money, or effects belonging to another and in the party's possession by virtue of some trust, duty, agency, or employment on the part of accused, and the wrongful or fraudulent appropriation thereof to his own use); Knight v. State, 152 Ala. 56, 44 So. 585 (essentials are coming rightfully into possession and fraudulently converting to own use or to the use of another or fraudulently secreting the property with intent to convert).

*Arizona.*—De Leon v. Territory, 9 Ariz. 161, 80 Pac. 348 (embezzlement defined under Penal Code sec. 460: essentials are being intrusted with property for use of another and fraudulent appropriation for any purpose not in due execution of trust); Thomas v. Territory, 9 Ariz. 180, 80 Pac. 320 (embezzlement by clerk, agent, or servant defined under Penal Code, sec. 426: essentials are fraudulent appropriation by such clerk, etc., of another's property in his control by virtue of such employment).

*Florida.*—Neal v. State, 55 Fla. 140, 19 L.R.A.(N.S.) 371, 46 So. 845 (Gen. Stat. 1906, sec. 3311: essentials are fraudulent conversion to own use anything of value intrusted to one,

if an agent fraudulently and feloniously converts to his own use the money of his principal; but where there is no such admission

or which has come into his possession, care, custody or control by virtue of his employment; but put on basis of larceny as to punishment); Tipton v. State, 53 Fla. 69, 43 So. 684 (embezzlement defined under Gen. Stat. 1906, sec. 3311: essentials of offense are possession of property by person sustaining relation of confidence or trust to owner of property and a breach of trust or conversion or appropriation in violation thereof).

*Iowa.*—State v. Carmean, 126 Iowa, 291, 106 Am. St. Rep. 352, 102 N. W. 97 (essentials of embezzlement are: fraudulent conversion or misappropriation of money or property received in a fiduciary capacity; but if funds intrusted to corporation are not received by officer thereof and he has no knowledge of their misappropriation and he did not intentionally fail to apply them to purposes for which intrusted, there is no embezzlement by him).

*Kentucky.*—National Life & Accident Ins. Co. v. Gibson, 31 Ky. L. Rep. 101, 101 S. W. 895 (embezzlement defined, under Ky. Stat. 1903, sec. 1202, as fraudulent conversion by an agent to his own use of money or property belonging to another which shall have come into his possession as agent).

*Louisiana.*—State v. Pellerin, 118 La. 547, 43 So. 159 (embezzlement is not a common law crime and its meaning must rest upon the statute: "embezzle" defined: essentials are, wrongful and felonious appropriation of property intrusted to servant, agent or employee by employer: is more comprehensive than "larceny:" Rev. Stat. sec. 905, as am'd by Acts 1888, No. 31, p. 23).

*Michigan.*—People v. Messer, 148 Mich. 168, 14 Det. Leg. N. 157, 111 N. W. 854 (embezzlement by cashier, officer, servant or agent of bank defined under Comp. L. sec. 11,562: money, or other property in possession or custody).

*New Jersey.*—State v. Egan, 84 N. J. L. 701, 87 Atl. 455 (failure to return or account for money on demand is not an essential although it may be evidence of crime of embezzlement: essentials are, fraudulent conversion to defendants own use, of money or property or fraudulent secretion with that intent. Comp. Stat. p. 1795, sec. 168).

*New York.*—People v. Miller, 169 N. Y. 339, 88 Am. St. Rep. 546, 62 N. E. 418. (It is embezzlement and not larceny where one honestly receives possession, upon express or implied trust of money, etc., and thereafter fraudulently converts such money, etc., to his own use); People v. Burnham, 104 N. Y. Supp. 725, 119 App. Div. 302, s. c. 106 N. Y. Supp. 57 (to support conviction of officer of insurance company of larceny under Pen. Code, sec. 528, subd. 2, essentials are, possession as bailee or officer and appropriation to his use or that of any other person with intent to defraud).

*Oklahoma.*—State v. Duerksen, 8 Okla. Cr. Rep. 601, 52 L.R.A.(N.S.) 1013, 129 Pac. 881 (fraudulent intent is implied when agent in possession of principal's funds, converts them to his own use without said principal's knowledge or consent).

"Embezzlement is the fraudulent conversion of property by a person to whom it has been intrusted. There must be a conversion, but this may be either actual or constructive" State v. Ensley, 177 Ind. 483, 97 N. E. 113.

"So far as necessary to define embezzlement for the purposes of this case," one of fidelity guaranty insurance, "it may be defined as the fraudulent conversion of the money or personal property of another which is in the possession of a trustee, servant, agent, or bailee in a trust capacity. There can be no embezzlement unless

in the record, and there is only prima facie evidence which a judgment against the principal imports as to the sum or amount which

the property charged to have been embezzled was, at the time of the conversion, held in trust." Milwaukee Theatre Co. v. Fidelity & Casualty Co. 92 Wis. 412, 66 N. W. 360.

The term "embezzle" is a technical word having a legal signification and is a fraudulent appropriation by a person to his own benefit of money or property of another with which he is intrusted and is "uniformly defined as importing an appropriation or conversion with a fraudulent and criminal intent. The subject is not a new one to this court because in the case of Hanna v. Minnesota Life Ins. Co. 241 Mo. 383, l. c. 401, 145 S. W. 412, this court said: 'Embezzlement is the fraudulent and felonious appropriation of another's property by a person to whom it has been intrusted or into whose hands it has lawfully come,' State v. Casey, 207 Mo. 1, l. c. 11, 123 Am. St. Rep. 365, 13 Am. & Eng. Ann. Cas. 878, 105 S. W. 645. At common law the crime of embezzlement did not exist, it being regarded as a breach of trust or duty. The same is wholly statutory, and a sort of a statutory larceny committed by persons who have lawfully secured possession of the property, and who afterwards criminally appropriate the same to their own use. The act not being a crime at common law, and having no criminal signification thereunder, we are not hampered in giving it its proper technical meaning, as, for instance, the case of larceny, with which this court was dealing in State v. Baker, 246 Mo. 339, 152 S. W. 46," per Revelle, J., in State v. Burgess, 268 Mo. 407, 414, 188 S. W. 135, under Rev. Stat. 1909, sec. 4552. See also State v. Pate, 268 Mo. 431, 439, 188 S. W. 135.

"Embezzlement is purely a statutory offense. It was unknown to the common law and the statute was enacted for the purpose of supplying what were regarded as defects in the common law of larceny, so as to reach and punish for the fraudulent conversion of money or property which could not be reached by the common law. And while our statute denominates the offense larceny, and concludes by providing that the person so committing an act of embezzlement shall be deemed guilty of larceny, yet embezzlement is generally regarded as a separate and distinct crime, and is so treated. The distinction between embezzlement and larceny is that embezzlement is the wrongful conversion of property without trespass, or where the original taking and possession is lawful. In order to constitute the offense, it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes. Under our statute, referred to, it is necessary to show; first, the trust relation of the person charged, and that he falls within that class of persons named; second, that the property or thing claimed to have been embezzled or converted is such property as is embraced in the statute; third, that it is the property of another person; fourth, that it came into the possession, or was placed in the care of the accused under and by virtue of his office, place or employment; fifth, that the manner of dealing with, or disposing of, the property, constituted a conversion and appropriation of the same to his own use; and, sixth, that the embezzlement or fraudulent conversion of the property to his own use was with the intent to deprive the owner of his property. A mere detention of money belonging to another without a fraudulent intent to convert it to the use of the one by whom it is detained and to deprive that other person of such property does not constitute embezzlement. The appropriation of money held by an agent

the surety is to pay, it constitutes error for the court to charge the jury in an independent action by the surety on its bond, that there

is not, under our statute, larceny, unless it be done with the fraudulent intent to deprive the owner of his property, or the use and benefit thereof. The mere fact of appropriation or use of the property may be an innocent exercise of dominion, if the intention exists to repay or restore it. It is the fraudulent intent that constitutes the offense—the intention to make an absolute appropriation as contradistinguished from a temporary use without any design to defraud the owner or deprive him of his property. If the legislature intended to make the mere use of money or other property mentioned an offense, it should not have used the language in the act, which says, to 'embezzle or fraudulently convert to his own use.' " State v. Moyer, 58 W. Va. 146, 149, 150, 6 Am. & Eng. Ann. Cas. 344, 52 S. E. 30, per Sanders, J., under sec. 19, c. 18, Acts 1903, amending and re-enacting sec. 19, c. 145 of Code providing that "If any officer, agent, clerk or servant . . . of any incorporated bank or other corporation . . . embezzle or fraudulently convert to his own use," etc.

In order to constitute larceny it is not necessary that the person wrongfully taking another's property should have the purpose of obtaining a pecuniary advantage or gain for himself. If he takes for the purpose of giving the property to a third person it is larceny. In every larceny there must be a taking from the possession of the owner against his will, but the taking need not be by the hand of the accused himself, for if he causes another person to take the goods for him his offense is larceny. He who procures another to take the property is, if present, guilty as principal, and if absent is guilty as an accessory before the fact. This was applied where the fidelity insurance bond of a cashier guaranteed to reimburse the bank for such pecuniary loss as it might sustain by reason of any fraudulent or dishonest conduct of the cashier, in connection with his duties, amounting to embezzlement or larceny, and among the specific allegations it was set out that said cashier caused the teller to pay certain checks and notes with the intention of appropriating, etc., the amount of money which they represented. The case turned upon a question of pleading and is noted more fully under subdiv. (gg) herein. Canton National Bank v. American Bonding & Trust Co. 111 Md. 41, 73 Atl. 684.

"Larceny at common law was the felonious taking of the property of another against his will with the intent to convert it to the use of the taker, or as some authorities hold, the use of the taker and a third person. Embezzlement, which is a statutory offense, consists in the fraudulent appropriation to one's own use of money or goods intrusted to him by another. In larceny the felonious intent must have existed at the time of the taking of the property, whereas, in embezzlement the fraudulent act consists in the appropriation of the property to the use of the taker or a third party, but the felonious or fraudulent intent is of the essence of the offense in each case." Williams v. United States Fidelity & Guaranty Co. 105 Md. 490, 66 Atl. 495, 36 Ins. L. J., 589, 591, per Schmucker, J.

"There is a distinction between embezzlement and larceny. The distinguishing element of the latter crime is the taking and carrying away or asportation of the property the subject of the larceny. In embezzlement the property is lawfully in the possession of the accused by reason of some fiduciary relation between the accused and the owner. The crime of larceny would be complete if there was a taking and carrying away from the owner, of his money or property with a felonious intent, although the

was no controversy about the fact that the employee converted the specified amount of plaintiff's money to his own use and that the only question for it to decide was whether he did that with a fraudulent intent.[20]

In applying what is stated at the beginning of this section as to the rule of construction against insurer, consideration should also be given, in connection with the words "embezzlement" and "larceny," to such statutory provisions as declare a rule of construction and require that words and phrases be given their plain and ordinary or usual sense, but that technical words be given a meaning according to their technical import.[1] In a Texas case where the

money or property taken was afterwards restored or recovered or the owner recompensed. Under section 75, of the Criminal Code, under which the defendant was indicted, strictly speaking, the crime of embezzlement is complete when there is a fraudulent conversion by the accused of money or property of his employer without his consent. Generally, there is a conversion only where there has been a refusal, or at least a failure to pay, or there are circumstances from which such refusal or failure can be implied. Whether there has been such conversion would, of course, depend upon the facts and circumstances of each particular case, the e act nature of the relation between the parties, the contract of employment or agency and the course of dealing of the parties with each other." People v. Ehle, 273 Ill. 424, 431, 432, 112 N. E. 970, per Craig, J.

"The distinction between larceny and embezzlement is one fully recognized in the criminal law of this state as well as in England. While the two offenses have much in common, for the purpose of prosecution they have uniformily been regarded as distinct. In every larceny there must be a trespass in the original taking of the property; that is, in larceny the felonious intent must have existed at the time of the taking. State v. Shermer, 55 Mo. 83, and cases cited; State v. Ware, 62 Mo. 602. Whereas embezzlement is the fraudulent and felonious appropriation of another's property by a person to whom it has been intrusted, or into whose hands it has lawfully come." State v. Casey, 207 Mo. 1, 10, 11, 123 Am. St. Rep. 367, 13 Am. & Eng. Ann. Cas. 878, 105 S. W. 645, per Gantt, J.

Embezzlement defined and essentials stated, 2 Wharton's Crim. Law (11th ed.) p. 1468, sec. 1256. For other definitions of "embezzle," "embezzlement" and distinctions, see 3 Words & Phrases, "embezzle," "embezzlement," pp. 2351–2358; 2 Id. (2d series) pp. 244–253.

[20] Dixie Fire Ins. Co. v. American Bonding Co. of Balt. 162 N. Car. 384, 78 S. E. 430 (bond stipulated "that if the employee shall in the position of general agent in the employer's service make good to the employer within thirty days any loss sustained to the employer by larceny or embezzlement committed by the employee during the term . . . this obligation shall be null and void; otherwise to remain in full force and effect." Action to recover for breach of bond was brought by Dixie, etc., Co., against the American, etc., Co., who furnished the bond guaranteeing fidelity of general agent of insurance company: judgment mentioned in above text as prima facie evidence was obtained in action by the employer against the employee).

[1] See State v. Pate, 268 Mo. 431, 438, 188 S. W. 139, where Rev. Stat. sec. 8057, so providing is applied in construing the words "embezzle" and

question was whether the embezzlement should be determined by construing and applying the state law defining that offense, or by the Federal law under which the employee held his position and which rendered him liable for his misconduct in his official capacity, it was held that the Federal law controlled.[2]

(g) *Whether the phrases "amounting to embezzlement or larceny," or, "any acts of larceny or embezzlement," restrict recovery to losses occasioned by acts which are criminal or import a criminal offense.*—In a frequently cited Kentucky case, insurer agreed to reimburse the employer for pecuniary loss sustained "by any act of fraud or dishonesty amounting to larceny or embezzlement." It was part of the employee's duty to make out weekly pay roll checks payable to himself, have them signed, and obtain the cash thereon at the bank. These checks he raised and cashed, appropriating for himself the excess over the amounts for which they were actually issued. He also fraudulently retained some of the money collected by him for insured, or took it from the cash drawer. A judgment below for defendant was reversed. In holding insurer liable, the court, per Settle, J., said: "It is not material, therefore, whether the fraudulent and dishonest acts of Weitkamp, which caused loss to appellant were committed by the making of false entries in its books, by the raising of its checks, or by extracting money from its money drawer; . . . appellant under the terms of the bond would be, and is, liable for the loss which he occasioned. There can be no doubt, under the evidence in this case, but that Weitkamp was authorized by appellant, and that it was a part of his duty, to receive money due it from its customers, and to draw money from the bank in which appellant's accounts were kept; and it was also his duty to account to appellant for the moneys thus received. His failure to do so was dishonest and fraudulent, and, in fact, constituted an act of embezzlement; and for the loss resulting to his employer thereby, appellee's liability is fixed by the terms of the bond. It was not necessary, in order to fix the liability of appellee upon the bond, that appellant should produce, in support of any claim that it might have arising thereunder, such proof as would convict Weitkamp of the crime of larceny or embezzlement as defined by the laws of Kentucky. Such a narrow construction of the provisions of the contract is not required by the law, and was never contemplated by the parties to it. While larceny is a common law crime, yet in this state it is to a great extent statutory. Embezzlement is purely a statutory crime, but the terms 'larceny' and 'embezzlement,' in the bond or policy sued on, are used as generic

"convert" under Rev. Stat. 1909, sec. 4550.

[2] Griffin v. Zuber, 52 Tex. Civ. App. 288, 113 S. W. 961.

terms to indicate the dishonest and fraudulent breach of any duty or obligation upon the part of an employee to pay over to his employer, or account to him for, any money, securities, or other personal property, the title to which is in the employer, that may in any manner come into the possession of the employee." [3] In an Illinois case the court, per Hand, C.J., declared in substance and so held that the phrase, "amounting to larceny or embezzlement" does not qualify the word "dishonesty" in a guaranty clause of a fidelity bond, insuring against loss "sustained by the employer by or through the dishonesty, or any act of fraud of the employee amounting to larceny or embezzlement;" and, applying the rule of construction against assurer and in favor of assured, assurer was held liable under the said bond for any financial loss sustained through the employee's dishonesty even though his conversion to his own use of moneys collected by him would not subject him to an indictment and conviction for larceny or embezzlement; also that the intent of assured under such a guaranty was to protect himself from financial loss through the employee's dishonesty even though the act by which the loss was occasioned was not criminal, and that it was immaterial that the employee could not have been convicted of larceny or embezzlement. This was applied where the employee, whose fidelity was guaranteed, was intrusted with the collection of rents for insured on the basis of a salary and commission and the use of a flat in which to live, and he collected the rents, converted them to his own use and absconded.[4]

[3] Champion Ice Manufacturing & Cold Storage Co. v. American Bonding Co. 115 Ky. 863, 25 Ky. L. Rep. 239, 103 Am. St. Rep. 856, 75 S. W. 197, 32 Ins. L. J. 808 (bond guaranteed to "reimburse the employer to an amount not in excess of the penalty of this bond, for such pecuniary loss as the employer shall have sustained of money, securities, or other personal property belonging to the employer, or for which the employer is responsible, by any act of fraud or dishonesty amounting to larceny or embezzlement committed by the employee during the continuance of this bond, in the performance of the duties of said office, or position, or such other position," etc.).

[4] City Trust, Safe Deposit & Surety Co. v. Lee, 204 Ill. 69, 68 N. E. 485, aff'g 107 Ill. App. 263, where Ball, P. J., makes a substantially like statement. The case of McElroy v. People, 202 Ill. 473, 66 N. E. 1058, was urged by counsel as an authority for the point that said conversion of rents by the employee did not amount to larceny or embezzlement, as said employee had an interest in the funds to the extent of his commissions and that therefore there could be no recovery on the bond, but this contention was not sustained by the court for substantially the reasons stated in the above text, although the authority of that decision was not disputed by the court, but only its application under the condition of the bond in suit in the principal case. The City Trust Co. Case (204 Ill. 69, above) is *considered* and held not applicable in Dominion Trust Co. v. National Surety Co. 221 Fed. 618, 137 C. C. A. 342, 46 Ins. L. J. 77 (also *noted* under subdiv. (g) this section);

In another case in that state the bonding company agreed under certain conditions to "reimburse the employer to an amount not in excess of the penalty of this bond, for such pecuniary loss as the employer shall have sustained of money, securities, or other personal property belonging to the employer, or for which the employer is responsible, by any act of fraud or dishonesty amounting to larceny or embezzlement." There was also another following clause in the bond relating to renewal which provided: "in which case the company shall remain liable for any dishonest act of the employee, amounting to larceny or embezzlement." It was declared that this condition was somewhat different from that of the condition under consideration in the preceding case,[5] in this, that in the bond here the words "fraud or dishonesty" and the words "amounting to larceny or embezzlement" were both phrases qualifying the word "act;" also that the words "fraud" and "larceny" and "embezzlement" were used as generic terms to indicate the dishonest and fraudulent breach of any duty on the part of an employee to pay over to his employer, or account to him for any money, etc., the title to which was in the employer, and that might in any manner come into the employee's possession. In other words as stated in the syllabus to this case, said clause is an indemnification only as against any loss that may have been sustained, (1) by acts of fraud, or (2) by dishonesty amounting to larceny or embezzlement, and the court itself concludes that "these bonds were intended to protect" insured "from financial loss from just such dishonest acts" of the employee "as the evidence in the case shows;"[6] said acts and facts were; that the employee as general agent—and also as manager of a certain department, had collected premiums belonging to appellee for which he failed to account or even to notify said appellee that they had been collected, and under the terms of their contract he was entitled to deduct commissions from his collections, but was obliged to remit the balance.[7]

*cited* in Farmers' State Bank v. Title Guaranty & Trust Co. 133 Mo. App. 705, 113 S. W. 1147, 38 Ins. L. J. 262, 265, as holding that the insurance was only against the fraudulent and dishonest acts of the employee and as not supporting the citing case which holds as appears under this subdiv. (f) where it is fully discussed. It was declared in the citing case that although the language in the Illinois case was "similar, the arrangement is different and renders it ambiguous."

[5] City Trust Co. Case, 204 Ill. 69 above.

[6] Relying as to this point upon the City Trust Co. Case (204 Ill. 69, above) and Champion Ice Manufacturing & Cold Storage Co. v. American Bonding & Trust Co. 115 Ky. 863, 25 Ky. L. Rep. 239, 103 Am. St. Rep. 856, 75 S. W. 197, 32 Ins. L. J. 808.

[7] American Bonding & Trust Co. v. New Amsterdam Casualty Co. 125 Ill. App. 33.

In an English case the word "embezzlement" is held to have the same meaning in a fidelity guarantee policy as in an indictment.[8] So where the bond stipulated that it secured insured against loss by reason of the fraudulent or dishonest acts of an employee "amounting to embezzlement or larceny" and it appeared that said employee acted as agent in obtaining orders for certain goods, was to receive them from the employer and return them or the money collected therefor within a specified time, it was held that recovery was precluded unless a criminal offense was proven upon evidence which would sustain a conviction, and therefore that a nonsuit should be granted in the absence of evidence that goods shipped to said employee had been received by him, or that they had been in his actual control, or that he ever collected or received the proceeds from their sale.[9] In a Missouri case it is held that conceding that the

[8] Debenham Ltd. v. Excess Ins. Co. Ltd., 28 T. L. R. 505.—K. B. D. (condition was: "This was an action on a fidelity policy issued to the plaintiff by the defendants, whereby the latter agreed 'to reimburse to the employer [the plaintiffs] to the extent of the sum stated against the name of the respective employed set forth in the schedule contained herein, such pecuniary loss, if any, as the employer shall sustain by any act of larceny or embezzlement, on the part of any one or more of the said employed in connection with the respective duties stated in the schedule hereto.'" Mr. Justice Hamilton said that "the term 'embezzlement' in this policy meant the same thing as it meant in an indictment. There was no reason for giving it any less strict meaning in the policy by which the plaintiffs were insured than if a direct charge was being made. It was of the very essence of it that the jury must be satisfied that what the man did he did fraudulently and dishonestly; because mere carelessness, mere puzzleheadedness, mere objection to discharge his routine business and keep accounts, mere unwillingness to come back to England and settle his account, mere careless omissions would not of themselves constitute, or even evidence, the crime that it is said was committed, unless there was evidence to show that which he did was dishonestly done. But if he fraudulently embezzled, that was to say, made away with money that was really his employer's; and if he converted it to his own use, so that he might have the benefit of it and might cheat them out of it, then, if the jury were satisfied of that, they were entitled to say, and should say, that there was the embezzlement against which the plaintiffs were insured. In the result the jury disagreed and were discharged."

[9] Reed v. Fidelity & Casualty Co. of N. Y. 189 Pa. 596, 42 Atl. 294 (the trial judge whose opinion was adopted by the supreme court divided the fraudulent or dishonest acts insured against into two classes "namely, fraudulent or dishonest acts in violation of equity, good conscience and the civil law, and dishonest acts which go beyond that line and subject the perpetrator of them to the penalties of the criminal law. By the express terms of the bond the defendants insure against fraudulent or dishonest acts of the second category only, to wit: [as expressed in the bond] those amounting to embezzlement or larceny. Embezzlement or larceny are both terms of the criminal law and in no respect are they terms of the contract law. Therefore, unless a criminal offense be proved against Leiding

cashier of a bank had been guilty of fraud in his transactions still said acts did not constitute embezzlement, as mere fraud or dishonesty alone not amounting to crime did not come within the obligation, since the terms of the bond only guaranteed to "make good and reimburse to the employer such pecuniary loss as may be sustained by the employer by reason of fraud or dishonesty of the said employee in connection with the duties of his position, amounting to embezzlement or larceny." The facts were as follows: Said cashier permitted another, with whom, without the bank's knowledge he was a silent partner in the produce business, to check on certain drafts, deposited to his credit, before any returns had been received on said drafts, and upon their return unpaid he had canceled the same, crediting them by other drafts, still permitting his partner to check on them, and these transactions were continued until said partner's account was largely overdrawn. It was stated in the opinion that there was no other evidence that the drafts were wrongful or that the cashier attempted to convert the funds of the bank to his own use or that of the firm. The amount overdrawn was subsequently reduced by deposits by the partner so that the balance remaining so overdrawn by reason of said acts was only about one-third of the original amount, and this balance was sought to be recovered under the bond.[10] With all respect for the Court in this case, and having in view that caution which should be exercised in considering any decision declaring what, in a certain jurisdiction, constitutes embezzlement, a term which had no definite meaning at common law, we submit that it is not so obvious as it might otherwise be why other evidence than the above facts was necessary to show a consummated intent on the cashier's part to actually convert the funds of the bank to the use of his firm, and so necessarily to his own use. It is not an unreasonable conclusion from the facts that he had actual knowledge that the bank's money was being used to aid a business in which he, without the bank's knowledge, was a silent partner and that he, while acting in his fiduciary capacity and in the course of his employment, permitted that money to be obtained in the admittedly fraudulent manner above stated with the intent to thereby realize whatever benefit might be derived from its use by the firm and by him personally by reason of his interest as partner. It is difficult to understand wherein lies the difference between knowingly and fraudulently aiding his partner to appropriate the bank's money for the use of his, the cashier's firm, and

the bond does not insure against his acts").

[10] Farmers State Bank v. Title Guaranty & Trust Co. 133 Mo. App. 705, 113 S. W. 1147, 38 Ins. L. J. 262. *Compare* Ohio and English cases under subdiv. (f) this section.

his own intended benefit, and the personal and fraudulent appropriation by himself of a like amount from the same source;[11] and the point strongly suggests itself whether in the latter case such a wrongful, fraudulent appropriation by the cashier himself personally would not have been such a conversion amounting to embezzlement as to justify a recovery on the bond. We regret that no statement is made in the opinion in this case[12] concerning what degree of fraud or dishonesty would so far constitute a crime for the purposes of the obligation as to amount to embezzlement under the law of that state.

In conclusion: Whatever may be the general trend of opinion in cases involving merely a discussion of the question here under consideration, it will be seen from the decisions wherein the issue has been directly raised and determined that the authorities are not fully in accord as to the effect which the use of the words "embezzlement" or "larceny," or the phrase "amounting to embezzlement or larceny" has upon the liability of insurer for losses. We suggest, however, the following:—(1) One consideration in this connection is that suit is brought to recover upon the contract and the remedy is in reality ex contractu to recover the reimbursement for loss agreed to be paid by insurer and is not an action based upon tort to recover a penalty; it is an action ex contractu upon assurer's undertaking to pay assured a certain amount of money upon the failure of the principal in the bond to do or not to do a certain thing.[13] (2) In view, therefore, of the factor that action or suit to recover is based upon the contract the point of construction of that contract becomes important, so that the language used in the condition upon which the obligation of the surety insurer rests must be a basis for the determination of its liability and as these conditions vary not so much in their general tenor as in their exact wording and the juxtaposition of words it is difficult to find a common ground upon which to formulate any rule other than the general one of construction against insurer in case of ambiguity and such other rules as are generally applicable and which are considered elsewhere herein.[14] (3) Another point is, Can or cannot the parties embody in their contract the statutory essentials or definition of an offense or crime without also importing into said contract in effect the statutory offense or crime itself with all the express and

[11] See on this last point, London, Brighton & South Coast Railway Co. v. Goodwin, 3 Exch. 736, 6 Railw. Cas. 177, 18 L. J. Ex. 337 (*considered* under subdiv. (e) this section).

[12] Farmers' State Bank v. Title Guaranty & Trust Co. 133 Mo. App. 705, 113 S. W. 1147, 38 Ins. L. J. 262.

[13] See Edward F. Gerber Co. v. Title Guaranty & Surety Co. (U. S. D. C.) 216 Fed. 980, 45 Ins. L. J. 102, *considered* under subdv. (dd) this section.

[14] See subdiv. (b) this section.

implied requirements of the statute as to the evidence and proof necessary to make out that offense or crime as such? In brief: Do or do not the parties by adopting a statutory definition and essentials of an offense or crime thereby also adopt all that which the statute expressly or impliedly imports as to proof thereof? (a) If the parties do thereby necessarily so adopt all that which such statute expressly or impliedly requires in respect to proof, then the words "fraud" or "dishonesty," or similar words, preceding the phrase "amounting to embezzlement or larceny" would logically seem to be narrowed down exclusively to the words "embezzlement" or "larceny," towards the establishment of which as an offense or crime all evidence must perforce be directed if recovery is sought for a loss occasioned by the acts of the person whose fidelity is guaranteed. (b) If then this view is adopted and the contract is otherwise binding and enforceable, and the language used is so clear and unambiguous as to need no construction, and it is clearly apparent therefrom that it was the intent of the parties to adopt all that which a statute defining "embezzlement" or "larceny" imports and requires as to proof of said offenses or crimes, and said parties unequivocally intended to thereby restrict their right to recover, they will be bound by the contract as they have made it. (c) Again, it is not an unreasonable assumption or inference that assured never intended to contract himself out of court by the use of language which would impose upon him such a restricted right to indemnity; therefore, if the above view be held to prevail it might reasonably be urged that the contract would in most cases seem to be a mere "scrap of paper" in so far as assured is concerned, for although he had contracted for indemnity nevertheless all the elements of embezzlement or larceny could exist according to the definitions of those offenses or crimes,[15] and still recovery be precluded unless his proof be of the commission of them as offenses or crimes, notwithstanding the evidence admissible would be otherwise sufficient to sustain an action on the contract itself.[16] (4) On the other hand ambiguity in these clauses is shown in some degree at least by the very fact that courts are not unanimous in their decisions as to the meaning thereof, therefore, if the language of the contract is so ambiguous as to require interpretation then the rule of construction against insurer and in favor of assured and indemnity will apply so as to preclude limiting or qualifying the words "fraud" or "dishonesty" or the like, by the words "embezzlement" or "larceny" or by the phrase "amounting to embezzlement or larceny," and so prevent restricting recovery to those cases only where the

[15] See subdv. (f) this section.

[16] See subdv. (gg) this section.

loss is occasioned by acts which are proven to be such as to sustain a criminal charge or to import a criminal offense under such a charge. (5) Whatever force, however, the above suggestions may have, it is undoubtedly true that, in this matter as well as in others where the courts are not in harmony, decisions in any state will follow whatever rule is laid down by prior adjudications of the highest courts in that particular state under the rule stare decisis.

(h) *What constitutes fraud or dishonesty amounting to embezzlement or larceny.*—Under a bond to indemnify the bank for all losses arising "from the fraud or dishonesty of the cashier amounting to embezzlement or larceny" insurer is liable, where the cashier of a bank by a known to him false certificate extends to a depositor a credit to which he is not entitled, and this is done in pursuance of an arrangement whereby the cashier is to derive a financial benefit from the transaction and loss results to the bank. The court, per Shauck, J., said: "Counsel for the obligor further insist that the default of the cashier was neither embezzlement nor larceny, and that, therefore, it was not within the terms of its obligation to make good 'such pecuniary loss as may be sustained by the employer by reason of the fraud, or dishonesty of said employee . . . amounting to embezzlement or larceny.' The parties were stipulating for the indemnity of the obligee. They were not concerned with the enforcement of the criminal laws of the state. It was not intended to indemnify against loss from the cashier's negligence or bad judgment. They adopted as descriptive of the misconduct contemplated the phrase 'fraud or dishonesty amounting to embezzlement or larceny.' If only indemnity on account of conduct amounting to technical embezzlement or larceny had been intended, that intention would have been naturally expressed more clearly in fewer words. Certainly we should not reach the correct conclusion with respect to this question if we should deny all effect to the words 'fraud or dishonesty amounting to,' which denial is involved in the argument of counsel for the obligor. It is very likely true that the cashier did not expect or intend that the bank should suffer loss from his transactions with Chadwick. She had doubtless quickened the pulsation of his venerable heart with dazzling stories of her enormous wealth, and he reached the conclusion, usual in such cases, that he could fraudulently and dishonestly exercise his authority as cashier to his own pecuniary advantage, and without loss to the bank. The fraud, dishonesty, and misuse of his authority as cashier were intended. That his conduct was for gain is the only motive suggested by the circumstances. If his own admission to that effect is not properly shown in the record, or if it is not competent in this case, that motive is clearly shown by

the letter of Chadwick presented in the record, in which, during these transactions, she effectively solicited the false certification of a check for a large amount, proposing as an inducement, 'I will pay you and Mr. B. well for this favor—and I am sure it will be safe.' To this the only answer from counsel is that there is no evidence that Spear ever realized any financial gain from these transactions. The reply may be as brief as the answer. Motive and intention may be as well shown by the hope of illicit gain as by its realization. A decision in favor of the Guaranty Company upon this ground would imply that its business in this state consists in the collection of premiums." [17] In another case the obligation bound insurer to make good the losses which might result from the employee's misconduct as teller and bookkeeper, and also covenanted to make good such losses of the bank, not exceeding a specified sum, as might result from such fraudulent conduct or acts of fraud of said employee in connection with his duties as cashier, as should be equivalent to embezzlement or larceny. Under the evidence the defalcations when the cashier's bond was in force, was on account of overdrafts paid by him without the bank's authority, but it was declared that it did not appear that he embezzled or appropriated any part of the proceeds of these overdrafts, or received any benefit therefrom, and it was held that though he was individually liable therefor to the bank the loss was not one within the obligation of the bond.[18] This decision, was, however, reversed upon the ground that the bank had failed to comply with the condition of the teller's bond requiring it to give notice after information had of the teller's acts of speculation, etc., and by reason of its negligence in failing to examine and verify his accounts, and accordingly that there could be no recovery on the cashier's bond because there would have been no cashier's bond if the bank had observed the stipulations of the teller's bond in these matters, inasmuch as he was a defaulter in a large sum, understated liabilities, and of other moneys abstracted from bills receivable. But what would seem an important fact was that after he became cashier he continued his speculating or gambling and thefts so that his total stealings amounted to more than double the capital of the bank.[19]

[17] Rankin v. United States Fidelity & Guaranty Co. 86 Ohio St. 267, 99 N. E. 314, 41 Ins. L. J. 1753.

[18] Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co. 100 Fed. 559, 40 C. C. A. 442.

[19] Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co. 183 U. S. 402, 22 Sup. Ct. 124, 46 L. ed. 253, a decree was rendered against the guarantee company on both bonds in 68 Fed. 459, which was aff'd on appeal, 47 U. S. App. 91. The case was then taken to the Supreme Court, 173 U. S. 582, 43 L. ed. 818, 19 Sup. Ct. 551, by certiorari, and the decree of the Circuit Court of Appeals was rev'd on the ground that

Nor is insurer liable under a clause agreeing to reimburse assured for any loss sustained "by or through the personal dishonesty, amounting to larceny or embezzlement of the employee" where the loss is due to acts which are more nearly those of forgery than of larceny or embezzlement; as where the employee, a president of the corporation and also a stockholder therein, held a number of valid stock certificates, each for a small number of shares, and at different periods he surrendered these to himself as president canceled them and then as president reissued to himself new certificates for a greatly increased number of shares which raised certificates he then sold and pledged. In such case assured is not aided by the fact that its loss is as complete as if the money were stolen or embezzled.[20] And where the stipulation was to make good and reimburse to the employer such pecuniary loss as it might sustain during the term of the bond, "by reason of any fraudulent or dishonest acts of the employed in connection with the duties of said position, amounting to embezzlement or larceny." The position referred to was that of general agent of the employer company and the bond had been renewed for a year. All moneys collected during the term of the bond were paid over to assured, but on accounts other than those so collected by said agent; that is, a part of said amounts were directed to be credited on other accounts owing by the employee to assured who had no knowledge that they were so applied. The court, per Boyd, J., said: "The necessary elements to bring Brumbaugh's acts within the statute are 1st, agency; 2nd, receipt of money for, in the name of, or on account of his principal, as such agent, and 3d, a fraudulent conversion thereof. . . . As the point is now presented to us, the agent used his principal's money received during the term and under the conditions of the bond and applied it to his own use—that is, to the payment of debts he owed the principal, on account of collections previously made by him for which he was liable, and it was therefore as much a conversion of the principal's money as if he had paid it to some third party. . . . There is no allegation that the Harvester Company was in any wise responsible for, or knew of, the use of the money, which

the decree of the circuit court was not final. A final decree was rendered against the company, 80 Fed. 766, 26 C. C. A. 146, modified and aff'd 100 Fed. 559, 40 C. C. A. 442. This last mentioned Circuit Court of Appeals Case is *cited* in Williams v. United States Fidelity & Guaranty Co. 105 Md. 490, 66 Atl. 495, 36 Ins. L. J. 589, 592, as sustaining the point that there must be proof of dishonest acts of the employee within the contemplation of the bond: that fraud and dishonesty are not presumed but must be proven.

[20] Dominion Trust Co. v. National Surety Co. 221 Fed. 618, 137 C. C. A. 42, 46 Ins. L. J. 77. The case of City Trust, Safe Deposit & Surety Co. v. Lee, 204 Ill. 69, 68 N. E. 485, declared not applicable.

the appellant was liable for under the bond, by Brumbaugh to pay other debts he owed it. If it had been accepted with such knowledge, another question would have arisen." Accordingly it was held that there was a fraudulent conversion of said money so collected and credited for which assurer was liable.[1] Again where a fidelity policy was issued to indemnify assured for any pecuniary loss he should sustain by any "fraud or dishonesty" of a commercial salesman employee in his employment, which should amount to "embezzlement or larceny" and he was authorized to collect on sales and required to remit such collections to assured, and in terminating his employment he retained a certain amount out of said collections, claiming that it was due him for arrears of salary and expenses, and sent a check for the balance to his employer with a statement of items, it was held that the claim that the amount retained was due him was made in bad faith and that the appropriation thereof constituted larceny under the state Code, which made it larceny for an agent or servant to appropriate to his own use any money or property which he had in his possession as servant or agent with the "intent to deprive or defraud the true owner of his property or of the use and benefit thereof;" also that the money was not appropriated under any claim of title, but under a claim of indebtedness and therefore its retention was not within the Code provision making it a sufficient defense that the "property" was "appropriated openly and avowedly under a claim of title preferred in good faith, even though such claim is untenable" especially where it is also provided by the same statute that it "shall not excuse the retention of the property of another to offset or pay demands held against him." Accordingly a judgment in favor of plaintiff was affirmed.[2]

[1] American Bonding & Trust Co. of Balt. v. Milwaukee Harvester Co. 91 Md. 733, 68 Atl. 72. The court relies upon Frownfelter v. State, 66 Md. 80, 5 Atl. 410 (which relies upon Inhabitants of Colerain v. Bell, 9 Mete. [50 Mass.] 499; Gwynne v. Burnell, 7 Cl. & F. 572), and *cites:*

*United States.*—Hecox v. Citizens Ins. Co. 2 Fed. 535.

*Indiana.*—Rogers v. State, 99 Ind. 218.

*Minnesota.*—County of Pine v. Williard, 39 Minn. 125; State v. Baumberger, 28 Minn. 226.

*Missouri.*—State v. Smith, 26 Mo. 226.

*New Jersey.*—State v. Sooy, 39 N. J. L. 539.

*New York.*—Stone v. Seymour, 15 Wend. (N. Y.) 19.

*Pennsylvania.* — Commonwealth v. Knettle, 182 Pa. 176.

*Virginia.* — Crawn v. Commonwealth, 84 Va. 282.

*England.*—Rex v. Hall, Russ & Ry. 463, 2 Bishop New Crim. L. (ed. 1892) sec. 377; Roscoe's Crim. Ev (456).

[2] Matthews & Co. v. Employers' Liability Assur. Corp. Ltd. 111 N. Y. Supp. 76, 127 App. Div. 195, aff'd (mem.) 195 N. Y. 593, 89 N. E. 1102. Pen. Code secs. 528, 548.

(i) *What acts do not constitute embezzlement or larceny.*—In a Maryland case insurer agreed to reimburse and make good to the employer all losses sustained by it of moneys, etc., in the possession or custody of the employee, or for the possession or custody of which he was responsible "directly occasioned by larceny or embezzlement" on the part of the employee in connection with the duties of his office or position, which was that of general agent of an insurance company for certain territory. The bond also stipulated that the obligor should not be responsible for loss resulting from bona fide mistakes or mere errors of judgment, also that it was intended to cover only such dishonest acts of said employee in his position, etc., "as amount to larceny or embezzlement" and there was a further provision that the "true intent and meaning" of the bond was to preclude liability thereunder for moneys diverted from the employer through "larceny or embezzlement" on the part of the employee, and that said obligor should not be liable for the amount of any balance found due from said employee to the employer. It appeared that under the terms of the employment, said agent was to receive commissions for his compensation and was to make certain expenditures or disbursements in carrying on the agency transactions, he was also permitted to retain his balances for three months, sometimes longer, as certain contingencies sometimes arose in the course of business which might not only exhaust monthly balances, but even leave a credit in favor of the employee. Whatever was due the employer was remitted by the agent's own checks, as the agency moneys were not required by the principal to be kept as separate deposits, but the agent deposited the balances due said employer to his own credit without objection being made thereto. The great fire in Baltimore compelled the agent's principal to cease operations and go into a receiver's hands who sought recovery on the bond for loss alleged to have been sustained by failure of said employee to pay over a claimed balance due on demand. The latter neither concealed nor denied the amount of the "balance" prima facie due by him, but permitted an examination of his accounts, although he asserted that his claims against his principal exceeded his debts, and a part of said claims was for special services rendered and expenses incurred claimed to have been necessitated for the purpose of holding the business together after the great fire. It was held that there was no such sufficient evidence of a dishonest attempt to appropriate or withhold the alleged "balance" as to constitute larceny or embezzlement. The court, per Schmucker, J., first defines

larceny and embezzlement;[3] and, it having been contended that as said agent's office was in New York, the alleged offense must be deemed to have been committed in that state and amounted to larceny there, under its statute, and that the insurance law there, also brought such an agent as the employee in this case[4] within the statutory definition of larceny or embezzlement, the court also declares that the law of that state had not done away with the necessity of proving the felonious or fraudulent intent at the time of taking, or appropriating, or withholding the property in order to establish the offense of "larceny" or "embezzlement."[5] It was further said by the court that "proof of a balance due from employee to the employer, and failure to pay the same when demanded, was not sufficient to bind the surety. There must be proof of dishonest acts of the employee within the contemplation of the bond. Fraud and dishonesty are not presumed. They must be proven . . . If at the end of three months he was unable to pay or simply failed to pay what was due, that fact without proof of some fraudulent disposition of the money animo furandi would not have sufficed to have convicted him of larceny or embezzlement. If the company had required him to deposit the money to its credit and draw upon it as its agent and for its use, and thus intrusted him with the mere custody or possession of it, and he had applied it to his own use, the case would have been different. The mere failure to pay a debt without compulsion, even by one having the financial ability to pay it, is neither larceny nor embezzlement. . . . The claim made by Tuttle for special services and expenses . . . does not raise a prima facie presumption of dishonesty amounting to larceny or embezzlement;" and it was further declared that "even though he was undoubtedly dilatory and perhaps indifferent in sending in his accounts after the fire," etc., still it would not legally justify a verdict for the plaintiff in view of the fact that he asserted his right to credits and an indebtedness to him in excess of the balance against him.[6] In another case a bond was given to indemnify insured against loss by the misappropriation, misapplication or mis-

[3] For definitions and essential elements of these offenses, see subdv. (f) this section.

[4] "Every person appointed or acting in this state as agent of any insurance corporation who receives or collects any moneys as such agent, shall be responsible in a trust or fiduciary capacity to such corporation therefor." Sec. 38, N. Y. Ins. Law (Consol. L. c. 28, Laws 1909, c. 33) revised from L. 1873, c. 688, sec. 1.

[5] *Citing* to this point, People v. Laurence, 137 N. Y. 517, 33 N. E. 547; Justice of Court of Special Sessions, etc. v. People, 90 N. Y. 12; Loomis v. People, 67 N. Y. 329; People v. Pollock, 51 Hun (N. Y.) 613; People v. Grim, 3 N. Y. Cr. Rep. 317.

[6] Williams v. United States Fidelity & Guaranty Co. 105 Md. 490, 66 Atl. 495, 36 Ins. L. J. 589.

use in any manner or by any means of certain paper or plates furnished by insured to a printing company under a contract whereby the latter was to restore the identical paper printed and cut into wrappers. The bond further stipulated that it was to be of full force and effect if the printing company should "in any manner dispose of same or convert them to their own use amounting to a larceny or embezzlement of said paper and plates." It was declared and so held that the bond should not be construed to mean that the paper must necessarily have been stolen or embezzled in order to create a liability thereunder; and that the indemnity guaranty provision was separable in that it created a liability in two contingencies, (1) if the printing company should in any manner or by any means misuse, misappropriate or misapply the paper, or (2) should in any manner amounting to larceny or embezzlement dispose of the same or convert it to its own use; and, therefore, the intent of the bond was, to protect the bailor against all wrongful acts of the bailee in using the former's property and that said bond would be breached by any misuse or misappropriation of said paper by the printing company after it had been delivered to it.[7]

(j) *When embezzlement or larceny does not include mere indebtedness or debts, or advances by employer.*—In the absence of allegation or proof that an employee has through fraud or dishonesty diverted from the employer moneys, securities, or other property, or that he has committed larceny or embezzlement of such property, the fact that the employee on settlement is found to owe the employer is not of itself sufficient to show that the debt originated in fraud or dishonesty, in embezzlement or larceny, for inasmuch as the law presumes that every man acts honestly until the contrary is evidenced some fact must be shown tending to prove that the debt originated in fraud or dishonesty.[8] So where the bond

[7] N. K. Fairbank Co. v. American Bonding & Trust Co. of Balt. 97 Mo. App. 205, 70 S. W. 1906. *Distinguished* in Farmer's State Bank v. Title Guaranty & Trust Co. 133 Mo. App. 705, 113 S. W. 1147, 38 Ins. L. J. 262, 265, which is *considered* under subdiv. (g) this section.

[8] Monongahela Coal Co. v. Fidelity & Deposit Co. of Md. 94 Fed. 732, 36 C. C. A. 444, s. c. (mem.) 175 U. S. 727, 44 L. ed. 339, 20 Sup. Ct. 1023. In this case the clause was "make good and reimburse to the employer to the extent of the sum of ten thousand dollars, and no further, all and any pecuniary loss sustained by the employer of moneys, securities, or other personal property belonging to the employer in the possession or custody of the employee, or for the possession of which he is responsible, directly occasioned by larceny, or embezzlement on the part of the employee in connection with the duties of the office or position in the service of the employer . . . and occurring during the continuance of this bond, and discovered . . ., provided always that said company shall not be liable by virtue of this bond for any mere error of judgment or

of a surety company stipulated that it would "make good and reimburse to the employer all and any pecuniary loss sustained by the employer of money, securities or other personal property in the possession of the employee, or for the possession of which he is responsible by any act of fraud or dishonesty on the part of said employee in the discharge of the duties of his office or position as set forth in said statement referred to, amounting to larceny or embezzlement," it expressly restricts liability to such acts of fraud or dishonesty as amount to larceny or embezzlement, and does not extend to and include every liability or claim which may accrue in favor of the employer against the employee, as where the employee drew on his account as agent various checks in favor of different parties, a portion of which, however, said agent accounted for as being used in the employer's business, the remainder being used for his personal benefit. He made no attempt at concealment of the amounts, or of his checking on his account as agent and aided, upon notification by the bank that his account was short, in an endeavor to discover the discrepancy. It was declared that the law presumes every man honest until the contrary is shown and that the evidence did not establish that the discrepancy in the said agent's accounts arose from fraud or dishonesty amounting to larceny or embezzlement.[9] Again, something more than the relation of debtor and creditor must exist to constitute embezzlement under the Tennessee Code, since by the requirements thereof the accused must in order to be subject to punishment for embezzlement

injudicious exercise of discretion on the part of said employee on and about any of the matters wherein he shall have been vested with discretion. . . . It being the true intent and meaning of this bond that the company shall be responsible aforesaid for moneys, securities or property diverted from the employer through fraud or dishonesty on the part of the employee within the time specified in this bond." See United States Fidelity & Guaranty Co. v. Overstreet, 27 Ky. L. Rep. 248, 84 S. W. 764; Milwaukee Theatre Co. v. Fidelity & Casualty Co. 92 Wis. 412, 66 N. W. 360.

[9] United States Fidelity & Guaranty Co. v. Bank of Batesville, 87 Ark. 348, 112 S. W. 957, reversing judgment in favor of plaintiff for amounts expended by agent employee (" 'a loss by carelessness or inattention to business might be the foundation of a just claim against the employee by the employer, which would impose no liability on the company by the terms of its obligation in the bond. If, with the consent of the employer, express or implied from the course of dealings between it and the employee, the latter retained moneys, charging itself with them, it would be no obligation covered by insurance on indemnity of the company. It follows, therefore, that the fact that the account between the employer and the employee shows an indebtedness from the latter to the former, is not sufficient to support a claim on the bond against the company.' ") Id. 356, per Hart, J., *quoting* from Monongahela Coal Co. v. Fidelity & Deposit Co. of Md. 94 Fed. 732, 36 C. C. A. 444.

sustain the relation of officer, agent, or clerk of a company, firm, or private person, and the money or property of another must have come into his possession by virtue of his employment and he must have fraudulently converted the same to his own use. Accordingly it is held in that state that the general agent of an insurer is not guilty of embezzlement of its funds where he is also general agent of other insurers and kept the funds of all of them on deposit in bank on his individual account and checked thereon for his expenses and business needs, and the employer insurer had authorized said agent to appoint local agents from whom he received reports of insurance effected by them, and remittances for premiums, and he was permitted without objection by said employer insurer with knowledge of the facts to deposit said premiums so collected in his own name, although he was required to make daily reports of the amounts of premiums and also monthly reports of balances which were to be paid within sixty days.[10] Nor does a loss occasioned by poor business judgment, whereby an employee becomes indebted

[10] Dixie Fire Ins. Co. v. Nelson, 128 Tenn. 70, 157 S. W. 416; Shannon's Code, sec. 6576. ("To make a case of embezzlement" under said Code the "person charged must occupy one of the relations indicated, 'officer, agent, or clerk' and he must 'fraudulently convert to his own use' the money or property of another person, which has come into his possession, or is under his care by virtue of such employment. It is clear that, if a merely debtor and creditor relation existed at the time of the acts complained of, there could be no conviction under a charge of embezzlement. . . . If the principal knows that the agent is accustomed to making such conversion, and raises no objection to it, but accepts the agent's individual checks habitually for balances found due against the agent, he must be held as consenting to the conversion, and to the creating of the relation of debtor and creditor merely, between himself and the agent, since the deposit in the bank in the individual name of the agent creates the relation of debtor and creditor between the bank and the agent. . . . We do not gainsay the proposition that if it be made to appear that an agent has appropriated the money of his principal to his own use, nothing else being shown, a case of fraudulent conversion is made out under which a charge of embezzlement can be sustained. But if the principal habitually permits his agent to convert his money, by depositing it in bank in his own name, and accepts the agent's individual checks in payment from time to time, as occasion for payment arises, he must thereby be held to understand that the money is subjected to the perils of the agent's individual business, and when it is lost in that business it is then too late for the principal to bring a charge of embezzlement. That is just what happened in the present case." Id. 76, 78, 79, per Neil, C. J., *citing* and *approving* Monongahela Coal Co. v. United States Fidelity & Deposit Co. of Md. 94 Fed. 732, 36 C. C. A. 444; Williams v. United States Fidelity Co. 105 Md. 490, 66 Atl. 495; United States Fidelity & Guaranty Co. v. Peoples Bank, 127 Tenn. 720, 157 S. W. 414; State v. Covert, 14 Wash. 652–7, 45 Pac. 304; State v. McFetridge, 84 Wis. 473, 20 L.R.A. 223, 54 N. W. 1, 998, disapproving Commonwealth v. Smith, 129 Mass. 104, 110).

to an employer, constitute larceny within the meaning of that word in a fidelity guaranty bond according to a Washington decision, wherein said term is defined as the taking of money or property of another with criminal intent to deprive the true owner of its use and benefit.[11] And a failure of the treasurer of a corporation to pay over, to his successor on demand, moneys in his hand in which under an arrangement with the corporation he is to pay interest, does not constitute such an embezzlement thereof as will render the insurer liable on a bond to reimburse to said corporation any such pecuniary loss as he may sustain "by reason of fraud or dishonesty of the employed in connection with the duties referred to, amounting to embezzlement or larceny" for in such case the employee is, as to such moneys, merely a debtor of the corporation.[12] So advancements by the employer to the employee of money and other property and credits to enable him to prosecute his work with the expectation that it would all be charged in the final settlement between them, are not recoverable from the surety where the employee decamped without repayment of said advances on his account. But a distinction exists in this, that the surety is responsible for money collected and appropriated by said employee on contracts for his employer where the bond stipulates that the surety will make good any and all pecuniary loss "amounting to larceny or embezzlement" on the employee's part.[13]

[11] John Lee Clarke, Inc. v. Fidelity & Deposit Co. of Md. 73 Wash. 62, 131 Pac. 468 (bond was to protect against pecuniary loss "by any act of larceny or embezzlement" of an employee).

[12] Milwaukee Theatre Co. v. Fidelity & Casualty Co. 92 Wis. 412, 66 N. W. 360 ("the defendant corporation did not contract to pay any mere debts which Obermann might owe to the theatre company, but only to reimburse it from pecuniary loss resulting from *embezzlement or larceny*. . . . So far as necessary to define embezzlement for the purposes of this case, it may be defined as the fraudulent conversion of the money or personal property of another which is in the possession of a trustee, servant, agent, or bailee in a trust capacity. There can be no embezzlement unless the property charged to have been embezzled was, at the time of the conversion, held in trust. A mere debtor does not embezzle the money of his creditor by failing to pay the debt when due. . . . Interest is the compensation for the *use of money*. When the theatre company resolved that Obermann should pay them interest on moneys in his hands and charged him with such interest, and Obermann assented, the necessary implication was that he was to have the use of the money. He was to pay for the use of it," per Winslow, J.).

[13] United States Fidelity & Guaranty Co. v. Overstreet, 27 Ky. L. Rep. 248, 84 S. W. 764 (surety obligated itself to "make good and reimburse to the employer all and any pecuniary loss sustained by the employer, of money, securities, or other personal property in the possession of the employee in the discharge of the duties of his office or position as set forth, amounting to larceny or embezzlement;" also that "It being the true intent and meaning of this bond that

(k) *"Any act or acts of fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or misappropriation."*—A loss resulting from the nonfraudulent mistake and mere error on the part of an employee agent in giving an excess payment check for the price of goods which he had authority to buy is not within a clause of a bond indemnifying the principal against loss of money, or property sustained by "any act or acts of fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or misapplication," on the part of the agent.[14]

the company shall be responsible only as aforesaid, for moneys, securities, or property diverted from the employer through fraud, or dishonesty amounting to larceny or embezzlement." O'Rear, J., said: "Appellant did not undertake to secure Davidson's debts nor that he would fulfil his contract to do the work for appellee that he had engaged to do. It merely undertook to indemnify the employer against Davidson's peculations by which he might have misappropriated the former's funds to the latter's own use, without the consent of the former, and which had been intrusted to the latter's care, or which had come into his possession, or to which he had got access, by virtue of his employment.") *Examine* Coyle v. United States Fidelity & Guaranty Co. 217 Mass. 268, 104 N. E. 559, 43 Ins. L. J. 667, *considered* under subdv. (q) this section. See further as to advancements, debts, etc., subdiv. (m) this section.

[14] Kansas Flour Mills Co. v. American Surety Co. of N. Y. 98 Kan. 618, 158 Pac. 118 (judgment for defendant was affirmed, the court, per Burch, J., said: "The plaintiff says the words 'fraud,' 'dishonesty,' 'forgery,' 'theft,' and 'embezzlement' are superfluous, because whatever meaning they might have is embraced in the words 'wrongful abstraction.' Whatever force the word 'wrongful' may have as indicating wilfulness and bad purpose is spent on the word 'abstraction' and is not carried over to the word 'misapplication.' 'Misapplication' is wrong application, and the bond should not be interpreted to read 'wrongful wrong application.' The word 'misapplication' speaks for itself and includes applications merely amiss and not vicious because of moral turpitude. The court is not willing to accept this interpretation of the bond. All the words used should be considered as employed for a purpose, and the collocation should be taken into account in arriving at their meaning. So considered it is plain the purpose of the bond was to cover all kinds of depravity. Some kinds were named in terms having fixed and definite legal meanings—'fraud,' 'forgery,' 'theft,' 'embezzlement.' In order that other kinds might not sift through this enumeration, words more general in their signification were inserted 'dishonesty,' 'wrongful abstraction.' The term 'wrongful abstraction' does not sum up all that goes before it, but fills some of the gaps in what goes before, and the word 'misapplication' was manifestly employed to attain the same end. If this were not true we would have one field of conduct, embracing many varieties, covered with great particularity and in the utmost detail, while another and distinct field, embracing just as many varieties of innocent conduct—error, omission, mistake, oversight, neglect—was covered by a single word, 'misapplication,' which is ambiguous. The word is commonly used to denote use of money or property improperly, illegally or wrongfully in the corrupt sense. Under these circumstances the court concludes the word was inserted

(1) *Pecuniary loss by reason of "fraud and dishonesty" does not restrict recovery to loss occasioned by criminal acts.*—It is held in New York that the "fraud or dishonesty" resulting in a loss to the employer need not amount in degree to a crime for which the employee could be indicted or convicted in order to enable the employer to recover under a bond stipulating for reimbursement to said employer for such pecuniary loss as he might sustain by reason of fraud or dishonesty of an employee; and the failure of the employee to account for goods delivered to him as manager of his employer's store, under a written contract whereby he agreed to either return the goods or the money for them within a specified time, constitutes a loss within the terms of the bond for which insurer is liable.[15] It is also declared in substance, per Hook, Cir. J., in a Federal case, that the words "fraud or dishonesty" are not restricted to losses which are occasioned by the employee's criminal acts or to conduct which imports a criminal offense, and while relating to criminal matters they must be given a broader interpretation than clauses insuring against "embezzlement and larceny" or "fraud and dishonesty amounting to embezzlement or larceny," so that acts which show any breach of trust or want of financial integrity coupled with deceit and concealment exercised in a position of trust and confidence and occasioning financial loss, will constitute both fraud and dishonesty, and the test is not whether the employee intended to personally profit. In the above case the bond was conditioned to "make good and reimburse to the employer all and any pecuniary loss sustained by the employer, of money, securities, or other personal property in the possession of the employee, or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of said employee, in the discharge of the duties of his office or position." It was further stipulated that assurer should be responsible only "for moneys, securities, or property diverted from the employer through fraud or dishonesty on the part of the employee." The employee was a salaried officer or treasurer of insured, largely entrusted, between directors' meetings held semi-annually, with the management of his employer's affairs, and he was also authorized to execute notes and accept drafts representing its bona fide indebtedness and he fraudulently and dishonestly and without insured's knowledge accepted drafts drawn on him by another, which he knew represented no valid indebtedness of his employer, and he paid such

to complete the thought and purpose indicated by the preceding words and not to introduce and deal with a new class of acts."

[15] Union Pacific Tea Co. v. Union Surety & Guaranty Co. 86 N. Y. Supp. 466, 43 Misc. 50.

drafts from his employer's funds and he continued this course after being instructed not to do so, concealed his conduct and falsified his reports, he also fraudulently and dishonestly took credit upon his books for disbursements he never made resulting in a shortage of his accounts as treasurer which he failed and refused to pay and through the drawer's insolvency pecuniary loss resulted to insured causing its failure. The claim that there was no showing of breach of the clause as to fraud or dishonesty in the fidelity bond was not sustained.[16]

(m) *Advances: "any other indebtedness:" debts: loans: personal dishonesty: fraud and dishonesty.*—Where a bond from a subagent to a general agent of an insurance company provides for the faithful discharge of his duties as such subagent and the faithful accounting of all moneys due on policies, etc., and also stipulates that the sureties are liable to the obligee for all moneys advanced to said subagent and for all endorsements on notes and for "any other indebtedness," his sureties are liable for his failure to pay over such collections and advances, and all other sums due in the line of his agency, but not for debts having no connection therewith.[17] But under a Pennsylvania decision advancements to salesman without salary but on commissions to be earned and which are required by him to carry on his business and for personal expenses are in effect a loan by the obligees to the salesman, and the unearned balance or any part thereof remaining unpaid constitutes a debt due from him. A distinction exists between such a case and one in which a salesman receives into his hands, or is intrusted with property belonging to his firm in which he has no interest whatever, as in case of samples to be exhibited but not for sale and which are to be returned on demand, or payments received from customers for which he is to account.[18]

[16] United States Fidelity & Guaranty Co. v. Egg Shippers Strawboard & Filler Co. 148 Fed. 353, 78 C. C. A. 345.

[17] Kaufman v. Marshall, 89 Ark. 1, 115 S. W. 680 (a suit in chancery by sureties, seeking to cancel bond and cross complaint by parties seeking to maintain the bond), *relying* upon and *following* Byington v. Sherman, 64 Ark. 189, 41 S. W. 423.

As to actions on agent's bonds, see §§ 708–712 herein.

[18] W. Bodek Co. v. Sacks, 67 Leg. Intel. (Pa.) 46 (condition was that if the principal shall, whenever thereunto requested, give a just and true account of all moneys, goods, chattels and other things, the property of the obligees, as have come into his hands in his employment as salesman, or otherwise, and shall and do immediately whenever thereunto required by the obligees, pay and deliver to them all such money, goods, chattels and other things, the property of the said obligees; as shall be in his custody or possession, then the obligation to be void, or else to be in full force and effect). As to loan, see Coyle v. United States Fidelity & Guaranty Co. 217 Mass. 268, 104 N. E. 559, 43 Ins.

So in a Kentucky case advancements are held not recoverable, although if money is collected by the employee on his employer's contracts it would be a loss under the guaranty.[19]

In an Iowa case the bond secured plaintiff against loss from any fraud or dishonesty of the employee during the term of the bond. The employee was under contract to sell certain goods in specified territory, make periodical reports, remit a certain proportion of collections if any amount was due thereon to plaintiff, and upon expiration of his contract was to account for all unsold goods. Said agent after expiration of the agency contract refused to settle matters, or permit an examination of his books and accounts, or to make any statement concerning the disposal of the goods and amounts owing thereon. It was held that the bond was breached. Upon the trial defendant introduced no evidence and a directed verdict was returned on plaintiff's motion and recovery awarded and upon appeal judgment was affirmed.[20] But it is also held in that state that under a fidelity bond securing against personal dishonesty of factors or brokers a merely technical conversion of property, or the knowingly failing or refusing to account for and turn over property when demanded, or the proceeds of the sales thereof, then in said employee's possession, does not constitute such a dishonest act as to breach the bond.[1] Nor can liability on a bond which insures against loss through an agent's fraud or dishonesty be extended to cover failure to pay for the goods purchased by a factor or broker, notwithstanding the application and letter of advice requested that the bond cover the liability of one engaged in an agency or commission business, and also desired credit with applicant; and the idea that a surety company is guaranteeing the payment of a debt contracted with the plaintiff and not the honesty of an agent, is excluded where the language of a bond clearly and explicitly provides that it will make good and reimburse to insured all and any pecuniary loss it may sustain in the form of money, securities, or other personal property in the possession of the employee, or for the possession of which he is responsible, "by any act of fraud or dishonesty on his part in connection with the duties of the office or position" mentioned in the bond.[2]

L. J. 667, *considered* under subdv. (q) this section.

[19] United States Fidelity & Guaranty Co. v. Overstreet, 27 Ky. L. Rep. 248, 84 S. W. 764, fully *considered* under subdv. (j) this section.

[20] Dr. Blair Medical Co. v. United States Fidelity & Guaranty Co. — Iowa, — (1902) 89 N. W. 20.

[1] Sinclair & Co. Ltd. v. National Surety Co. 132 Iowa, 549, 107 N. W. 484 (insurer not liable).

[2] Orion Knitting Mills v. United States Fidelity & Guaranty Co. (Knitting Mills v. Guaranty Co.) 137 N. Car. 565, 70 L.R.A. 167, 50 S. E. 304, 2 Ann. Cas. 888 (in this case it was sought to hold the defendant lia-

(n) *Bond stipulation to faithfully discharge duties of office, pay over and account for moneys, etc.: mutual association officer.*—Although the business of a mutual association is under the management of a board of directors, and the president subject to its control, both are governed not only by the articles of its incorporation, but also by state statutes which specifically enumerate their respective duties and powers and limit the same, so that any act of the president not in conformity therewith or contrary thereto, constitutes a breach of duty which is not excused by the fact that such board directed the same and acquiesced therein, for the board itself in such case can exercise no authority contrary to the laws of the state and said articles of incorporation; and where a bond, given by the president as required by the articles of incorporation enumerates certain conditions,[3] and in conclusion provides, that he shall faithfully discharge "all other duties now and hereafter required of him by virtue of his said office, it will not be construed as relating only to what precedes, but it has reference to matters not previously connected and is broad enough to include any breach of duty. But he is not responsible for the act of a bonded cashier in placing, without his knowledge, on the corporation's books, funds to the credit of the wrong account; although it constitutes a breach of the bond to divert, to the payment of the expenses of litigation, assessments collected to pay death losses. A liability is, however, created on said bond to the extent of the amount due unpaid beneficiaries from a particular fund, where said president, who fully comprehends the association's financial situation and inability to then pay losses in full, makes excessive payments to certain beneficiaries to the exclusion of others who are entitled to participate therein.[4]

(o) *Dishonesty: acts of omission or commission, done or committed in bad faith.*—In a Wisconsin case the employee while act-

ble for the amount of a debt incurred for goods bought as an independent purchaser by one specified in the bond as an employee, under a claim to the effect that the bond did not cover the risks contemplated).

[3] Bond was conditioned that he should "render a true account of his office and of his doings therein to the proper authority when required thereby or by law, and shall promptly pay over to the persons or officers entitled thereto, all moneys which may come into his hands at the termination of his office, and shall promptly account for all balances of money remaining in his hands at the termination of his office, and shall exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers and securities, or other property pertaining to his office, and deliver them to his successor, or to any person authorized to receive the same; and if he shall faithfully and impartially discharge all other duties now and hereafter required by virtue of said office, then this bond to be void, otherwise in full force."

[4] Sherman v. Harbin, 125 Iowa, 174, 100 N. W. 622, s. c. 124 Iowa, 643, 100 N. W. 629.

ing as assistant cashier and cashier, permitted another to obtain fictitious credit at the bank by "kiting checks" said practice consisting in allowing the other to receive credit for checks drawn on other banks in which he had no funds and then permitting him to withdraw from the employer bank moneys sufficient to meet the amount of said fictitious checks so deposited whereby the bank's funds were depleted to a large amount exceeding the guaranteed indemnity sum in the bond. There was also some evidence tending to show that the employee had profited to some extent by this practice. In addition, it further appeared that these acts were done by the cashier after he had been explicitly and directly instructed not to cash any checks given by said depositor on outside banks unless the banks on whom said checks were drawn advised him that they would be paid on presentation. Under the stipulations of the bond insurer agreed to "pay to the employer the amount of any loss or damage that shall happen to the employer in respect to any funds, property, or estate belonging to or in the custody of the employer, through the dishonesty of any of the employees, or through any act of omission or commission of any of the employees, done or committed in bad faith, and not through mere negligence, incompetency, or any error of judgment, whether such dishonesty or such act of omission or commission occurs in the performance of any duty or trust specially assigned to such employee or occurs otherwise," not exceeding a specified amount. It was found by the court below that the above stated acts of the employee constituted dishonesty and acts of omission or commission done and committed in bad faith, and not through mere negligence, incompetency or any error of judgment and on appeal a judgment for plaintiff to the amount of the bond with interest was affirmed.[5]

(p) *Personal dishonesty or culpable negligence: negligence: gross negligence: ordinary care.*—In a New York case a bond was issued to a street railway company guaranteeing and indemnifying against any loss by reason of "the personal dishonesty or culpable negligence" of an employee, and it was also stipulated that insurer should not be liable for "any act or thing done or left undone by any employee in obedience to or in pursuance of any instruction or authorization received by him from the employer . . . nor for any mere error of judgment, nor any injudicious exercise of discretion . . . wherein he shall have been vested with discre-

[5] First National Bank of Crandon v. United States Fidelity & Guaranty Co. of Balt. 150 Wis. 601, 137 N. W. 742, 41 Ins. L. J. 1893. See First National Bank v. National Surety Co. 130 Fed. 401, 64 C. C. A. 601, 66 L.R.A. 777 (where condition of bond same as in above case) considered near end of subdv. (x) this section.

tion." It was further provided that it was "expressly understood and agreed that the company shall in no way be held liable hereinunder to make good any loss by robbery that the employer may sustain unless the same be occasioned by or with the connivance or culpable negligence of some one or more of said employees." It was claimed that insurer was liable for a loss sustained through the culpable negligence of the employee, from whom a canvas bag containing quite a sum of money was taken while he was in the discharge of his duties in conveying, in a covered wagon, insured's money from one of its stations to the bank. The evidence of the actual loss rested upon the uncontradicted account thereof given by the said employee and the driver of the wagon from which the bag disappeared. There was no claim of any defect in the manner in which the work of the employee was done so far as the mere doing of it was concerned. It was held, therefore, that inasmuch as it was inconceivable under the uncontradicted version of the circumstances, given by said employee, that the bag could have been taken without his culpable negligence or dishonesty, and as there was no direct charge that he was dishonest, a presumption or inference of culpable negligence was raised. O'Brien, J., said: there was "imposed upon the employees of the company the duty and necessity of exercising active vigilance and care. The mere recital of how that duty was performed on the day of the loss raises a presumption that care and vigilance were not exercised. The question of whether upon the evidence Wickham was guilty of culpable negligence was properly submitted to the jury . . . we think that their verdict should not be disturbed" and judgment for plaintiff was affirmed.[6] In a Tennessee case an action was brought against the insurer to recover for loss sustained by a railroad company through the alleged negligence of its clerk. Insurer claimed that it was exonerated under a clause of the guaranty which provided that: "The company shall not be liable hereunder for any loss occasioned by mistake, accident or error of judgment on the part of any employee; or by robbery, unless by or with the connivance or culpable negligence of the employee." The bond further stipulated that "culpable negligence as used in this bond shall be deemed and held to mean failure to exercise that degree of care and caution which men of ordinary prudence and intelligence usually exercise in regard to their own affairs of the same character" a rule of insured upon the subject of "order notify" shipments made provisions as to shipments consigned "to order" with direc-

[6] City Trust Safe Deposit & Surety Co. of Phila. v. Fidelity & Casualty Co. of N. Y. 68 N. Y. Supp. 601, 58 App. Div. 18, aff'd (mem.) 171 N. Y. 666, 64 N. E. 1119.

tions to notify the consignee and precluded receiving agents from delivering such shipments until surrender of the original bill of lading properly endorsed. It was held that a violation of this rule by the delivery of goods consigned to the shipper's order against the purchaser attached to a bill of lading whereby insured in order to cancel liability caused by the negligence of said clerk paid a large amount in excess of that specified in the bond constituted culpable negligence within the intent of the bond but that these contracts were in form bonds with collateral conditions limited by the sum expressed therein called the "penalty" which the judgment could not exceed.[7] Under a Federal decision where a guaranty company agreed to make good and reimburse to a bank; any pecuniary loss sustained by it through the personal dishonesty and culpable negligence of its receiving teller under a bond containing almost identically the same condition and the same definition as in the Tennessee case above considered, it was decided that the terms of the contract were perfectly plain and did not call for the exercise of the highest or an extraordinary degree of care and caution, but only such as men of ordinary prudence and intelligence usually exercise in regard to their own affairs; that the two things are not substantially the same but essentially different and, therefore, it was error to instruct the jury that the degree of care and caution, failure to exercise which would constitute culpable negligence was "the very highest, you might almost say the highest possible," "the very highest" and "an extraordinary and a very high degree," for such charge conveyed to the jury an enlarged idea of the right of the bank and the obligation of insurer. It was also held that negligence is actionable only when loss or injury proximately results therefrom, and to be thus proximate the loss or injury must be a natural and probable consequence which ought to have been foreseen or reasonably anticipated in the light of the attendant circumstances. It was decided that personal dishonesty and culpable negligence of said employee were not proven by evidence that certain money was taken from the chest of the bank, where it appears that it might have been taken by others who had equal access thereto as had the bonded employee, and that over these others he had no supervision or control, and the manner in which it disappeared was not shown.[8]

[7] Louisville & Nashville Rd. Co. v. United States Fidelity & Guaranty Co. 125 Tenn. 658, 148 S. W. 671.

[8] United States Fidelity & Guaranty Co. v. Des Moines National Bank, 145 Fed. 273, 74 C. C. A. 553, 35 Ins. L. J. 880, *cited* (upon point of negligence being actionable, etc.) in Mella v. Northern Steamship Co. (U. S. C. C.) 162 Fed. 499, 511–12. See comments on principal case in Finch v. City of Ottawa, 190 Fed. 299, 303–4, 111 C. C. A. 199, given under subdiv. (gg) this section.

The general rule that mere negligence on the part of assured does not constitute a defense,[9] applies to an action on a fidelity or surety corporation bond unless the negligence amounts to fraud or bad faith.[10]

Concerning the question of negligence, the following cases are important: In a suit against a cashier of a bank and his sureties on their bond, where the defendants pleaded, severally, it is no defense to the suit that the directors have been negligent in examining his account where the negligence occurred after the bond was executed, nor that, prior to the execution of the bond, the cashier had lost money by gambling, such fact not relating to the business which was the subject of suretyship. To avoid the bond on the ground of fraud on the part of the bank or its directors there must be a fraudulent concealment of something material for the sureties to know.[11] And a loss due to the bonded employee's carelessness is not within the intent of a bond indemnifying insured against loss occasioned by the fraud or dishonesty of said employee amounting to larceny or embezzlement.[12] But insurers are liable under a guaranty of fidelity and diligence in duty of a clerk for a loss of money, owing to the negligence of said employee in leaving a large sum of money exposed in his room while absent at lunch.[13] In another case it appeared that before the delivery and acceptance of the bond of a cashier, and before the sureties had become guarantees for his diligence, honesty, and fidelity, the directors of the bank had published a statement under the provisions of the law of its organization, whereby the affairs of the bank appeared to be well managed and prudently and honestly administered, and which was intended to and did convey the belief that the cashier had up to that time acted as a trustworthy person, and the sureties were in-

[9] See §§ 2838–2848 herein.

[10] First National Bank of Crandon v. United States Fidelity & Guaranty Co. of Balt. 150 Wis. 601, 137 N. W. 742, 41 Ins. L. J. 1893.

[11] Atlas Bank v. Brownell, 9 R. I. 168, 11 Am. Rep. 231 (*cited* in note to Thompson's Bank Cases, 614. *considered* in Grand Lodge A. O. United Workmen v. Massachusetts Bonding & Ins. Co. 38 R. I. 276, 284, 94 Atl. 859, as follows: "The sureties on a cashier's bond sought to avoid liability on the ground that the directors had failed to inform them relative to the personal habits of the cashier without any inquiry on the part of the sureties. The court held that the mere giving and accepting the surety bond was not a relation sufficiently confidential to impose upon the directors that duty."—Vincent, J.; and the citing case holds that where the failure to observe the obligations of the bond in performing certain duties was gross negligence, a verdict for defendant was properly directed). See Bank of United States v. Etting, 11 Wheat. (24 U. S.) 59, 6 L. ed. 419.

[12] United States Fidelity & Guaranty Co. v. Bank of Batesville, 87 Ark. 348, 112 S. W. 957.

[13] Citizens' Ins. Co., In re, 16 Can. L. J. (N. S.) 334 (Quebec).

duced in consequence thereof to assume the bond obligation. The cashier was, in fact, a defaulter at the time, and the directors by the use of slight care might have learned this fact. An action was brought upon the bond for subsequent embezzlements, and the court refused a recovery against them. The court, however, declared that the sureties could not claim immunity upon account of any report made after they became sureties, the reports being sworn to by the cashier. It was said that it could be assumed that upon his representations and upon what appeared upon the books of the association the directors were induced to certify to their accuracy; that although the directors may have been negligent in the discharge of their duties, whereby the cashier was enabled to misappropriate the funds of the bank and to conceal its true condition, by false reports to the comptroller of the currency and by false entries, yet inasmuch as the sureties had covenanted that the principal should "well and properly perform" his duties, and should "well and truly account for all moneys," etc., that should pass through his hands, their covenant was "unconditional, and no failure on the part of directors of the association short of actual fraud or bad faith can be deemed sufficient to exonerate them from its performance." The decision, however, as above noted, rested upon the particular facts of the case, and did not controvert this doctrine so stated by the court.[14] So an instruction is misleading which informs the jury in broad terms, in an action by a receiver upon an indemnity bond given to hold a bank against fraud of a specified officer, that if they found that the directors were careless in the bank's management generally they should find for defendant.[15]

Negligence, however, while existing may be but an incident and not the basis of a judgment as where "it is not intended to hold

[14] Graves v. Lebanon National Bank, 10 Bush (73 Ky.) 23, per Lindsley, J., *quoted* from in United States Fidelity & Guaranty Co. v. Blackly, Hurst & Co. 117 Ky. 127, 136, 77 S. W. 709, *distinguished* in Grant County Deposit Bank v. Littell's Extx. 108 Ky. 442, 444, 56 S. W. 669, *cited* as being within same principle of law in Deposit Bank of Midway's Assignee v. Hearne, 104 Ky. 819, 823, 48 S. W. 160, *quoted* from in Trimble v. Read, 97 Ky. 713, 720, 31 S. W. 861, as to fraud asserted in ignorance by one obligated to use reasonable diligence, *cited* in Connecticut Mutual Life Ins. Co. v. Scott, 81 Ky. 540, 545; Thompson's Bank Cases, 492, n. 614. See further, Tapley v. Martin, 116 Mass. 275, per Morton, J.; Thompson's Bank Cases, 611n, 614–18. The court in this case *cites* Minor v. Mechanics' Bank of Alexandria, 1 Pet. (26 U. S.) 46, 7 L. ed. 47; United States v. Kirkpatrick, 9 Wheat. (22 U. S.) 720, 6 L. ed. 199; Franklin Bank v. Stevens, 39 Me. 532; Farmington v. Stanley, 60 Me. 472. See Board of Supervisors v. Otis, 62 N. Y. 88. See § 2002a herein.

[15] Fidelity & Deposit Co. of Md. v. Courtney, 186 U. S. 342, 46 L. ed. 1193, 23 Sup. Ct. 120.

that mere negligence on the part of the guaranty may afford a defense, but to hold that a warranty binds the warrantor, and that the breach on his part constitutes a defense to an action on the bond," to recover for loss through delinquences, embezzlement or larceny on the part of an employee.[16]

Gross negligence or want of such reasonable diligence and skill as the duties of the office necessitate, or dishonesty in the exercise of the office, render the sureties liable as a rule, although honest mistakes of judgment do not.[17]

Upon the question of ordinary care in getting at the state of accounts of an employee, an insured employer is not chargeable with the negligence of an expert employed by it to examine the accounts, provided that in employing him for that purpose reasonable or ordinary care was exercised as to his competency for the work.[18]

(q) *Liability for acts of fraud or dishonesty, "embezzlement" or "larceny," etc.: scope of duties: other or additional employment or duties.*—If a bond provides that the employer may at any time transfer the employee from one position to another and shift any employee about at pleasure without any notice to insurer, and that the latter shall be and remain liable, and also stipulates for indemnity "whether such dishonesty or such act of omission or commission occurs in the performance of any duty or trust specially assigned to such employee or occurs otherwise," the appointment of an assistant cashier to the position of cashier without the knowledge or consent of insurer does not constitute any defense to an action for loss sustained by the employer through the dishonest acts of the employee.[19] And where the bond insures against dishonesty as receiving teller in a bank, or in the duties to which in the employer's service he may be subsequently appointed or assigned, it covers his acts of fraud and dishonesty as assistant cash-

[16] Livingston & Taft v. Fidelity & Deposit Co. of Md. 76 Ohio St. 253, 81 N. E. 330, 36 Ins. L. J. 699, 707, per Spear, J. s. c. Livingston v. Fidelity & Deposit Co. of Md. 27 Ohio Civ. Ct. Rep. (17 Cir. Dec.) 662.

[17] Common Council of Alexandria v. Case, 2 Cranch (U. S. C. C.) 363, Fed. Cas. No. 10,447; Union Bank v. Forest, 3 Cranch (U. S. C. C.) 218, Fed. Cas. No. 14,356; Minor v. Mechanics Bank of Alexandria, 1 Pet. (26 U. S.) 46, 64, 7 L. ed. 47; Commercial Bank of Albany v. Ten Eyck, 48 N. Y. 305; Bank of Washington v. Barrington, 2 Pa. 27, 2 P. & W. 37; Bank of St. Mary v. Calder, 3 Strob. (S. C.) 403; Melville v. Doidge, 6 Com. B. 450, 18 L. J. C. P. 7, 12 Jur. 922.

[18] Fidelity & Guaranty Co. of N. Y. v. Western Bank, 29 Ky. L. Rep. 639, 94 S. W. 3, 35 Ins. L. J. 692.

[19] First National Bank of Crandon v. United States Fidelity & Guaranty Co. of Balt. 150 Wis. 601, 137 N. W. 742, 41 Ins. L. J. 1893.

As to representations and warranties as to duties of position, see § 2002a, subdv. (n) herein.

ier although insurer had received no notice of his appointment as said assistant cashier.[20] So where upon and after suspension of the business of a bank the cashier of the bank, whose fidelity is guaranteed, continues in the employment of the bank examiner and of the receiver, he is none the less in the service of the bank, at least so up to the day on which the receiver takes possession of the books, papers and assets, where the bond contemplates service other than as cashier, as when it insures fidelity of the employee "in connection with the duties of the office or position hereinbefore referred to, or of the duties to which, in the employer's service, he may subsequently be appointed;" and where the bond also provides for insurer's liability for acts of fraud or dishonesty of the cashier during the "continuance of this bond" and "discovered within six months thereafter, and six months from the death, dismissal, or retirement of the employee, from the service of the employer," the surety company insurer is not discharged from liability for acts discovered more than six months from the date when the bank examiner took charge of its affairs but within six months from the date of the resignation of the cashier.[1] And if a principal in a suretyship bond receives and embezzles moneys under his appointment and in pursuance of his duties, the faithful performance of which are secured by the bond, it will not avail insurer as a defense in avoidance of his liability that other and greater duties and responsibilities are imposed upon him where such duties, or the duties of a new position do not interfere with or modify those under the original appointment for the faithful performance of which the sureties are obligated, provided such other or new duties are not such as to make the obligation one so entirely outside the parties' intent that it would be inequitable to impose them upon the contract. This applies where it appears that the general manager of an association whose fidelity was guaranteed was to have supervision of the insured corporation's affairs under the supervision of a board of directors and was also to perform such duties in the detail work of said association as should be prescribed from time to time by said board, and the by-laws provided that it should be the treasurer's duty to receive all moneys due the association and keep account thereof, but the evidence showed that it was the duty of said general manager, as understood by both parties to the contract to receive the cash and deposit it in the bank, that

[20] Fidelity Casualty Co. v. Gate City National Bank, 97 Ga. 634, 33 L.R.A. 821, 54 Am. St. Rep. 440, 25 S. E. 393, 32 Ins. L. J. 808.

[1] American Surety Co. v. Pauly, 170 U. S. 160, 42 L. ed. 987, 18 Sup. Ct. 563, s. c. 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. 552, 29 Ins. L. J. 3, aff'g 72 Fed. 484, 18 C. C. A. 657, s. c. 72 Fed. 470, 18 C. C. A. 644.

he had charge of the books and that a statement was presented and accepted at each meeting of the directors showing the amount of money received by him and that it was in the treasurer's hands Accordingly, although the application for the bond stated that said manager's position was merely clerical, the question whether the loss was covered by the contract was properly submitted to the jury, and a verdict and judgment for plaintiff was sustained.[2] Again, a bond indemnifying an employer against loss through acts amounting to larceny or embezzlement on the part of an employee in the performance of his duties as bookkeeper, or in such other position as he might be called upon to fill, covers a loss sustained through the employee raising checks and appropriating the money thereby received from the bank, whether he was at the time acting as bookkeeper or in some other capacity in his employer's service.[3] Nor does an employee cease to be an employee merely because the method of fixing his compensation has changed.[4] As to additional employment, sureties for the faithful performance of the duties of the bookkeeper of a bank are liable for his errors in that capacity, although he also performs the duties of teller, unless the errors were connected with or induced by the latter employment.[5]

A new appointment, however, will terminate the liability of sureties on a bond given after the first appointment, and the employment of a bank cashier for a period of one year, after appointing him to office for a period to continue at the pleasure of the trustees, constitutes a new appointment.[6] And where an assistant cashier,

[2] Harrisburg Savings & Loan Assoc. v. United States Fidelity & Guaranty Co. 197 Pa. St. 177, 46 Atl. 910 (condition in bond was: "make good and reimburse to the employer all and any pecuniary loss sustained by the employer, of money, securities or other personal property in the possession of the employee, or for the possession of which he is responsible, by any act of fraud or dishonesty, on the part of said employee, in connection with the duties of the office or position hereinbefore referred to, and occurring during the continuance of this bond, or any renewal thereof," etc., also not to be liable "for any mere error of judgment, or injudicious exercise of discretion on the part of the said employee, in and about all or any matters wherein he shall have been vested with discretion, either by instruction or rules and regulations of said employer") the court, per Mestregat, J., approves Shackmaxon Bank v. Yard, 150 Pa. 351, 358, 24 Atl. 635.

[3] Champion Ice Manufacturing & Cold Storage Co. v. American Bonding & Trust Co. 115 Ky. 863, 103 Am. St. Rep. 356, 75 S. W. 197, 32 Ins. L. J. 808.

[4] Adams Co. v. Nesbit, — S. Dak. —, 159 N. W. 869.

[5] Home Savings Bank v. Traube, 75 Mo. 199, 42 Am. Rep. 402.

[6] Wapello State Savings Bank v. Colton, 133 Iowa, 147, 11 L.R.A. (N.S.) 493 and note, 110 N. W. 450. See Westervelt v. Mohrenstecker, 76 Fed. 118, 22 C. C. A. 93, 40 U. S. App. 221, 34 L.R.A. 477; First National Bank v. Briggs, 69 Vt. 12, 37 L.R.A. 845, 37 Atl. 231.

whose fidelity is guaranteed and who owns only a few shares of stock, acquires a majority of the stock, becomes a director, and also cashier, the policy determines, even though it permits him to perform other duties than those specified in the bond.[7]

Again, where the loss insured against was such as might be sustained by reason of the fraud or dishonesty of the employee "in connection with his duties as specified . . . amounting to embezzlement or larceny," and his duties as secretary were to receive and deposit all moneys received by the employer, to indorse checks for deposit only, but he was not authorized to sign checks or accept drafts, or pay out on account, or withdraw money, and it was not within the scope of his duty to pass upon applications for loans nor perform other duties which, while necessary to the working out of his fraudulent schemes, were wholly without any of his specified duties, so that his dishonest acts in inducing the employer, which was a loan company, to accept a loan to a fictitious person, on fictitious security, and in procuring money from the bank, where moneys of the employer were on deposit, on a check issued by said employer in the name of the fictitious borrower by forging the name on the check, do not render the bondsman liable, for they are without the obligation of the bond, and within an exception of liability where the acts of the employee are not "within the direct scope" of his duties.[8] In a Massachusetts case it appeared that a fidelity bond agreed to make good to assured, called the "employer" all loss sustained by him through any act of a person designated as the "employee," whose position was described as that of "agent or collector" whose duties were the "collection of accounts assigned to" assured, for which he was to receive a "commission or percentage as collected." This was in accordance with an agreement where the so-called "employee" who was in business on his own account was to be assisted by the said assured "employer" and under said agreement, which was made a part of the bond which was renewed several times, the "employee" made collections of money from accounts receivable and due to him from his customers and earned in his said business. These accounts were from

[7] Farmers & Mechanics Bank v. United States Fidelity & Surety Co. 28 S. Dak. 315, 36 L.R.A.(N.S.) 1152, 133 N. W. 247.

[8] Livingston & Taft v. Fidelity & Deposit Co. of Md. 76 Ohio St. 253, 81 N. E. 330, 36 Ins. L. J. 699, s. c. Livingston v. Fidelity & Deposit Co. of Md. 27 Ohio Cir. Ct. Rep. (17 Cir. Dec.) 662, holding that a conversion of checks payable to a fictitious payee by the secretary of a loan company constitutes an embezzlement sufficient to charge the insurer on a fidelity guaranty bond, when, etc. ("The demurrer to the petition should have been overruled, and the judgment below is therefore reversed and the cause remanded."—Henry, J.)

time to time assigned to assured for cash at their value less a certain per cent, said receivables were then collected by the "employee" from his customers the same as if no assignments had been made. There were annual settlements upon which "interest and expenses" were added to cash advanced originally, and that sum was deducted from the amounts collected by the "employee" on the assigned accounts. The "balance" was settled in cash or by assignments of new accounts receivable on which the "employer" made a new advance, or partly in cash and partly by a new assignment on which a new advance was made. The "employer" received a monthly profit on these transactions. During the entire period of the original bond and its renewals, before the renewal in question, no commissions or any other compensation was received by the "employee" for collecting these assigned accounts. Money was collected and used by him for his own benefit by said "employee" on accounts assigned to the "employer" assured. Action was brought against insurer to recover reimbursement for the failure to pay over the amount so collected and used. It was held upon a verdict for plaintiff below and exceptions that judgment should be entered for defendant as the bond did not cover the misappropriation by the so-called employee, and although it could have been found by the jury to have been dishonest, it was not done in the course of the described employment. The court, per Loring, J., declared that "We are of opinion (taking the view of the evidence most favorable to the plaintiff) that the true relation between the plaintiff and Mudge" the employee so called "was materially different from that stated in the bond" which was "that existing in the ordinary case of an 'agent or collector' employed to collect accounts assigned to his employer for his (the employer's) benefit, the 'agent or collector' receiving for so doing a 'commission or percentage' on the accounts as they are collected," and a distinction was made between said transactions in this case and embezzlement of collections where an "agent or collector" is paid commissions as collections are made, and has no other interest in or relation to the accounts collected, and in that capacity misapplies or embezzles the amount collected, for this misappropriation was not made or committed in the course of such an employment. A contention of defendant that the real nature of the transaction was, as matter of law, a running account by way of a loan secured by the accounts assigned to assured by the so-called "employee" was not sustained, although the court said that, "doubtless the jury could have found that to be the true relation" between them "but they were not bound as matter of law to do so;" nor was the defendant's further contention sustained that "as matter of law, on the evidence" said designated "employee"

had "authority to use the money collected by him in his business in which case . . . his failure to account for the sums collected by him would not have amounted to embezzlement and so would not have come within the terms of the bond." [9]

If the description of the employee's duties is in fact misleading, even though not intended to mislead, a judgment dismissing the complaint will be affirmed; as where the described duties were taking orders and delivering goods sent to him C. O. D. but in addition thereto he was a manager of a sort of branch shop with a supply of merchandise, making sales to customers dealing with him directly, and it was impossible to determine from which, of either, or possibly a commingling of both, the shortage came for which recovery was sought.[10] Again, a bond was executed for the faithful performance of duty by an "assistant clerk" in a bank. He was employed as a messenger. Afterward, he was promoted to the next higher clerkship, and still later to the position of bookkeeper. In the last position he was stationed near the money-drawer, and from time to time abstracted money from it and made false entries to conceal his crime. The last promotion was without the knowledge of his sureties on the bond, and it was held that they were not liable for the embezzlement. The reasons advanced were, however, that a surety is not to be held beyond the precise terms of his contract; that his liability is not to be extended by implication beyond the terms of his contract; and that the surety is discharged if, without his consent, the principal parties make a new agreement inconsistent with the terms of the original agreement or in the mode of performing them. The distinction, therefore, between this rule of strict construction and that of liberal construction in favor of assured, applicable in fidelity insurance contracts, is apparent.[11]

(r) *Fraud and dishonesty of member of partnership.*—The bond was to make good and reimburse to insured any loss that might be sustained by him of money or other securities by any act of fraud or dishonesty with reference to the funds committed to him

[9] Coyle v. United States Fidelity & Guaranty Co. 217 Mass. 268, Ann. Cas. 1917C, —, 104 N. E. 559, 43 Ins. L. J. 667 (bond stipulated to make good and reimburse "to the employer all and any pecuniary loss sustained by the employer, of money, securities or other personal property in the possession of the employee, or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of said employee in the discharge of the duties of his office or position as set forth in said statement referred to, amounting to larceny or embezzlement." Id. 217 Mass. note at p. 271.)

[10] Buchner v. Title Guaranty & Surety Co. 128 N. Y. Supp. 1007, 144 App. Div. 326, 40 Ins. L. J. 1510, aff'd 207 N. Y. 672, 100 N. E. 1125. See § 2002a, subdv. (n) herein.

[11] Manufacturers' National Bank of Newark v. Dickerson, 41 N. J. L. 448, 32 Am. Rep. 237 (action to recover penalty on bond).

or of any improper use of said funds, or any other act other than that of mere error of judgment, or injudicious exercise of discretion on the part of one who was then a member of assured's firm under a contract to purchase cotton with funds furnished by assured, which contract was shown the guarantor before execution of the bond. It was held that upon proof of misapplication of the guarantee's funds, and that the bonded individual was an active member of the firm and had received the guarantee's funds, a cause of action arose against the guarantor on the bond which should have been submitted to the jury and a judgment of nonsuit was reversed.[12]

(s) *Extent of duty and liability as to supervision, inspection, etc., to prevent default.*—While it may be generally stated that the surety will be released or discharged from liability on its bond by the failure of assured to comply with the stipulations of the bond or the requirements of a representation or warranty which induced the execution of the contract, and to exercise in accordance therewith the stipulated degree of care or supervision over the employee, whose integrity is guaranteed, in the matter of his accounts or in respect to the faithful performance of the duties of his position in his fiduciary capacity or employment, nevertheless the conditions of the bond or contract, the situation of the parties and the surrounding circumstances must be considered, for what would constitute compliance under one set of conditions would not so operate under other circumstances, a distinction, however, exists under the decisions between the absolute failure to comply and an attempt to comply which is insufficient in that the proper degree of care is not exercised.[13]

[12] Clifton Manufacturing Co. v. United States Fidelity & Guaranty Co. 60 S. Car. 128, 38 S. E. 790.

That partnership funds cannot be embezzled by member of firm unless statute expressly so provides, see State v. Hogg, 126 La. 1053, 29 L.R.A.(N.S.) 830, 83 So. 225.

When sureties on bond for fidelity of firm of agents not liable for funds misappropriated by one member of firm after its dissolution and retirement of other partner from business, even if obligee does not know of such dissolution, see Standard Oil Co. v. Arnestad, 6 N. Dak. 255, 34 L.R.A. 861, 63 N. W. 107.

[13] National Surety Co. v. Western Pacific Ry. Co. 200 Fed. 675, 119 C. C. A. 91 (requirement that all reasonable steps and precautions be taken to prevent loss; but this does not require employer to examine books of bank, where employee deposited, to ascertain its solvency); Larrimore v. United States Fidelity & Guaranty Co. 21 Cal. App. 767, 132 Pac. 1050 (warranty as to accounting: no recovery); Fidelity & Deposit Co. v. Colorado Ice & Storage Co. 45 Colo. 443, 103 Pac. 383, 38 Ins. L. J. 1094 (under no obligation to exercise continuous diligence in making investigations as to habits and character as to employee); Atlantic City Aerie No. 64, Paternal Order of Eagles v. International Fidelity Ins. Co. 83 N. J. L. 583, 85 Atl. 325 (examination

As instancing what is above stated there is such a breach of the bond of the treasurer of a union as precludes recovery for a shortage where the insured union fails to comply with its agreement to verify the treasurer's accounts and the amount of money in his possession at the periods stipulated in the bond.[14] But where quarterly inspections by the bank officials, and also frequent daily inspections by the president were made of the cashier's accounts, which inspections covered the counting of cash and securities in the cashier's custody or charge, with the exception that it was impossible at such times to verify accounts with certain corresponding banks which would seldom balance on the same day, it was decided, that a requirement of an inspection of the cashier's accounts, at least once in every twelve months, including an examination of all cash and securities in his custody or charge, was sufficiently complied with and recovery could be had.[15]

If, however, there is nothing in the application or renewal of a bond which requires an insured employer to do so, he is under no obligation to exercise continuous diligence in making investigations so as to be at all times thoroughly advised as to the habits and character of his employee during the entire period for which he is bonded.[16] Again, in determining the duty or obligation of insured in the matter of inspection and supervision over the employee for the prevention of default, the provisions of the bond in this respect supersede what is stated in the application and operate as a waiver of any other requirements than those which the surety has specified in the bond, in other words, the surety has substituted its own requirements for the things insured had, in the application, stated it would do.[17]

(t) *Liability conditioned upon discovery of fraud, defalcations, etc.*—An indemnity bond which limits insurer's liability to losses occurring and discovered during the continuance of the bond, or any renewal thereof or within a specified time thereafter, does not contravene public policy, nor is it invalid on the ground that it fixes a period of limitation within which actions for fraud or mis-

held insufficient and insurer not liable where by proper inquiry defalcation would probably have been discovered).

As to representations and warranties: examination of accounts, etc., what is and is not sufficient compliance, see § 2002a, subdivs. (f)–(h) herein.

[14] United States Fidelity & Guaranty Co. v. Downey, 38 Colo. 414, 10 L.R.A.(N.S.) 323 and note, 120 Am. St. Rep. 128, 88 Pac. 451, 36 Ins. L. J. 279.

[15] Equitable Surety Co. v. Bank of Hazen, 121 Ark. 422, 181 S. W. 279.

[16] Fidelity & Deposit Co. v. Colorado Ice & Storage Co. 45 Colo. 443, 103 Pac. 383, 38 Ins. L. J. 1094.

[17] United American Fire Ins. Co. v. American Bonding Co. 146 Wis. 573, 40 L.R.A.(N.S.) 661, 131 N. W. 994, 40 Ins. L. J. 1805.

take may be brought, different from that prescribed by statute.[18] And if in order to impose liability upon insurer the bond is conditioned that the loss must be discovered during the term of the bond or within a specified time thereafter, the fact that the bonded officials conspired together to conceal their fraud or embezzlement, does not aid assured corporation where it has failed to discover such official's dishonesty or embezzlement within the specified time.[19]

(u) *Prosecution of employee as condition precedent to liability.* —If the policy contains as a condition precedent a stipulation that the employer shall, at the company's request, use all diligence in prosecuting the employee to conviction of any fraud or dishonesty, the expense thereof to be borne by the insurer in case of conviction, it is held that such a clause is reasonable and the failure on the company's request to prosecute an employee for embezzlement precludes a recovery.[20] But where a bond guaranteeing an employer against loss sustained by reason of fraud and dishonesty of any of its employees contains a requirement that the employer shall if and when requested by insurer at its expense, use all due diligence in prosecuting any employee to conviction for any fraud or dishonesty which he shall have committed and in consequence of which a claim shall have been made under the bond and that "such action, when requested, by the employer shall be a condition precedent to recovery under the bond," said requirement is satisfied if the employer, when requested to prosecute an employee charged

[18] Ballard County Bank's Assignee v. United States Fidelity & Guaranty Co. 150 Ky. 236, 150 S. W. 1. Ky. Stat. sec. 2519, Clay, C., said: "Similar provisions to the one in question have been upheld in the courts, and it is well settled that where the liability of the insurer is limited to losses discovered within a specified time, there is no liability unless the fraud, dishonesty or negligence, causing the loss, not only occurred but was discovered within the time limit. American Surety Co. v. Pauly, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. 552, 170 U. S. 160, 42 L. ed. 987, 18 Sup. Ct. 563; New York Fidelity Co. v. Consolidated National Bank, 71 Fed. 116, 17 C. C. A. 641; Guaranty Co. of North America v. Mechanics' Savings Bank & Trust Co. 80 Fed. 766, 26 C. C. A. 146 (rev'd 173 U. S. 582, 43 L. ed. 818, 19 Sup. Ct. 551); Proctor Coal Co. v. United States Fidelity & Guaranty Co. 134 Fed. 434; California Savings Bank v. American Surety Co. 82 Fed. 866; De Jernette v. Fidelity & Casualty Co. 98 Ky. 558, 33 S. W. 828.

[19] Larrabee v. Title Guaranty & Surety Co. 250 Pa. 135, 95 Atl. 416.

[20] London Guarantee & Accident Co. v. Fearnley, 5 App. Cas. 911, 43 L. T. 390, 28 W. R. 893, 45 J. P. 4 H. L. Ir. the Lord Chancellor dissenting (principal and surety); La Canadienne Compagnie D'Assurance sur la Vie v. London Guarantee & Accident Co. (Can.) 9 Rap. Jud. Que. B. R. 183.

As to furnishing information and every description of aid for prosecution of principal, see Hough v. American Surety Co. 90 Mo. App. 475.

As to notice and proofs of loss: notice affecting loss: guaranty insurance, see § 3336 herein.

with fraud uses all diligence in endeavoring to secure a conviction; a conviction is not a condition precedent, and this applies where assured's agent went before the grand jury and presented proof of the fraud, but no indictment was found and the employee was discharged.[1] And a clause in a one year indemnity certificate providing that insurer shall not be liable for embezzlements by the collector of insured and making it obligatory upon the insured, if required to do so by the surety, "to prosecute the defaulting officer to conviction or judgment" is of doubtful meaning and must therefore be construed in favor of the insured and cannot be deemed to require a criminal prosecution and conviction of the officer and is satisfied by a judgment recovered against him by insured in a civil action.[2]

(v) *Extent of liability: time limitation for occurrence of losses: future acts are covered and not past defaults unless so stipulated.*—These fidelity guaranty insurance contracts also, in the absence of an expressed intent to the contrary, bind the surety or insurer for future losses only, and if it is intended that past defaults should be covered language should be used which clearly evidences such purpose as existing in the minds of the parties at the time the bond was executed; nor in this connection is there any presumption that if a series of acts are alleged to have occurred between two dates that the first and last acts occurred respectively on the first and last dates.[3] And if insurer in direct and express terms makes its surety

[1] Union Pacific Tea Co. v. Union Surety & Guaranty Co. 86 N. Y. Supp. 466.

[2] Sullivan v. Fraternal Surety Co-operative Union, 73 N. Y. Supp. 1094, 36 Misc. 578.

[3] Adams v. Western Surety Co. 35 S. Dak. 194, 151 N. W. 890 (the bond in this case was executed January 9, 1913, for one year after January 18, 1913. The complaint alleged that between the 18th day of January, 1912, and the 24th day of February, 1913, the employee [Nesbit] fraudulently and dishonestly appropriated to his own use various sums aggregating an amount of money in excess of the amount agreed upon as indemnity under the bond. A demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action was overruled. It was held that the demurrer should have been sustained and judgment for plaintiff was reversed. It was contended that at least a part of the money was misappropriated after the bond. "This is upon the theory that where a series of acts are alleged to have occurred between two dates it will be presumed that the first and last acts occurred respectively on the first and last dates named. But we know of no such presumption of law. Of course, under the allegations of the complaint, it is possible that some, or even all, of the acts complained of may have occurred after the bond was executed; but on the other hand it is just as possible that all of the acts complained of occurred prior to the execution of the bond, and for which appellant would not be liable. . . . This presents a question that is altogether novel to this court. Of course a bond could be so framed as to render a surety liable for past delinquencies, but language must be

bond prospective by restricting its liability to a time commencing at an expressly specified date, it is not retroactive and excludes lia-

used that clearly shows such was the intention and understanding of the surety when the bond was executed. . . . Has the assured in this case any reasonable ground to expect the indemnity it is now contending for? In other words, is there anything in the bond to furnish grounds for any such expectation? By the terms of the bond, appellant covenants to make good and reimburse respondent for any and all pecuniary loss sustained by respondent 'by reason of the fraud or dishonesty' of the said defendant, Nesbit, not exceeding the amount named in the bond, and that said bond shall 'be and continue in force for one year from January 18, 1913.' The first clause including, as it does, any and all pecuniary loss that might be sustained by respondent by reason of the fraud or dishonesty of the said Nesbit, is broad enough, standing alone, to include losses that occurred before the execution of the bond as well as after; and because the latter clause, fixing the period within which the bond is to continue in force, does not expressly limit respondent's liability to losses that occurred between January 18, 1913, and January 18, 1914, counsel contend that it fails to provide any limitation whatever as to the time of occurrence of losses, except that they must occur before the 18th of January, 1914. With this contention we cannot agree. It is the general if not the invariable rule that contracts such as fidelity bonds, insurance policies, and the like, look only to the future and bind the surety or insurer only for losses that occur in the future; and in the absence of language in the bond or policy clearly showing a contrary intent on the part of a surety, we hold that appellant is not liable for losses that occurred before the bond was executed." Per Polley, J. "This court, I think, correctly holds as matter of law, that under the terms of the bond plaintiff can recover only for a defalcation occurring within the bonded period. Suppose then, that plaintiff had shown conclusively, by evidence, that a defalcation had occurred, but had wholly failed to show that it occurred *within the bonded period*—would it be entitled to a judgment? Clearly not." —Per Smith J., concurring. McCoy, P. J., dissented, evidently upon the ground that a general demurrer was not the proper remedy and that the test was: whether evidence could have been introduced under the complaint sufficient to make out a prima facie case; whether evidence could not have been introduced showing the defalcation alleged to have been at a time covered by the bond); Sinclair & Co. Ltd. v. National Surety Co. 132 Iowa, 549, 107 N. W. 184 ("the bond provided that defendant should not be liable for any sum whatever which the employee at the commencement of the bond term owed his employer. As it was given to cover the personal dishonesty of the employee and not to guarantee payment of his debts, it is manifest, we think, that defendant is not liable, for any money collected by Higgins & Ogilvie before the bond went into effect and which was afterwards dishonestly converted by them. . . . At the time of the execution of the first bond Higgins & Ogilvie had been plaintiff's brokers, handling goods for some time, and under the evidence was indebted to plaintiff for goods sold. As to this amount, defendant was not responsible, no matter if the money thus received was thereafter dishonestly converted" per Deemer, J.). See United States Fidelity & Guaranty Co. v. Fultz, 76 Ark. 410, 89 S. W. 93, 35 Ins. L. J. 149.

As to attachment and duration of risk: fidelity guaranty, see § 1443a herein.

bility for a defalcation existing prior to said specified time of commencement of liability.[4] So it is declared in a Georgia case that: "It seems to us absolutely free from doubt that, under the contract between the insurance company and the receiver, it was never contemplated that the company should be in any manner responsible or liable for any breach of duty or misfeasance on the part of any employee of the receiver, which occurred before the bond was executed. The company simply undertook to guarantee the faithful and honest discharge of duty by the employees named in the bond, *from and after its date.* The contract as to its operation, related exclusively to the future, and not to the past." [5] And although in order to cover up prior shortages or defaults the employee may have credited up the amounts to wrong accounts, still if after the bond insuring against his dishonesty is executed said employee accounts for and turns over all moneys collected by him no liability exists against insurer.[6]

The bond may, however, so specifically provide for indemnity for losses arising out of past defaults as to justify a recovery.[7]

In the case of a surety on the bond of a re-elected county treasurer the liability extends only to defaults during the term for which

[4] Mystic Workers of the World v. United States Fidelity & Guaranty Co. 152 Ill. App. 223, 39 Natl. Corp. Rep. 708 (*distinguishing* Roper v. Sangamon Lodge, 91 Ill. 518, *following* Stern v. People, 96 Ill. 475, and *citing* United States v. Boyd, 15 Pet. (40 U. S.) 187, 10 L. ed. 706); Fidelity & Casualty Co. of N. Y. v. Bank of Timmonsville, 139 Fed. 101, 71 C. C. A. 299 (stipulation was: "That any claim made under this bond, or a renewal thereof, shall embrace and cover only for acts and defaults committed during its currency, and within twelve months next before the date of the discovery of the act or default upon which such claim is based." There was a special deposit of bag of silver coin May 19, 1900, the bond was executed March 17, 1891, and the last renewal was dated from March 17, 1901. After default and flight of the cashier whose fidelity, etc., was guaranteed, said bag was not found in the vault, but the evidence as to the time when the default in respect to said money or coin was committed was so wholly uncertain that there could only be surmise and speculation as to said time of default and it was held that in order to justify a recovery for the amount of this loss there must be sufficient evidence tending to show that it occurred within twelve months prior to discovery of the loss).

[5] Dorsey v. Fidelity & Casualty Co. 98 Ga. 456, 25 S. E. 52, per Lumpkin, J. A case where a fidelity insurance company by its bond guaranteed a receiver of a railroad that certain specified employees should faithfully, etc., perform their duties and faithfully and truly account for all moneys, property, and other things which might come into their possession in their respective employments, and insurer was held not liable to assured for acts of an employee which occurred before the bond was executed.

[6] Model Mill Co. v. Fidelity & Deposit Co. of Md. 1 Tenn. Ch. App. 365.

[7] Union Central Life Ins. Co. v. Prigge, 90 Minn. 370, 96 N. W. 917.

the bond was given.[8] So where the office of a town treasurer is an annual one, sureties are not liable on his official bond for misappropriations of money made after the expiration of the official year and before the successor qualifies.[9]

(w) *Continuing employee in service after default: concealment: knowledge of assured or surety.*—So recovery for future defalcations is precluded as against sureties on a new bond the execution of which in the presence of the employee is permitted without informing the surety, if it is ignorant thereof that the employee had been continued in the service of collecting money for insured upon repayment of money embezzled, for in such case a fraud is perpetrated upon insurer. If, however, it does not appear upon the record whether or not the sureties had knowledge of said facts a new trial will be granted for the determination of that point.[10]

[8] Van Sickel v. County of Buffalo, 13 Neb. 103, 42 Am. Rep. 753.

See the following cases:

*Alabama.*—McPhillips v. McGrath, 117 Ala. 549, 23 So. 721.

*Arizona.* — Territory v. Cooke — Ariz. —, 17 Pac. 10.

*Kansas.* — McMullen v. Winfield Bldg. & Loan Assoc. 64 Kan. 298, 56 L.R.A. 924, 67 Pac. 892 (when liability of surety on bond of officer of corporation extends to defaults of entire year when officer not elected until after first of year of bond but had held successive terms and had been continuously in office for several years before and after date of commencement of his office as fixed in the bond).

*Louisiana.*—Max J. Winkler Brokerage Co. v. Fidelity & Deposit Co. of Md. 119 La. 735, 44 So. 449 (bond for one year to indemnify for losses from embezzlement by one proposed to be employed: insurer not liable for losses sustained after termination of year of bond although certificate for renewal filled out and returned to co-insurer but said certificate stated that the employee was not then in default and it was ascertained that he had been in default before the expiration of the year). See § 2002a, subds. (f), (g), (o) herein.

*Mississippi.*—Board of Supervisors of Lauderdale County v. Alford, 65 Miss. 63, 3 So. 246.

As to nonliability on reinsurance contracts for embezzlements after date of cancelation, where guaranty not retroactive but only applied to losses after its date, see United States Fidelity & Guaranty Co. of Balt. v. French Mutual General Society of Mutual Ins. Against Theft, 212 Fed. 620, 129 C. C. A. 156, 44 Ins. L. J. 86, rev'g French Mutual General Society of Mutual Ins. Against Theft v. United States Fidelity & Guaranty Co. of Balt. 203 Fed. 558, 42 Ins. L. J. 865, *considered* under subdv. (e) this section.

[9] Norridgewock v. Hale, 80 Me. 362 14 Atl. 943. See Bigelow v. Bridge, 8 Mass. 275; State of Louisiana v. Powell, 40 La. Ann. 241, 4 So. 447; South Carolina Soc. v. Johnson, 1 McCord (S. C.) 41. *Compare* Yawger v. American Surety Co. 212 N. Y. 292, L.R.A.1915D, 481, 106 N. E. 64, *considered* under subdiv. (bb) this section.

[10] Connecticut General Ins. Co. v. Chase, 72 Vt. 176, 53 L.R.A. 510, 47 Atl. 825.

As to concealment, see §§ 1844, 2002a, subd. (b) herein.

As to misrepresentations and warranties: guaranty insurance: knowledge of assured, etc., see § 2002a, subdivs. (k)-(m) herein.

But where there is nothing to show that the employer had knowledge of the employee's gambling habits, said fact has no material bearing upon the right to recover.[11] Again, a material departure from the terms of the contract where it affects the substantial rights of insurer, operates as a release from its liability on a bond guaranteeing the faithful performance by an agent of his duties, as when the employer permits said employee to continue the transaction of the agency business without requiring him to make weekly reports as stipulated in the guaranty contract.[12] But it is also held that one who at the request of the principal, and without the knowledge of the obligee, signs a bond for the principal's conduct as an insurance agent is not released by the principal's previous neglect in the same employment to make payments promptly which were subsequently made good, nor by the obligee's continuing him in his employment after such default, and if the surety allows his name to remain without protest after learning of such default, he is liable in future.[13]

(x) *Renewals: fidelity guaranty.*[14]—As to the effect upon risks and losses, or upon liability, where there are renewals of fidelity guaranty insurance bonds, the decisions are not in harmony. Necessarily the determination of this question ought to depend upon the language of the original and renewal bond or bonds, and generally if it appears that it was intended that renewals should cover the same subject matter, the same risk, and the same liability as the original bond, then such intent should govern and the bonds be held one entire or continuous contract, but otherwise if the deducible intent shows that each renewal, or any one renewal was intended to be a separate and distinct contract in nowise dependent upon or connected in terms with the original bond, or upon any other prior or subsequent renewal; and in ascertaining this intent, the rules of construction governing insurance contracts should be considered. Beyond this general rule the decisions rest upon no common ground. The following authorities, however, are submitted:

It is held in Tennessee, that if a bond is renewed there is still only one contract and one penalty, the renewal being a new bond

[11] Fidelity & Deposit Co. v. Colorado Ice & Storage Co. 45 Colo. 443, 103 Pac. 383, 38 Ins. L. J. 1094.

[12] Fidelity Mutual Life Ins. Co. v. Dewey, 83 Minn. 389, 54 L.R.A. 945, 86 N. W. 423.

[13] Home Ins. Co. v. Holway, 55 Iowa, 571, 39 Am. Rep. 179.

[14] As to attachment and duration of risk: renewals: guaranty insurance: whether new contract or continuation of old one, see § 1470a herein.

As to renewals generally, see §§ 1459 et seq. herein.

As to representations and warranties: renewals: guaranty insurance, see § 2002a herein.

As to measure of recovery: guaranty insurance, see § 3454b herein.

merely for the purpose of extending for a new period of time the indemnity stipulated for in the original bond.[15] Under a Kentucky decision if the original bonds contain the same conditions, as, where they each guarantee insured against loss during the continuance of said term or any renewal thereof on discovery during said continuance, or within a specified time limit thereafter, the contract is a continuing one, so that if a greater part of the loss takes place by the bonded employee's defalcation during the term of the second bond, but it is not discovered until after renewal thereof, there may be a recovery for a total loss occurring from inception of the risk and up to the limit of the guaranty; and recovery is not limited to the amount of loss subsequent to the renewal thereof.[16] In an Ohio case it is determined that both the renewal and the original bond should be construed together, not only because they related to the same subject matter, but because each in terms related to the other; that the terms of the original bond showed that when it was issued a renewal or continuation thereof was contemplated and an instrument was executed whereby insurer continued the original bond subject to all its terms and conditions, etc.; and the contention that both instruments were in legal effect the same as though the original bond had been executed for the entire period covered by both bonds, that is for two years instead of for one was sustained. The court, per Shauck, J., said: "By the material stipulations of the original bond the obligor undertook to make good any loss which the obligee might sustain by reason of the fraud or dishonesty of its cashier, 'committed during the continuance of said term or any renewal thereof and discovered during said continuance or any renewal thereof, or within six months thereafter.'" Here are no words of severalty or discrimination respecting the time of the discovery, and since it would not be within the proper function of interpretation to supply such words the terms of the stipulation must be regarded as within the same construction. This view is enforced by the consideration that the term during whose continuance a deposit was contemplated by the original instrument is the term which was continued by the express terms of the second; no terms are used to suggest that any difference in the relation of the parties was intended by the second instrument than such as would have existed

[15] First National Bank v. United States Fidelity & Guaranty Co. 110 Tenn. 10, 100 Am. St. Rep. 765, 75 S. W. 1076.

[16] United States Fidelity & Guaranty Co. v. Shepherd's Home Lodge, No. 2, 163 Ky. 706, 174 S. W. 487. See also Fidelity & Deposit Co. of Md. v. Champion Ice Manufacturing & Cold Storage Co. 133 Ky. 74, 117 S. W. 393.

if the original bond had been for two years. It is conceivable then that, if this question had been anticipated by the parties at the time of the execution of these instruments, clearer terms would have been used to express their intention with respect to it. But certainly in view of their stipulations nothing more favorable to the obligor can be concluded than that an interpretation against it is doubtful. (1) It being entirely clear that within the contemplation of both parties their stipulations were for the purpose of affording indemnity to the obligee, all substantial doubts with respect to the meaning of the terms they employ should be so resolved as to effectuate that obvious intention." [17]

It is held, however, that a renewal bond is a new and independent contract and not a continuation of the original bond where the terms of the two appear upon comparison to be essentially different as is also the subject matter and the later bond makes no reference to the former instrument which had expired. This applies where by the earlier bond insurer makes itself liable for such acts of the bonded employee as amount to "embezzlement or larceny" and under the last policy its liability covers pecuniary loss growing out of "any act or acts of fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful abstraction or misapplication, or misappropriation or any criminal act by "said employee" directly or through connivance in any position and at any location in assured's employment and the term of said insurance depended upon certain conditions and was for no definite time and so differed from that fixed in the original policy which was for a definite time; nor in such case is the contention that the later policy was a continuation of the pre-existing insurance and not a new and independent contract aided by the claim that as an inducement to write the first bond insured agreed to renew, continue or extend it from time to time, for consideration of the premium paid, and without any further or additional cost, expense, trouble or annoyance to

[17] Rankin v. United States Fidelity & Guaranty Co. 86 Ohio St. 267, 99 N. E. 314, 41 Ins. L. J. 1753. The condition of the first bond was "make good and reimburse to the said employer, such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of the said employee in connection with the duties of his office or position, amounting to embezzlement or larceny, and which shall have been committed during the continuance of said term, or any renewal thereof, and discovered during said continuance or any renewal thereof, or within six months thereafter," etc. The second bond provided that the insurer "hereby continues in force" the original bond, specifying the term of one year beginning with the end of the term of the first bond "subject to all covenants and conditions of said original bond."

insured.[18] So under a Mississippi decision where the original and renewal bonds were each issued for the term of one year, and upon the same conditions, it is decided that the original bonds and each of the renewals do not constitute one continuous contract but are separate and distinct contracts and therefore liability for losses was confined to those only which occurred during the term or separate life of each bond, that is during one year and discovered during the continuance or renewal, or within six months after the expiration of said term. The case, however, also turned upon the held to be insufficient allegation of the complaint in that it failed to specifically allege that the acts in question were done during the continuance of said term or any renewal thereof, and discovered during said continuance or any renewal thereof, or within six months thereafter, and there was a failure to declare upon the particular bond or renewal current at the time.[19]

The terms of renewals are also held to be governed by new applications instead of the original ones, where the former are required and made, and by the terms of the original bond, it is stipulated to continue for one year only subject to renewals so long as the employer may wish "to continue this bond" and insurer shall consent to receive a like or agreed premium, for in such case the matter of renewals is one of agreement between the parties.[20] And in a New York case it is decided that such renewals cover separate and distinct liabilities, but it was so stipulated.[21] Again, a bond given by a re-elected president of a corporation is a new and independent undertaking, and in no sense a renewal or continuance of his previous bond, even though incorporating the covenants and conditions of said prior bond.[1]

Another point is that if no definite term for the duration of the bond is stated therein but the application justifies the understanding by the applicant that its renewal depends on payment at the end of the year of the annual premium and the contract is silent as to the party who may exercise the option to terminate the contract, it may be ended by the one who procured it and who is obligated to pay the premiums. In other words, where the application has been made a part of the bond and its language taken in

[18] Miners' & Merchants' Bank v. United States Fidelity & Guaranty Co. 233 Fed. 654, 147 C. C. A. 462.

[19] United States Fidelity & Guaranty Co. v. Williams, 96 Miss. 10, 49 So. 742.

[20] Danvers Savings Bank v. National Surety Co. 166 Fed. 671, 92 C. C. A. 423.

[21] Alex. Campbell Milk Co. v. United States Fidelity & Guaranty Co. 146 N. Y. Supp. 92, 161 App. Div. 738.

[1] Sherman v. Harbin, 125 Iowa, 174, 100 N. W. 629, *distinguishing* First National Bank v. United States Fidelity & Guaranty Co. 110 Tenn. 10, 75 S. W. 1076.

connection with that of the bond imports that while the bond may run indefinitely, but one year at a time, and be continued providing the annual premium is paid, the contract is a continuing one only by force of mutual consent, and, if assent is refused by the applicant for the bond, to a continuance of the contract liability to his future conduct, the risk does not attach.[2] It is further decided that the sureties on the second term of a bond of a treasurer must, in order to release themselves, show that a deficiency occurred during a former term.[3]

If fictitious credits by falsifying his accounts are given a customer by a bank clerk, and these acts have extended over a series of years covered by different bonds, the liability of the surety on the last bond will be determined by appropriating the customer's deposits during said time to the checks drawn during the same period, and if by said tests the drafts have not exceeded the deposits, the bank has sustained no loss for which the last surety is chargeable; and in such case transactions which occur during the absence of the clerk, who has for a short time overstayed his vacation, must also be considered, for he must be regarded as still in the bank's service where the latter has recognized their relations as still existing for the purpose of adjusting the liability of his bondsman for losses occasioned by reason of such fictitious credits being given.[4] Again, if by the terms of the bond the liability is not to lapse if the bond is renewed at the end of the term, but it is not to be cumulative, the total liability under the original and renewal bonds is limited by the specified amount in the bond.[5]

(y) *Notice of acts of employee affecting loss: precautions against loss.*—If a guarantee requires notice to the guarantor immediately of any criminal offense of the employee whose fidelity is insured,

[2] Bryant v. American Bonding Co. 77 Ohio St. 90, 82 N. E. 960, 37 Ins. L. J. 72 (bond was to state guaranteeing faithful performance of his duty by state officer).

[3] Pine County v. Willard, 39 Minn. 125, 39 N. W. 71; Roper v. Sangamon Lodge, 91 Ill. 518, 33 Am. Rep. 60. See Crawn v. Commonwealth, 84 Va. 282, 4 S. E. 721.

[4] First National Bank v. National Surety Co. 130 Fed. 401, 64 C. C. A. 601, 66 L.R.A. 777 (in this case the surety company agreed to pay to the employer bank "the amount of any loss or damage that shall happen to the employer, in respect of any funds, property or estate belonging to or in the custody of the employer, through the dishonesty of any of the employees, or through any act of omission or commission of any of the employees, done or omitted in bad faith, and not through mere negligence, incompetency, or any error of judgment," etc.). See First National Bank of Crandon v. United States Fidelity & Guaranty Co. of Balt. 150 Wis. 601, 137 N. W. 742, 41 Ins. L. J. 1893 (where condition of bond same as above) *considered* under subdv. (o) this section.

[5] American Bonding Co. v. Morrow, 80 Ark. 49, 96 S. W. 613.

and for which insured may make claim, a failure to give the required notice avoids the policy.[6] And where the policy stipulates that the assured shall within a specified number of days after discovery of any fraud or dishonesty of the employee, and any matter in respect to which any claim is intended to be made, notify the society at its office in writing, stating as far as the case will permit all the particulars thereof, and that the guarantee shall end as to all future acts of frauds and dishonesty by the employee after discovery thereof, such conditions refer only to claims intended to be made, and concerning acts of fraud or dishonesty which may be the foundation of a claim against the insurers,[7] this question is, however, considered more fully elsewhere herein.[8]

(z) *Limitation clauses affecting actions or suits: statute of limitations.*[9]—A fidelity guaranty bond may, without contravening public policy, limit the liability of insurer on such bond to losses occurring and discovered within a specified term, where such guaranty does not attempt to fix the period within which suit shall be brought; nor is such a condition violative of a statute providing when an action for relief on the ground of fraud may be commenced, and that such right of action shall not be deemed to accrue until after discovery, but also that no action shall be brought after the expiration of a certain number of years after perpetration of the fraud.[10] And construction of such limitation of the

[6] Molson's Bank v. Guarantee Co. of North America, Montr. L. R., 4 Sup. Ct. Rep. 376. Where the policy stipulates that the books are kept in a certain manner and will be so kept, and that immediate notice be given the insurer, upon the employer's ascertaining the fact, of any criminal offense entailing or likely to entail loss to the employers and for which a claim was liable to be made under the policy, and the evidence showed no proper supervision of the books and that the guarantors were not notified until a week after the employee's defalcation and after he had left the country, a recovery was refused: Harbor Commissioners of Montreal v. Guarantee Co. of North America, 22 S. C. R. (Can.) 542, 30 Can. L. J. (N. S.) 215. If an employer is insured against pecuniary loss sustained by him by reason of the dishonesty of employees "committed and discovered during the continuance of this agreement, and within three months from the death, dismissal, or retirement of the employee," and it is also stipulated that immediate notice be given to the company on the discovery of the employee's fraud or dishonesty, and the defalcation was not discovered until after the policy had lapsed, and the company was not notified thereof until eleven days after the discovery, when the employee had left the country, recovery was denied: Commercial Mutual Building Soc. v. London Guarantee & Accident Co.

[7] Byrne v. Muzio, 8 L. R. (Ir.) 396. Montr. L. Rep., 7 Q. B. 307.

[8] See § 3336 herein.

[9] See chapter LXXXI. (§§ 3181 et seq.) herein.

[10] Ballard County Bank's Assignee v. United States Fidelity & Guaranty Co. 150 Ky. 236, 150 S. W. 1; Ky.

right to sue, will be against the maintenance of any claim calculated to impair the indemnity or suretyship under a bond furnished by a paid or compensated surety in a form prepared by it.[11] So where a bond guaranteeing the integrity of an employee provides that no action, suit or proceeding in law or equity shall be maintained on said bond, unless the same was commenced within one year from the time of making claim on insurer for the loss in respect to which said action is brought, such provision does not require insured to first exhaust its remedies against others who may be liable before bringing suit on the bond, for the covenant is that insurer will pay to insured the amount of any loss or damage sustained under its indemnity, not that it will pay only after other probable or possible remedies have been exhausted.[12] And that breach of contract which creates a liability on the bond is what is meant by a limitation of the right to bring suit on the bond to a specified period after the first breach of the contract guaranteed.[13] Again, as to insured's rights if the policy fixes a time limit from the larceny, embezzlement, or default of the employee, within which insurer or the surety will pay the loss, it is bound thereby and suit may properly be brought after the expiration of said time, at least a demurrer to a petition will not be sustained where it alleges that more than the time so specified has elapsed since the employee's default.[14]

The statute of limitations begins to run and a cause of action accrues from the time when pecuniary loss results in case damage is required to be shown before a party who is guaranteed indemnity is entitled to recover; said statute, however, begins to run from the date of default in performance, irrespective of the question of damage suffered through the employee, where the bond is conditioned upon the performance of a certain act. If there are several breaches of an agent's bond an action is not barred as to subsequent breaches even though the limitation period has expired as to a prior breach, for the statute runs to each breach from the time of its occurrence. Accordingly in case of a bond guaranteeing that

Stat. secs. 2515, 2519. See § 3181 herein.

[11] Fitger Brewing Co. v. American Bonding Co. of Balt. 115 Minn. 78, 131 N. W. 1067.

[12] First National Bank of Crandon v. United States Fidelity & Guaranty Co. of Balt. 150 Wis. 601, 137 N. W. 742, 41 Ins. L. J. 1893. See Champion Ice Manufacturing & Cold Storage Co. v. American Bonding Co. 115 Ky. 863, 25 Ky. L. Rep. 239, 103 Am. St. Rep. 856, 75 S. W. 197, 32 Ins. L. J. 808, *considered* at end of subdv. (ee) this section.

[13] Fitger Brewing Co. v. American Bonding Co. of Balt. 115 Minn. 78, 131 N. W. 1067.

[14] Oklahoma Sash & Door Co. v. American Bonding Co. — Okla. —, 153 Pac. 1151.

agents shall "well and faithfully perform their duties as such agents," etc., the condition is broken where loss occurs through the breach and the statute begins to run from the time when loss to the obligee results from their misconduct.[15]

(aa) *Extent of liability: aggregate amount of bond: fund for creditors, how reached.*—If a bond is given conditioned upon the principal faithfully holding, transmitting, and paying over all moneys received by him for transmission to foreign countries, and also faithfully keeping and paying over all moneys received by him upon deposit and the principal absconds, the extent of liability upon said bond is limited in the aggregate by the amount of the undertaking and such amount constitutes a fund which is subject to the payment pro rata of the creditors and is to be distributed among them in accordance with the amount respectively due them, so that said fund can be reached only by an action or suit in a court having equitable jurisdiction; and liability on said bond is not determined as to a single claimant by his diligence in prosecuting a claim against the fund, for he does not thereby become entitled to priority of payment.[16]

(bb) *Extent of liability on successive official bonds: contribution by sureties.*—Under a New York decision the questions of liability on official bonds for successive terms and also of the extent of liability of a surety seeking contribution were determined. It appeared that the bond of a supervisor and ex-officio treasurer of a town provided that if he should faithfully account for all moneys that "may come into his hands, as such supervisor, and pay over the same pursuant to the provisions of law or the order or resolution of the board of trustees of the town of . . . , and shall faithfully perform the duties of his office to the best of his skill and abilities, then this obligation to be void, otherwise to remain in full force and effect." The treasurer's duties under the town charter were to receive and hold the town's moneys and to "keep a correct account of all moneys received and paid out by him, and when required, to furnish to the board a statement of the moneys in his hands." Upon his re-election he gave a second bond, but with another surety. Before the bond for the first term expired he had deposited sums aggregating a large amount of the town's money in a bank, only a small proportion of which had been drawn out by him during said period. After re-election he continued his

[15] Northern Assurance Co. of England v. Borgelt, 67 Neb. 282, 93 N. W. 226, 32 Ins. L. J. 266.

[16] Illinois Surety Co. v. Mattone, 122 N. Y. Supp. 928, 138 App. Div. 173, 39 Ins. L. J. 1083, under Laws 1907, c. 185, as am'd by L. 1908, c. 479, *citing* upon amount of liability Guffanti v. National Surety Co. 118 N. Y. Supp. 207, 133 App. Div. 610, aff'd 196 N. Y. 452, 90 N. E. 174; Musco v. United Surety Co. 117 N. Y. Supp. 21, 132 App. Div. 300, aff'd 196 N. Y. 459, 90 N. E. 171.

deposits and as only a small amount was drawn against the same a final balance for the two years to a large amount of the town's money was left in the bank. At the time the second bond was given the bank was insolvent and could not have paid the deposit although said bonded supervisor had no knowledge of said fact. His successor in office made demand for payment of this balance and obtained judgment in a foreign jurisdiction against the surety on the second bond,[17] who, not as a volunteer but by force of said adjudication, satisfied the same, and this action was brought by its receiver to enforce an equitable contribution. It was contended that as said supervisor while acting as his own successor continued his account during his second term the sole liability rested upon the second surety, but it was held that he did not thereby account for the money which came into his hands during his first term and had not paid it over pursuant to law, and that to the extent of the loss suffered during the first term the first as well as the second surety was liable to the town, therefore the latter, having not voluntarily but by force of said adjudication, discharged a debt for which the defendant as first surety was equally bound, it was entitled through the remedy of contribution to enforce an equitable division. It was also claimed that without identity of liability between sureties there was no right to contribution, but this argument was held to be without force.[18]

[17] In Town of Cicero v. Grisco, 240 Ill. 220, 88 N. E. 478.

[18] Yawger v. American Surety Co. 212 N. Y. 292, L.R.A.1915D, 481n, 106 N. E. 64, 44 Ins. L. J. 489, s. c. 142 N. Y. Supp. 1151, 157 App. Div. 911, s. c. 141 N. Y. Supp. 491, 156 App. Div. 504, the court, per Cardozo, J., said: "It is important to bear in mind the nature of a public officer's liability for public moneys received by virtue of his office. His liability does not grow out of negligence. It is absolute, admitting of no excuse, except perhaps the act of God or the public enemy, Tillinghast v. Merrill, 151 N. Y. 135, 142, 34 L.R.A. 678, 56 Am. St. Rep. 612, 45 N. E. 375; Smythe v. United States, 188 U. S. 156, 23 Sup. Ct. 279, 47 L. ed. 425. . . . The allegation in this complaint is, in substance, that the Lincoln bank lost the money, and lost it during the first period, at the end of that term it was no longer money in Grisco's," (said supervisor's) "hands; it was no longer money in bank; it was merely a fictitious and misleading entry on the balance sheet. In these circumstances it is impossible to hold that Grisco accounted for the money by keeping his books as if he still held it. The fact is that he had already lost it, and he has never put it back. He may have been innocent of any wilful wrong, but that does not absolve him. He may have been ignorant of the loss, but that again does not absolve him. He did not account for the money by innocently carrying forward a fictitious balance any more than he would have accounted for it by carrying forward such a balance with guilty knowledge. . . . Before the first term was ended the money had been lost and something more than mere words was needed to restore it. . . . It is argued, however, that if the first surety was liable to the town for the deposits lost during the first term, the second surety on a proper construction of its bond, was not, and that

(cc) *Discharge or release from liability.*—A general rule is that if a condition known to the obligee upon which a surety agrees to be bound is not complied with, the surety is discharged and parties who have entirely failed to keep their agreement, cannot enforce the fulfilment of the covenant; and the party who commits the first substantial breach of a contract, is precluded from maintaining an action against the other party for a subsequent failure to perform.[19] Liability under the bond will also be terminated by the death of the employer, for it extends only up to that time, and this applies even though the employer's business is continued by his executors.[20] So fraud perpetrated against the rights of sureties

without identity of liability between sureties the right to contribution fails. We think the argument as applied to the case at bar is without force. The second surety in paying this loss was not a volunteer. It resisted the town's suit and did not pay till its liability was adjudged. Town of Cicero v. Grisco, 240 Ill. 220, 88 N. E. 478. The adjudication seems to be in accord with the settled rule in Illinois. Morley v. Town of Metamora, 78 Ill. 394, 20 Am. Rep. 266; Cowden v. Trustees of Schools, 235 Ill. 604, 23 L.R.A.(N.S.) 131, 126 Am. St. Rep. 244, 85 N. E. 924. At all events the second surety having discharged the defendant's liability not officiously, but under compulsion of law, has brought itself within the reason and the equity of the rule of contribution. Aspinwall v. Sacchi, 57 N. Y. 331; Pease v. Egan, 131 N. Y. 262, 273, 30 N. E. 102. Our conclusion, therefore, is that the town treasurer did not account for the town's moneys and pay them over to his successor by taking office a second time and giving a new bond, and that to the extent that the moneys were lost during the first term the defendant continued liable."

See further as to right of sureties to contribution:

*United States.*—United States Fidelity & Guaranty Co. v. Naylor, 237 Fed. 314, — C. C. A. —.

*Alabama.*—Carter v. Fidelity & Deposit Co. 134 Ala. 369, 92 Am. St. Rep. 41, 32 So. 632.

*Kentucky.*—United States Fidelity & Guaranty Co. v. McGinnis' Admr. 147 Ky. 781, 145 S. W. 1112.

*New York.*—People v. Metropolitan Surety Co. 161 N. Y. Supp. 616, 175 App. Div. 43.

*Ohio.*—Assets Realization Co. v. American Bonding Co. of Balt. 88 Ohio St. 216, 102 N. E. 719.

*Pennsylvania.*—Fidelity & Deposit Co. of Md. v. Phillips, 235 Pa. 469, 84 Atl. 432.

*Texas.*—First State Bank of Teague v. Hare, — Tex. Civ. App. —, 190 S. W. 1113.

*West Virginia.*—Central Banking & Surety Co. v. United States Fidelity & Guaranty Co. 73 W. Va. 197, 51 L.R.A.(N.S.) 797, 80 S. E. 121.

[19] Rice v. Fidelity & Deposit Co. of Md. 103 Fed. 427, 43 C. C. A. 270.

As to effect of cancelation by reinsurer, see subdv. (e) this section.

[20] Roth v. Massachusetts Bonding & Surety Co. 158 Wis. 469, 149 N. W. 143, 44 Ins. L. J. 706.

As to the effect of the death of a surety for the integrity of a person under the law governing principal and surety, see Balfour v. Grace (1902) 1 Ch. 733, 2 B. R. C. 929, and note 937. This reference is made, however, only for the purpose of comparison of the principles there stated with cases of the character here under consideration which relate to paid sureties, to whom the rule of strict construction does not apply.

whereby they are induced to execute a new bond, as in case of failure to disclose the fact that the employee has retained a bonded employee in service on condition that he pay a prior shortage and execute a new bond, operates to release a surety who is ignorant of the facts.[1] Under a statute allowing a surety company to be released from its liability on a bond in the nature of a fidelity insurance contract, on the same terms as an individual, such a company can release itself from liability only by getting off the bond.[2]

(dd) *"Fraud or dishonesty" "amounting to embezzlement or larceny:" Remedy is ex contractu, upon a contract and not based upon tort to recover a penalty, not only so in form but also in its nature: pleading: affidavit of defense.*—Although the following Federal decision goes to the form of remedy and matters of practice, its importance and general value rests upon the questions involved and determined not only as to the nature of contracts of this character, but also upon the fact that the point was in issue, discussed and determined as to the distinction between contract and tort, both under a statute and at common law when an action or suit is to recover the guaranteed reimbursement under a fidelity bond. The suit was brought in assumpsit. The bond stipulated that insurer would "make good and reimburse to the said employer such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of any or either of the employees named upon said schedule, or added thereto as hereinafter provided, in connection with his duties as specified on said schedule, amounting to embezzlement or larceny and which shall be committed during the continuance of said term" etc. It was alleged that said employee had defrauded the plaintiff, assured, of the several itemized sums claimed, by embezzling at specified times the money which he had received from the sale of certain automobiles or from the improper sales of such. The question involved went to the necessity and sufficiency of an affidavit of defense. It was contended that while the action was in form in assumpsit, it was in reality not ex contractu because based on a penal bond for the misfeasance, fraud and dishonesty of plaintiff's agent, and in its very nature ex delicto and therefore no affidavit was required. Accordingly the controlling feature of the case resolved itself into a question whether recovery was dependent solely upon the contract in suit, and it was held that the action was not in tort to recover a penalty, but was

[1] Connecticut General Life Ins. Co. v. Chase, 72 Vt. 176, 53 L.R.A. 510, 47 Atl. 825.

As to concealment, see §§ 1844, 2002a, subdiv. (b) herein.

As to misrepresentations and warranties: guaranty insurance: knowledge of assured, etc., see § 2002a, subdivs. (k)–(m) herein.

[2] Bank of Tarboro v. Fidelity & Deposit Co. 128 N. Car. 366, 83 Am. St. Rep. 682, 38 S. E. 908.

within the Pennsylvania statute requiring that all demands previously recoverable in debt, assumpsit, or covenant, should be sued for and recovered in an action in assumpsit, and that defendant must file an affidavit of defense. But as above stated, the real point was whether recovery was dependent solely upon the contract in suit. The court, per Witmer, D. J., said: "That no recovery can be maintained without it will be conceded, and upon it alone; it is equally certain, rests the plaintiff's cause of action. It is not misappropriation or embezzlement of moneys by the defendant that gives rise to the suit, nor is it even hinted that the defendant has been guilty of wrongdoing, but because of the defendant's contract with plaintiff to make good and reimburse the latter for all such moneys as may be wrongfully retained by plaintiff's employee. We have here a definite promise to pay a sum of money to the employer, to be measured only by the amount of loss sustained through the conduct of the employee, up to the maximum provided in the bond, and this amount is specifically set forth in the plaintiff's statement and is as easy of liquidation as in an action for moneys had and received. . . . 'The form of the action under the common law before the Act of 1887, would have been covenant. . . . That the act of the principal in the bond, in not faithfully performing the duties of his office, amounts to a tort does not take the case out of the provisions of the Act of Assembly. . . . The action here, however, is clearly an action ex contractu, as it is upon the defendants undertaking to pay to the trust company a certain amount of money upon the failure of the principal in the bond to do or not to do certain things.' " It is noteworthy that the court holds as above stated notwithstanding it makes an exception of cases where the proof sounds in tort or crime rather than in contract.[3]

(ee) *Defenses: general instances.*[3a]—It constitutes no defense that a bonded employee had defaulted on prior occasions if the insured employer is ignorant thereof, where the bond is qualified by a condition that it is issued upon the express understanding that said "employee has not within the knowledge of the employer at any former time been a defaulter." [4]

[3] Edward F. Gerber Co. v. Title Guaranty & Surety Co. (U. S. D. C.) 216 Fed. 980, 45 Ins. L. J. 102 (under Pract. Act Pa. May 25, 1887, sec. 1; P. L. 271), *quoting* from and *adopting* as the law governing this case Rathfon v. City Trust Co. 24 Lanc. L. Rev. (Pa.) 113.

[3a] As to defenses generally to actions on insurance contracts, see §§ 3731–3744 herein.

[4] Legler v. United States Fidelity & Guaranty Co. 88 Ohio St. 336, 103 N. E. 897. See § 2002a subdv. (1) herein.

*Defenses: that validity of bond may depend upon signature of employee as condition precedent,* see National Surety Co. v. Rieves, 112 Miss. 747, 73 So. 732; Oklahoma Sash & Door Co. v. American Bonding Co. — Okla. —, 153 Pac. 1151; Prosser Power

So fraud of the principal in misleading a surety as to the character and extent of the obligation signed and assumed constitutes no defense against the payee or obligee where it does not appear that the latter had knowledge thereof or participated therein.[5] And a condition of a bond voiding it if assured makes any settlement with the principal for any loss thereunder, and another provision limiting recovery to such proportion of the loss as the full amount of security, valid or invalid, carried by assured sustains to the amount covered by the bond, are neither of them broken by acceptance by assured from his employee of a worthless deed, subsequently repudiated, and also a note to secure defalcations prior to execution of the bond in suit.[6] If, however, notes covering the defalcations are conditioned not to prosecute they are against public policy and void.[7]

As to recourse to another: In a Kentucky case it was part of the duty of an employee, whose fidelity was guaranteed, to make out checks payable to himself for his employee's weekly payrolls, have them signed, and obtain cash thereon at the bank. He fraudulently raised said checks, obtained the cash thereon and appropriated to himself the excess over the amounts for which they were actually issued. In an action against insurer upon the bond, it was contended that the bank which cashed said raised checks was the sole loser by the employee's fraud and must account to the employer, under the laws of banking, for the amount of defalcation consequent thereon and, therefore, there was no cause of action upon the bond for said amount, but this contention was not sustained, as under the facts of the case the knowledge of the bank

Co. v. United States Fidelity & Guaranty Co. 73 Wash. 304, 132 Pac. 48 (waived). When bond valid though not signed by employee, see Adams Co. v. Nesbit, — S. Dak. —, 159 N. W. 869. When bond not invalid even though conditioned that employee's signature essential: obtained after its expiration, American Bonding & Trust Co. v. New Amsterdam Casualty Co. 125 Ill. App. 33. See American Surety Co. of N. Y. v. Pangburn, 182 Ind. 116, 105 N. E. 769. That condition as to signature of employee may be waived, see General Railway Signal Co. v. Title Guaranty & Surety Co. 203 N. Y. 407, 96 N. E. 734, 41 Ins. L. J. 600. When employee, not signing bond not liable under bond to indemnify surety company against loss on bond guarantying said employee's fidelity, see Hall v. Equitable Surety Co. — Ark. —, 191 S. W. 32. See § 178a, also § 54b herein.

[5] Lucas v. Owens, 113 Ind. 521, 16 N. E. 196 (principal and surety). *Examine* § 2002a, subdiv. (m) herein.

[6] Prosser Power Co. v. United States Fidelity & Guaranty Co. 73 Wash. 304, 132 Pac. 48.

As to compromise and settlement: accord and satisfaction: release, see § 3465a herein.

[7] United States Fidelity & Guaranty Co. v. Charles, 131 Ala. 658, 57 L.R.A. 212, 31 So. 558.

that it was the duty of said employee to fill out such checks, would preclude any suspicion on its part as to the amount being raised. It was also decided that even though the bank was liable to the employer for the amount the checks were raised, the fact would not exonerate insurer from liability, as it would restrict the law of insurance and suretyship to an absurd degree to hold that insurer cannot be held liable until after insured, having exhausted every other remedy or having prosecuted to insolvency any others who might be liable, is still not reimbursed.[8]

(ff) *Action by surety to recover money paid: what constitutes "fraud" or "dishonesty."*—In a Minnesota case the condition of the bond was: "make good and reimburse to the said employer, such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of any or either of the employees named . . . in connection with his duties as receiving agent or buyer . . . Provided . . . that the company shall be liable only for the acts of fraud or dishonesty on the part of the persons . . . who act as receiving agents, for shortages in their grain accounts as follows" etc., providing a mode of ascertaining shortages, but no liability was assumed for the said employee's errors, mistakes, or mere negligence. There was no evidence tending to impeach or cast suspicion upon the employee's honesty or integrity outside of the bare fact of an alleged shortage, and the employee testified positively that he had never admitted that there was any shortage and that he had never used or converted to his own use any particle of assured's grain. It was held in an action brought to recover money paid to defendant's employer on account of said alleged shortage of defendant upon a bond executed by plaintiff in favor of said employer that there was no shortage for which the plaintiff was liable to the employer on the bond, and a finding by the trial court in favor of defendant was affirmed.[9]

[8] Champion Ice Manufacturing & Cold Storage Co. v. American Bonding Co. 115 Ky. 863, 25 Ky. L. Rep. 239, 103 Am. St. Rep. 856, 75 S. W. 197, 32 Ins. L. J. 808. See also First National Bank of Crandon v. United States Fidelity & Guaranty Co. of Balt. 150 Wis. 601, 137 N. W. 742, 41 Ins. L. J. 1893, *considered* under subdiv. (z) this section.

[9] Fidelity & Casualty Co. of N. Y. v. Crays, 76 Minn. 450, 79 N. W. 531. See Fidelity & Casualty Co. of N. Y. v. Eickhoff, 63 Minn. 170, 30 L.R.A. 586, 56 Am. St. Rep. 464, 65 N. W. 351, where the condition of the bond was the same and the employee's obligation was held coextensive with that of the plaintiff to assurer where the guaranty was executed at the employee's request. See also upon the point of obligation being coextensive only, Lion Bonding & Surety Co. v. Capital Fire Ins. Co. 96 Neb. 51, 146 N. W. 1051, 1054. *Examine* Hall v. Equitable Surety Co. — Ark. —, 191 S. W. 32, where bond to indemnify surety company from loss on its bond guaranteeing fidelity of employee was held an indemnity contract and no

(gg) *Pleading and evidence: fraud, dishonesty, embezzlement, larceny, etc.*—Although a complaint fails to set out in full the contract of suretyship, the failure is cured by pleadings of defendant making it a part of their answer; and where the complaint alleges the execution of the bond, its renewal, and sets out the substantial features thereof, the alleged fraudulent acts of the cashier and notice to defendant insurer, it is a sufficient averment of facts to entitle plaintiff upon proof of the same to recover if nothing else appears; if any breaches of contract by plaintiff are relied on to defeat recovery they must be specifically pleaded by defendant, and it sustains the burden of proof thereof, for where there are numerous conditions and stipulations in the bond, it would work an injustice to compel plaintiff to set out and prove affirmatively that he had performed each and every one of them and especially is this applicable where the conditions are complicated in their nature.[10] And where a bond stipulates for payment to insured of any loss sustained by him by reason of larceny or embezzlement committed by the employee, a petition sufficiently alleges the embezzlement which sets out in detail in what the defalcation consisted; part in depositing in bank a less amount than the cash book showed he should have deposited, and also alleges that the employee "raised pay roll checks" and sets out a number of instances in which he had done so and appropriated to himself the difference.[11] If a statute provides that a surety bond shall contain certain conditions and the bond sued on shows upon its face the defect or failure to meet statutory requirements, the complaint need not further suggest it.[12] And if insurer is to make good the loss within a certain specified time, such as thirty days, from the larceny or embezzlement of the employee, it constitutes error to sustain a demurrer to a petition which alleges that the default occurred at a time much more than thirty days before suit was brought. But if the employee has paid the amount of the defalcation it is held that the defense should be taken advantage of by a plea of payment.[13]

one of surety or guaranty and that there was nothing to show that the obligee of bond had any remedy whatsoever against the employee whose fidelity was guaranteed and who did not sign the bond.

As to fidelity guaranty: right to subrogation, see § 3577 herein.

As to judicial bonds: joint or several liability: surety's right of subrogation, see § 3568c herein.

[10] Bank of Tarboro v. Fidelity & Deposit Co. of Md. 126 N. Car. 320, 35 S. E. 588, 29 Ins. L. J. 447.

As to sufficiency of declaration, complaint or petition, see §§ 3665, 3666, 3681, 3685 herein.

[11] Oklahoma Sash & Door Co. v. American Bonding Co. — Okla. —, 153 Pac. 1151.

[12] United States Fidelity & Guaranty Co. v. Poetker, 180 Ind. 255, L.R.A.1917B, 984, 102 N. E. 372, 42 Ins. L. J. 1394; Burns's Ann. Stat. 1908, secs. 1278, 3331.

[13] Oklahoma Sash & Door Co. v. American Bonding Co. — Okla. —, 153 Pac. 1151.

Under an agency bond guaranteeing to reimburse to the employer all and any pecuniary loss "by any act of fraud or dishonesty on the part of said employee," if the petition does not charge that the loss sued for was due to fraud or dishonesty of the agent or employee a demurrer thereto should be sustained.[14] When this case deciding as above came subsequently before the court upon an amended petition the above was held to be the law of the case and binding, and that the appellant was responsible for any loss due to the fraud or dishonesty of the employee.[15] And in a Maryland case the bond stipulated that insurer would make good and reimburse to plaintiff assured "such pecuniary loss, if any, as may be sustained by the employer by reason of any fraudulent or dishonest conduct of the employed in connection with the duties of said position, amounting to embezzlement or larceny," etc. The employee was cashier of a bank. The particular acts which it was claimed amounted to larceny through which the losses were sustained, were set out instead of charging in general terms the loss of the money through the fraudulent and dishonest acts of the cashier amounting to larceny, and it was held that while it did not appear necessary to set out in a separate count each breach of a bond of the kind sued on here, the assignment of each breach must be perfect in itself without reference to other breaches; but the counts were held defective in failing to show whether the cashier was guilty as principal or as accessory; other counts were also held bad on demurrer in failing to allege that certain moneys paid out on checks were paid out of the bank's funds.[16]

[14] United States Fidelity & Guaranty Co. v. Merkley, — Ky. —, 65 S. W. 614 (bond stipulated that insurer would "make good and reimburse to the employer all and any pecuniary loss sustained by the employer, of money, security, or other personal property in the possession of the employee, or for the possession of which he is responsible by any act of fraud or dishonesty on the part of said employee. . . . It being the true intent and meaning of this bond that the company shall be responsible as aforesaid for moneys, securities, or property diverted from the employer, through fraud or dishonesty on the part of the employee within the period specified in the bond").

[15] Merkley & Son v. United States Fidelity & Guaranty Co. 24 Ky. L. Rep. 2306, 73 S. W. 1126.

[16] Canton National Bank v. American Bonding & Trust Co. 111 Md. 41, 18 Ann. Cas. 820, 73 Atl. 684. The syllabus to this case reads, as to this point as follows: (1) A bond executed for the faithful performance of the duties of a cashier of a bank, provided that the surety would make good to the bank such pecuniary loss as it might sustain by reason of any fraudulent or dishonest conduct of the cashier in connection with his duties amounting to embezzlement or larceny. In an action on the bond by the bank the declaration did not charge in general terms the loss of the plaintiff's money by the acts of the cashier amounting to larceny but set forth the particular acts alleged

Where the bond limits insurer's liability to losses occurring within a specified time a petition that does not allege that the loss sustained was discovered within the time fixed is bad on demurrer.[17] A complaint is also insufficient which fails to allege facts showing that the time specified, within which assurer agrees to reimburse assured for the loss sustained through the fraud or dishonesty of the employee, had elapsed before the action was brought, and although the code provided that in pleading the performance of conditions precedent it may be stated generally that the party performed all the conditions on its part, still in such case an allegation that plaintiff "duly kept and performed all the conditions of said bond on its part to be kept and performed" is not sufficient.[18] So a stipulation in a one year indemnity certificate that insurer shall not be liable for embezzlements of the collector of insured unless committed and discovered within a year and reported within a certain time thereafter is a condition precedent to a right of action on the certificate and therefore defendant need not plead its nonperformance as a defense.[19] Again, unless a fidelity guaranty bond covers past defaults, no cause of action is stated in a complaint which alleges that the defalcations in question took place during a period commencing a year before and ending at a date subsequent

to have been larcenous. In some of the counts it was alleged that the cashier, without any authority to do so, and with the intention of feloniously taking and carrying away from the possession of the plaintiff, the several sums of money for which checks and notes were drawn, caused the teller of the bank to pay said checks and notes when there was not sufficient money to the credit of the drawers of the same to justify their payment. It was held that if these sums were paid out of the funds of the plaintiff under such circumstances, and the teller was innocent of any felonious intent, or if he participated in the felonious intent and the money was taken and paid in the presence of the cashier, then the cashier was guilty of larceny, but if the teller was guilty and the several sums of money charged to have been taken by him were not taken and paid in the presence of the cashier, then the cashier was only guilty as an accessory before the fact; and that these counts are defective in that they fail to show whether the cashier was guilty as principal or as accessory. (2) It was held, further, that other counts of the declaration are bad on demurrer, because they do not allege that the money paid out on the checks therein mentioned was paid out of the funds of the bank. (3) In an action on an indemnity bond, it is not necessary that the declaration should set out in a separate count each breach of the bond, but the assignment of each breach should be perfect in itself.

[17] Ballard County Bank's Assignee v. United States Fidelity & Guaranty Co. 150 Ky. 236, 150 S. W. 1.

[18] California Savings Bank v. American Surety Co. (U. S. C. C.) 82 Fed. 866, s. c. 87 Fed. 118, 38 Ins. L. J. 688.

As to averment of performance of conditions precedent, see §§ 3674–5 herein.

[19] Sullivan v. Fraternal Society Cooperative Union, 73 N. Y. Supp. 1094, 36 Misc. 578.

to that when the bond in suit became of force, for while under said allegations some or all the acts complained of may have occurred after the bond was executed, nevertheless all of said acts may have occurred prior thereto and said allegations might be literally true and still defendant not be liable.[20] And if a fidelity bond guarantees the faithful performance by a bank cashier of his duties as such during a specified term, and stipulates for liability for his fraudulent acts amounting to embezzlement or larceny "committed during said term and discovered" within said period or within a specified time "after the expiration thereof," a declaration is bad on demurrer which fails to allege when the claimed fraudulent acts of the cashier were discovered.[1] In a Mississippi case wherein it is held that each renewal bond even for the same term or duration and upon the same conditions is a separate and distinct and not one continuous contract, it is also decided in accordance therewith, that an allegation that a declaration or complaint is insufficient where it does not specifically allege that the acts in question were done during the continuance of said term or any renewal thereof and discovered during said continuance, or any renewal thereof, or within six months thereafter that is, the particular bond or renewal current at the time must be declared on setting forth also that the loss was discovered, etc.[2]

*Evidence* of the offense or crime of embezzlement or larceny need not, it is decided, be sufficient to convict the employee thereof in order to justify a recovery upon a bond indemnifying an employer against loss sustained through the acts of an employee "amounting to" larceny or embezzlement.[3] And in a Colorado case where insurer agreed to save insured harmless and indemnify it against loss occasioned by the larceny or embezzlement of an employee, it is said by the court, per Hill, J., that "we are further of the opinion that in a civil action of this kind an instruction which required the plaintiff to make out its case by a preponderance of the evidence as to the embezzlement or larceny of funds, is sufficient, and, considering the purpose for which such indemnity bonds are made, the terms 'larceny' and 'embezzlement' as used therein are intended to mean in their commercial sense, and that it was not error to refuse to give instructions, which in substance

[20] Adams v. Western Surety Co. 35 S. Dak. 194, 151 N. W. 890.

[1] Canton National Bank v. American Bonding & Trust Co. 111 Md. 41, 73 Atl. 684.

[2] United States Fidelity & Guaranty Co. v. Williams, 96 Miss. 10, 49 So. 742.

[3] Champion Ice Manufacturing & Cold Storage Co. v. American Bonding & Trust Co. 115 Ky. 863, 103 Am. St. Rep. 356, 75 S. W. 197. *Examine* subdvs. (f), (g) this section.

required the plaintiff to establish this fact beyond a reasonable doubt as in criminal cases, and that the proper construction of the language of the entire bond with the application and other transactions did not contemplate it would be necessary in order to recover in a civil action, that the evidence should be sufficient in all respects to warrant the conviction of the employee in a criminal case." [4] So conversion of money to his own use by the agent of an insurance company, who had management and control of its financial affairs, is not proven by evidence that he had bought school warrants with the company's funds, in the absence of evidence that the company's directors were ignorant of said purchase or had objected thereto.[5] And evidence that certain money was taken from the chest of a bank, where it also appears that it might have been taken by others who had equal access thereto as had the teller of the bank, and that over these others he had no supervision or control, does not prove personal dishonesty and culpable negligence of said teller whose integrity is insured under a bond to reimburse to the assured bank any loss sustained by reason thereof and which defines "culpable negligence" as meaning "failure to exercise that degree of care and caution which men of ordinary prudence and intelligence usually exercised in regard to their own affairs." [6]

[4] Fidelity & Deposit Co. of Md. v. Colorado Ice & Storage Co. 45 Colo. 443, 449, 103 Pac. 383, 38 Ins. L. J. 1094, 1099.

[5] Lion Bonding & Surety Co. v. Capital Fire Ins. Co. 96 Neb. 51, 146 N. W. 1051.

[6] United States Fidelity & Guaranty Co. v. Des Moines National Bank, 145 Fed. 273, 74 C. C. A. 553, 35 Ins. L. J. 880.

In Finch v. City of Ottawa, 190 Fed. 299, 303–4, 111 C. C. A. 199, Reed, Dist. J., said: "It is true that in United States Fidelity & Guaranty Co. v. Des Moines National Bank, 145 Fed. 273, 279, 74 C. C. A. 553, Mr. Justice Van Devanter then Circuit Judge speaking for this court, said, *quoting* from Asbach v. Chicago, Burlington & Quincy Ry. Co. 74 Iowa, 248, 37 N. W. 182.

"'A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent merely with that theory for that may be true, and yet they may have no tendency to prove the theory.'

"In that case the question for determination was whether certain money taken from the chest of the bank and lost to it was lost because of the 'personal dishonesty or culpable neglect' of a bonded employee of the bank, within the meaning of the undertaking of a surety company which had guaranteed his fidelity, or was taken by others who had equal access to the chest where the money was kept that the bonded employee had, and over whom he had no supervision or control, the only evidence being that the money had disappeared from the chest in some manner not shown. Clearly the disappearance alone of the money would be equally as consistent with its

But it is relevant and material to show that on a certain date the cashier whose fidelity was guaranteed and who had an apparent balance to his credit in a large sum was in reality, partly by reason of various improper actions by him in his fiduciary capacity and also because of other false entries, a debtor to the employer bank to a large amount.[7] A prima facie case of embezzlement which justifies a recovery, in the absence of proof sufficient to overcome the same, is also shown by evidence that the employee collected a certain amount of money which he failed to pay to his employer and that he subsequently disappeared after demand made for the same and that diligent search had to be made for him before he was arrested.[8] And a prima facie case of embezzlement is made out where the evidence shows the volume of business done by a bonded agent of an insurance company, the amount of his principal's money which he had received and converted to his own use, and repeated demands that he pay over the money, and it also appears that said agent had, after the termination of the agency, but with-

theft, or removal from the chest by some other employee who had access thereto, as that it was lost through the 'personal dishonesty or culpable neglect' of the bonded employee. As the burden was upon the bank to show that it was lost through such conduct of the bonded teller, the fact alone that the money was missing was not sufficient to warrant a finding that such was the fact.

"It is not easy to formulate a general rule that will determine in advance the effect, or the weight that shall be given to the infinite variety of circumstances that may be offered to establish a principal fact under judicial investigation; and plainly it was not intended to do so in that case, or in the case from which the quotation is made. Each case must rest upon its own facts, and under the facts there shown it is entirely plain that the circumstances were insufficient to warrant a finding that the pecuniary loss of the bank resulted from the 'personal dishonesty or culpable neglect' of the bonded teller. When different inferences or conclusions may fairly and reasonably be drawn by impartial minds from the proven facts, it is the province of the jury, under proper instructions from the court, to draw them; and only when the facts are such that but one conclusion or inference can reasonably be drawn therefrom may the court declare that conclusion. Northwestern Fuel Co. v. Danielson, 57 Fed. 915–920, 6 C. C. A. 636; Goldsmith v. Thuringia Ins. Co. 114 Fed. 914, 52 C. C. A. 534; and this is all that is held in United States Fidelity & Guaranty Co. v. Des Moines National Bank, supra." The case from which the above opinion is taken was an action for damages for personal injuries and negligence. So much of the above as begins with "a theory cannot be said," etc., is *quoted* in Richards v. United States, 175 Fed. 911, 939, in dissenting opinion of Phillips, D. J.

[7] American Surety Co. v. Pauly, 72 Fed. 470, 18 C. C. A. 644, s. c. 72 Fed. 484, 18 C. C. A. 657, aff'd 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. 552, 29 Ins. L. J. 3, s. c. 170 U. S. 160, 42 L. ed. 987, 18 Sup. Ct. 563.

[8] Marcus v. Fidelity & Deposit Co. of Md. 145 N. Y. Supp. 49. See § 3793 herein.

in the time allowed him to remit collections, admitted the correctness of an account submitted to him and that he had collected and retained the entire balance shown by the account.[9] So a written

[9] United American Fire Ins. Co. v. American Bonding Co. 146 Wis. 573, 40 L.R.A.(N.S.) 661, 131 N. W. 994, 40 Ins. L. J. 1805. The court, per Barnes, J., upon this last point said: "It is conceded by both parties that any admission by the agent of the amount of money in his hands belonging to his principal made prior to his resignation would be competent evidence against the surety. Goldman v. Fidelity & Deposit Co. 125 Wis. 390, 396, 104 N. W. 80, and cases cited. It is contended by the defendant, however, that such admissions were made after the agency was terminated, and were therefore incompetent. There are many cases holding, generally, that declaration or admissions made by an agent when his employment has ceased are not competent in an action by the principal against the surety. . . . The question we have before us therefore is, Where an agent renders an account or O. K.'s an account submitted to him after his employment has ceased, but which it is his duty under his contract to render or to O. K. as the case may be, is that act a part of the res gestæ, and admissible in evidence as such, in an action against the surety? There is no question but that, if the statement had been O. K.'d while he was still actively engaged as agent for the plaintiff it would be receivable in evidence against the surety. Should that rule be extended beyond the term of employment? The case to which our attention has been called that bears most directly on the subject is Father Matthew Soc. v. Fitzwilliam, 12 Mo. App. 445, 449, which was affirmed in 84 Mo. 406. There the treasurer of the society had been removed for dishonesty. After his removal, he made a statement showing the amount of his defalcation, which was admitted in evidence in action against the surety. The latter claimed that the evidence was incompetent, but the court held that it was the duty of the treasurer to make up a statement of his account, and, such being the case, what he did in this regard was as much a part of the res gestæ as if the work had been done before he ceased to be treasurer. Some significance is given to the fact that the statement was made during the term of office for which the defaulting treasurer had been elected, but we fail to see how this fact can have very much weight in determining whether the evidence was admissible or not. He was not the treasurer when the statement was made. It has also been held that, where it is the duty of a public officer to render an account of the moneys in his hands as such officer, but he fails to do so before the expiration of his term a performance of such duty thereafter renders the admission made competent evidence against the surety. Townsend & Gordon v. Everett, 4 Ala. 607, approved in Lewis v. Lee County, 73 Ala. 148; Jenness v. Black Hawk, 2 Colo. 578; Wyche v. Myrick, 14 Ga. 584. These cases are quite analogous in principle to the one before us. Other authorities holding that the true test of admissibility is whether the admission is made in the course of official duty are Greenleaf on Evidence, sec. 187; Douglass v. Howland, 24 Wend. (N. Y.) 35, 59. See also, 2 Wigmore on Evidence, sec. 1077. We perceive no very good reason why, where an agent does an act which it is his duty under his contract to perform, evidence of that act, after his principal duty as agent has ceased, should not be admissible, as well as if made during the time he was actively performing his duties, and we think it would be the better rule to hold such testimony competent. We conclude, therefore, that a prima facie case of embezzlement was made; there being

statement of loss, certified by the duly authorized officer or representative of the employer, who under the circumstances may be a receiver, and based upon the accounts of the employer, constitutes evidence prima facie sufficient to establish the loss, where it is so stipulated in the bond.[10] And where the evidence of a cashier of a bank is positive that a loan was made to an insurance company, solely upon its credit and not to the latter's agent, who had the management and control of its financial affairs, it is not, in the absence of other contradictory evidence, overcome by the fact alone that the note representing said loan was signed by said agent individually, where it also appears that although he applied for the loan to his company, and it was made, still it was placed to the credit of the company in its account to the bank.[11]

Again, in an action to recover on a bond to secure an employer against the embezzlement of an employee, evidence in proof of such offense is admissible against the surety, of entries, reports and statements made in the course of his duties by the employee in the guaranteed employment, and proof may be given of such statements

no evidence offered by the defendant upon the question." Kerwin, J., dissented.

[10] American Surety Co. v. Pauly, 170 U. S. 160, 42 L. ed. 987, 18 Sup. Ct. 563, s. c. 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. 552, 29 Ins. L. J. 3, aff'g 72 Fed. 484, 18 C. C. A. 657, 72 Fed. 470, 18 C. C. A. 644.

[11] Lion Bonding & Surety Co. v. Capital Fire Ins. Co. 96 Neb. 51, 146 N. W. 1051.

*Upon the issue of fraud* it is declared in Hawks, In re (U. S. D. C.) 204 Fed. 309, per Thieber, J., Id. 315, 316, that: "There are certain well-settled rules of law to guide the courts in the determination of such an issue. If the circumstances proven are just as consistent with honesty and good faith as with a fraudulent intent, the inference of fraud is unwarranted. United States Fidelity & Guaranty Co. v. Des Moines Nat. Bank, 145 Fed. 273, 74 C. C. A. 553. To establish fraud, the proof must be clear, unequivocal, and convincing. Jones v. Simpson, 116 U. S. 609, 29 L. ed. 742, 6 Sup. Ct. 538; Thorwegan v. King, 111 U. S. 549, 28 L. ed. 514, 4 Sup. Ct. 529; Farrar v. Churchill, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. 771; Walker v. Collins, 59 Fed. 70, 8 C. C. A. 1; Foster v. McAlester, 114 Fed. 145, 52 C. C. A. 107; Schagun v. Scott Mfg. Co. 162 Fed. 209, 89 C. C. A. 189.

"Proofs which only create a suspicion are not sufficient to warrant a finding of fraud. United States v. Hancock, 133 U. S. 193, 33 L. ed. 601, 10 Sup. Ct. 264; United States Fidelity & Guaranty Co. v. Des Moines Nat. Bank, supra. A mere preponderance of evidence, which at the same time is vague or ambiguous, is not sufficient to warrant a finding of fraud. Lalone v. United States, 164 U. S. 255, 41 L. ed. 425, 17 Sup. Ct. 74.

"But it is not essential that the fraud be established by direct evidence; for that is often impossible. The circumstances proved may raise a sufficient presumption to warrant a finding of fraud; but in such case the evidence must be of such a nature as to be convincing and inconsistent with the presumption of honesty. Bank of Little Rock v. Frank, 63 Ark. 16, 58 Am. St. Rep. 65, 37 S. W. 400."

and admissions from which, in connection with the amounts and records kept by plaintiff he is able to state the amount which the employee has appropriated to his own use. It may also be shown that defendants' agent upon their mutual investigation of such accounts and records concurred with the plaintiff as to the amount of the shortage.[12] So in a suit by a bank upon the bond of its cashier, resembling a fidelity insurance contract, a memorandum of the examination of the cashier before a committee of the board of directors of the bank, prior to the suit, made at the time of the examination, and read over to the cashier, who said it was correct, is admissible in evidence.[13] And where a judgment was obtained by an employer against his employee and the question was as to the admission of this judgment record in an action by an insured employer against the surety company to recover on its bond, the court, per Brown, J., said: "An examination of the question has convinced us that the decided trend of modern authority is to the effect that such a judgment against the principal prima facie only establishes the sum or amount of the liability against the sureties, although not parties to the action, but the sureties may impeach the judgment for fraud, collusion or mistake, as well as set up an independent defense." [14]

But a letter is held inadmissible in evidence which refers to another bond which the employer had given, where it does not appear that the other bond covered the period included in the one in suit.[15] And the actual shipment of money to a bank and the embezzlement of said money by a bank officer, who has absconded, cannot be established by letters announcing such shipments, as they are not competent evidence for that purpose.[16] Again, evidence of a subsequent offer by an agent under bond to account, may, it is decided, be excluded where it appears as evidence of the alleged breach that said agent had refused to account.[17]

It is held that even though an employee denies the justice of a claim against him, he is not aided where he, as employee of an

[12] Goldman v. Fidelity & Deposit Co. of Md. 125 Wis. 390, 104 N. W. 80.

[13] Bank of Tarboro v. Fidelity & Deposit Co. 128 N. Car. 366, 83 Am. St. Rep. 682, 38 S. E. 908. In the determination of this case the decision in the same case, 126 N. Car. 320, is considered final as far as it goes.

[14] Dixie Fire Ins. Co. v. American Bonding Co. of Balt. 162 N. Car. 384, 392, 78 S. E. 430.

[15] Dr. Blair Medical Co. v. United States Fidelity & Guaranty Co. — Iowa, —, 89 N. W. 20.

[16] Title Guaranty & Trust Co. v. Bank of Fulton, 89 Ark. 471, 33 L.R.A.(N.S.) 676, 117 S. W. 537, 38 Ins. L. J. 722.

[17] Dr. Blair Medical Co. v. United States Fidelity & Guaranty Co. — Iowa, —, 89 N. W. 20.

express company, guaranteed as such, has agreed that any proper evidence that said insurer has paid his employer on his account, should be conclusive evidence against him, and in such case, where insurer has paid several claims to the employer the production of the vouchers justifies a judgment against said employee as defendant.[18] So where a contract of guaranty has been executed in the form requested by an employee whereby a guaranty insurance company insures his employer against said employee's acts of fraud or dishonesty, the employee's obligation to indemnify the company is coextensive with that of the company to reimburse the employer; and any provisions in the contract, as to proof of liability, binding on insurer in favor of the employer, are equally binding on the employee in an action by insurer against him to recover indemnity for what it has paid in his behalf.[19] And if assurer sues to recover money paid defendant's employer upon a bond by which plaintiff obligated itself to indemnify said employer against such loss as it might sustain by reason of the larceny or embezzlement of the employer's property by its manager or salesman, something more than a prima facie case by the voucher must be made out, as there can be no recovery where such prima facie showing is rebutted by evidence that there was no larceny or embezzlement for which assurer was liable on the bond to the employer.[20] And in order to prove embezzlement by a bonded cashier and the amount thereof the real condition, as between the insured bank's accounts as kept by said cashier, and the accounts of its correspondent banks, may be shown as may also the difference between said accounts, as appears by the monthly statements of the latter theretofore sent to insured, all being identified by a witness and theretofore examined by defendant's expert and reported to it by him, and referred to in

[18] Guarantee Co. of North America v. Pitts, 78 Miss. 837, 30 So. 758.

[19] Fidelity, etc., Ins. Co. v. Eickhoff, 63 Minn. 170, 56 Am. St. Rep. 464, 30 L.R.A. 586, 65 N. W. 351.

[20] Fidelity & Deposit Co. of Md. v. Nordmarken, 32 N. Dak. 19, 155 N. W. 669. (The action was brought by insurer, to recover money paid by it to the trustees in bankruptcy of assured's company. The condition of the guaranty to insurer was: "To reimburse the said fidelity company for all loss, costs, damages and expenses whatever resulting from any act, default or neglect of defendant, that said fidelity company might sustain by reason of executing the bond or any renewal thereof." The condition in the bond under which insurer paid the money sought to be recovered in this action, agreed to reimburse the employer assured "such pecuniary loss as may be sustained by the employer, of money, securities or other personal property belonging to the employer, as the employer shall have sustained by any act of larceny or embezzlement committed by the employee." As to the voucher above it was agreed in the application that it should be conclusive evidence of payment by the insurer and it was held that such agreement was void as against public policy.)

the depositions of the officers of said banks and returned as exhibits with the depositions.[1]

If an obligation reinsuring a surety on a bond of a foreign corporation, to enable it to transact business in the state is attached to and filed with the said bond in the insurance department, a copy of said obligation certified to by the Commissioner of Insurance & Banking when it is not a document of such a character as is required or permitted by the statute to be filed in a public office so as to constitute archives or records, copies of which certified under the authority of such office are admissible in evidence, it evidences only a common-law obligation, is only a private instrument, and the certified copy thereof does not constitute legal proof of the contract.[2]

(hh) *Guaranty of fidelity of guardians, and persons holding similar or other fiduciary or trust relations in respect to money or property.*—We have seen that a distinction exists as to the rules of construction between fidelity guaranty insurance contracts where paid sureties are parties and those wherein the surety is an individual or his suretyship is voluntary, and as coming within the former class we will briefly consider certain important decisions

[1] Title Guaranty & Surety Co. v. Nichols, 12 Ariz. 405, 100 Pac. 825. The court, per Doan, J., said: "For the purpose of proving the embezzlement and the amount thereof the appellee sought to show the condition of the accounts between the bank and correspondent banks" in other cities. "The real condition of said accounts was sought to be proved by monthly statements theretofore sent to the plaintiff's assignor of these several correspondent banks. The embezzlement was further sought to be proved by showing the difference between the accounts as shown by the books and accounts kept by the cashier of plaintiff's assignor and the amounts as shown by the statements of the three respective banks as aforesaid; great stress is laid by the counsel for the appellant upon the alleged error committed by the court in permitting the three witnesses above named to be interrogated relative to these monthly statements sent by the several banks to the plaintiff's assignor and to attach the same to their several depositions upon the ground that those statements had not been submitted to the appellant's attorney and not being part of the interrogatories it was impossible for the appellant's attorney to cross-examine the witness relative to them. The record discloses that these statements had all been identified by the witness McDowell as the ones that had theretofore been sent by these banks to the Union Bank & Trust Co. and the defendant's expert had theretofore examined and reported to the defendant upon these same statements and from the nature of the case the defendants would be aware that these would form the basis on which the amount alleged to have been embezzled by the cashier would be arrived at. The interrogatories referring to the papers submitted with the depositions to the deponent in each of these instances were such as would plainly indicate to the defendant, who had in his possession the report of his expert based upon these very statements, that they and none other were the 'papers' or 'statements' to which reference was made."

[2] Southwestern Surety Ins. Co. v. Anderson, 106 Tex. 46, 155 S. W.

including not only guardians, but also other cases of similar nature in so far as they cover fiduciary or trust relations and concern the guaranty of faithfulness or fidelity of persons entrusted with moneys, property, etc., and the accounting therefor, in the discharge of their fiduciary or trust relations.

Sureties on the general bond of a guardian are liable for his failure to pay over all funds that come into his hands in that capacity, including funds received from the sale of real estate; nor are such sureties relieved from liability in this respect by the fact that a special "sale bond" was required in the proceedings for the sale of the real estate.[3] And a verdict against a surety on a guardian's bond is sustained by evidence that such guardian had been removed from office by order of the court, the amount due from him to the ward ascertained and judgment entered ordering said amount to be paid over to the person entitled thereto; also showing that his successor had been duly appointed and qualified, and had demanded the amount so found due, and that payment of the same or of any part thereof had been refused.[4] In case a guardian's bond is executed after he has converted property of his ward to his own use the sureties thereon are liable for the defalcation if, after the

1176, 42 Ins. L. J. 1083 (bond filed under Act of March 20, 1909, Art. 4870-I; Acts 31st. Leg. c. 102) rev'g 152 S. W. 816. The court, per Phillips, J., said: "The proof made in the trial court of the contract of the plaintiff in error, above copied, in virtue of which it was sought to be charged the liability primarily resting upon the Farmers' & Merchants' Ins. Co., under the policy of insurance issued to the plaintiff, was by means of a copy of the instrument certified by the Commissioner of Insurance & Banking, to the admission of which exception was duly reserved. It is an established rule that it is only of such documents as are required or permitted by law to be filed in a public office, so as to constitute them archives or records, that copies certified under the authority of such office are admissible in evidence. If the document is not of such character, it cannot be regarded as other than a mere private instrument, and such a certificate gives the copy no legal authenticity. State v. Cardinas, 47 Tex. 250; Herndon v. Casiano, 7 Tex. 320: Hatchett v. Conner, 30 Tex. 110; Lott v. King, 79 Tex. 119; Lott v. King, 79 Tex. 292, 15 S. W. 231. . . . But under no law was it authorized to be filed in the office of the Commissioner of Insurance & Banking, and it therefore evidenced only a common law obligation . . . the statute makes no provision for the filing of such a contract in the insurance department; and otherwise the Commissioner is not its legal custodian.

"Furthermore, if the instrument can be regarded as creating the relation of a suretyship on the original bond, it is clear that the statute does not authorize the evidencing of that relation in any such manner or by any such instrument. The certified copy did not constitute legal proof of the contract." See this case also under subdiv. (e) this section.

[3] Southern Surety Co. v. Burney, 34 Okla. 552, 43 L.R.A.(N.S.) 308, and note, 126 Pac. 748.

[4] Southern Surety Co. v. Burney, 34 Okla. 552, 43 L.R.A.(N.S.) 308, 126 Pac. 748.

bond is executed, he continues solvent, so that he could have restored the funds to the trust, which he failed to do.[5] And sureties for a guardian on a bond substituted for a former general bond are liable for the failure to pay over the moneys adjudged due from such guardian, without regard to the time when the conversion or misappropriation by said guardian took place.[6] But a surety on an administrator's bond is not liable thereon for the latter's obligation to pay money illegally borrowed after decedent's death, or for money tortiously obtained by said administrator, although the money procured by him is used for the benefit of the estate.[7]

As to the right to cancel: upon an action in equity for the cancellation of a bond for the faithful administration of an estate, the surety company is entitled to a cancellation thereof where maladministration of the estate and fraudulent representations in inducing the bond to be issued are shown; and where there was a secret agreement as to the conduct of the business of the estate which was a fraud upon the surety, and the bond was secured from it to further the execution of such agreement, the bond is void as between the surety and all parties who took part in perpetrating the fraud.[8]

A paid guaranty company has the same arbitrary right as an individual or private party who has assumed the obligation gratuitously, to be relieved from its suretyship by following the prescribed statutory conditions in such cases, nor is such surety required to show cause as a condition precedent to the relief sought for the court is without discretion in the matter as its duty is ministerial; and for refusal of relief the remedy is mandamus and not a writ of error.[9] And under the New York code providing for the release and discharge of sureties or from bonds of trustees, guardians, etc., "as a matter of right" as provided therein, a surety company on a receiver's bond is entitled to discharge as a matter of right from future liability and the mere fact that said surety had received a year's premium and the year has not expired, is not a defense as the unearned premium could be recovered by the receiver.[10] But a surety company upon the bond of a trustee for the

[5] Aetna Indemnity Co. v. State (Use of Gallaspy) 101 Miss. 703, 39 L.R.A.(N.S.) 961, and note, 57 So. 980.

[6] Southern Surety Co. v. Burney, 34 Okla. 552, 43 L.R.A.(N.S.) 308, and note, 126 Pac. 748.

[7] Bank of Newton County v. American Bonding Co. 141 Ga. 326, 50 L.R.A.(N.S.) 1089, 80 S. E. 1003.

[8] Fidelity & Deposit Co. of Md. v. Moshier (U. S. C. C.) 151 Fed. 806.

[9] United States Fidelity & Guaranty Co. v. Peebles, 100 Va. 585, 42 S. E. 310, Code sec. 2887; Acts 1895–6, p. 284.

[10] United States Fidelity & Guaranty Co. In re, 98 N. Y. Supp. 217, 50 Misc. 147; Code Civ. Pro. sec. 812.

entire period of the trust agreement, after the death of one of the beneficiaries and the appointment of the other as administratrix of her estate, cannot, without proof that the trustee has been guilty of some default or dereliction of duty, compel the trustee to account or terminate its liability without his consent. A surety cannot, under such circumstances in the absence of statutory authority, be relieved from his contract of suretyship. This applies in the case of certain bonds held in trust during the lives of certain persons with provision for disposition at death of second beneficiary.[11] And statutory provisions as to discharge or release of sureties on bonds, must be complied with, and as to administrator's bonds said requirements cannot be waived by the court.[12] Under a Mississippi decision where the action was to recover the premium, the power to release sureties is statutory, and the statutory circumstances must be shown to have existed when the power is exercised; and the surety still remains such and is entitled to its premium despite the order of the chancery court when it has exceeded its power in discharging sureties.[13]

If an application by a surety for discharge from a guardian's bond alleges acts amounting to "misconduct of his principal in the discharge of his trust," but also sets forth facts showing that he was not a proper person to be entrusted with the management of his ward's estate, a demurrer thereto will not be sustained.[14] And it is also decided that a surety may by suit in equity compel his principal to discharge the debt for which both are liable and so relieve said surety from liability, even though he has not first paid it.[15]

In Pennsylvania a bond given by a guardian and approved by the court is deemed to be held in trust for all persons interested and the court has no authority without the consent of all parties in interest to release a bond of a bonding company as surety on a guardian's bond.[16]

(ii) *Contract guaranty: nature of contract: construction.*—As to contract guaranty bonds: although we have considered the question elsewhere,[17] it may be stated here that if they are issued by

[11] Lawyers Surety Co. v. Ayrault, 150 N. Y. Supp. 800, 165 App. Div. 254 (N. Y. Code Civ. Proc. sec. 812, relates only to sureties upon bonds or undertakings given in an action or special proceeding).

[12] Clark v. American Surety Co. 171 Ill. 235, 49 N. E. 481, rev'g 66 Ill. App. 284. Rev. Stat. 1874, c. 3, secs. 33, 35.

[13] United States Fidelity & Guaranty Co. v. Felder, 105 Miss. 283, 62 So. 236, Code 1906, secs. 121, 634 (bond for assignee receiver of bank).

[14] National Surety Co. of N. Y. v. Morris, 111 Ga. 307, 36 S. E. 690, under Civ. Code, sec. 2533.

[15] Dobie v. Fidelity & Casualty Co. 95 Wis. 540, 60 Am. St. Rep. 135, 70 N. W. 482.

[16] Commonwealth v. American Bonding Co. 245 Pa. 535, 91 Atl. 938.

[17] See § 339d herein.

a corporation organized for the purpose of engaging for profit in the business of giving indemnity bonds the law does not place them on the same basis as it does the bonds of voluntary sureties; so where such bonds guarantee the contracts of third persons or they are given by these paid surety companies to indemnify the owner of property against loss from the failure of a contractor to perform the conditions of a building or other contract, they are essentially contracts of insurance although they may resemble in form contracts of suretyship, and said corporations being in effect insurers the rules peculiar to suretyship do not apply in determining their rights and liabilities;[18] the rule, therefore, of construction against insurer if an ambiguity exists, applies; an ambiguity cannot, however, be assumed and the plain intention of the parties nullified by construction; but the above rule has evidently been limited in Minnesota to cases where the legislature has not prescribed a standard policy.[19] Again, it is decided in New York that bonds of such sureties are not strictly construed when they are engaged in issuing bonds for profit.[20] It is also held in Maryland in this connection that a paid surety's business is that of insurer and its liabilty is greatly extended beyond that to which sureties formerly bound.[1] So in Oregon the rule strictissimi juris is also relaxed when applied to a paid surety so that a bonding company must show that its rights have been injuriously affected before it can defeat the contract.[2] But in a Wisconsin case the principle is applied to such a bond by a corporation that sureties are favorites of the law.[3] What is above stated must, however, be considered in connection with

[18] State v. Blanchard Construction Co. (State v. Massachusetts Bonding & Ins. Co.) 91 Kan. 74, 136 Pac. 905; Chicago Lumber Co. v. Douglas Co. 89 Kan. 308, 44 L.R.A.(N.S.) 843, 131 Pac. 563; George A. Hormel & Co. v. American Bonding Co. 112 Minn. 288, 33 L.R.A.(N.S.) 513, 123 N. W. 12.

[19] George A. Hormel & Co. v. American Bonding Co. 112 Minn. 288, 33 L.R.A.(N.S.) 513, 128 N. W. 12. See also State v. Blanchard Construction Co. (State v. Massachusetts Bonding & Ins. Co.) 91 Kan. 74, 136 Pac. 905. See §§ 206a–206c, 221b, 222a, 222e herein.

[20] American Bonding Co. of Balt. v. Kelly, 158 N. Y. Supp. 812, 172 App. Div. 437.

[1] American Fidelity Co. v. State, 128 Md. 50, 97 Atl. 12 (contractor's bond for faithful performance and prompt payment of all just debts for labor and material, etc., given under statute for construction of state road).

[2] Neilson v. Title Guaranty & Surety Co. 81 Oreg. 422, 169 Pac. 1151 (bond to indemnify against loss from breach of contract to do certain work and labor under contract to clear and plow lots, etc.).

[3] Electric Appliance Co. v. United States Fidelity & Guaranty Co. 110 Wis. 434, 53 L.R.A. 609, 85 N. W. 648.

such controlling statutes as determine the nature of surety corporations who enter into these contract indemnity bonds.[4]

As to contractors' guaranty bonds under the Federal statute; the United States Supreme court has also refused to extend the rule strictissimi juris to a corporation which has undertaken for profit to insure the obligee against a failure of performance on the part of the principal obligor, and holds that such a contract should be interpreted liberally in favor of a sub-contractor, although it is declared that such interpretation does not extend to cases of fraud or unfair dealing on the part of a sub-contractor or to cases not otherwise within the undertaking. The case so deciding presents also the factor that bonds containing the covenant there in question are not common in that said covenant was inserted for an entirely different purpose from that of securing to the government the performance of a contract for the construction of a building, but was made and executed solely for the benefit of sub-contractors, the bond also contained a distinct and separate obligation which was that the contractor should fulfil all the conditions and covenants of this contract, whatever changes in or additions to such contract might thereafter be made. Said bond was given in pursuance with a Federal statute for the protection of persons furnishing materials and labor for the construction of public works, and which required that persons contracting with the United States for the construction of any public building, etc., should be required to execute a penal bond with the additional obligation as to promptly making payments for labor and materials furnished, etc., and since neither the contractor nor his sub-contractor has the protection of a mechanic's lien upon the proposed government building the government requires for the sole protection of the latter, a covenant for the prompt payment of their claims and the same security that it requires for the performance of the principal contract. Said covenant guarantees nothing to the principal obligee, the government, but the latter permits an action upon the bond for the benefit of the sub-contractors.[5]

[4] See § 339d herein.

[5] United States, Fidelity & Guaranty Co. v. Golden Pressed & Fire Brick Co. (Guaranty Co. v. Pressed Brick Co.) 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. 142 (under Act of Cong. Aug. 13, 1894, 28 Stat. 278, c. 280), *cited* in Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 440, 26 Sup. Ct. 168 (bond under same statute: materialman entitled to recover from surety company although materials furnished to sub-contractor and not directly to contractor); National Surety Co. v. United States, L.R.A.1917A, 336, 228 Fed. 577, 581, 143 C. C. A. 99 (but declaring that said case placed liberal construction upon ground that purpose of statute should be accomplished and not upon ground of paid suretyship), approved in Equitable Surety Co. v. McMillan, 234 U. S. 448, 455, 58 L. ed. 1394, 34 Sup. Ct. 803 (applied to Act Cong.

(ii–1) *Contract guaranty: what is part of bond: construction.*—Another important point is this, that where a surety bond recites that the building contract has been made, etc., and the contracts are made at the same time, the terms of the contract become a part of the bond and both constitute one transaction; accordingly in such case when a party enters into a contract to do certain work on certain terms and procures a surety to guarantee the faithful performance of the work, the surety necessarily contracts with reference to the contract as made, otherwise said surety could never know what obligation he was assuming.[6]

(ii–2) *Contract guaranty: distinction between indemnity against liability and indemnity against loss.*—In Pennsylvania a distinction is made between indemnity against liability and indemnity against loss so that where a surety company's contract is one of indemnity against actual pecuniary loss the mere incurring of liability does not constitute a ground of action; as where a subcontractor's bond is conditioned to secure a general contractor from pecuniary loss and the former defaulted thereby occasioning default by the latter and the owners made payments to materialmen for work to be performed acquiring thereby a right of action to guard against the general contractor, still there can be no recovery by the latter of such payments against the surety on said sub-contractor's bond unless it also appears that the general contractor had actually sustained pecuniary loss in consequence of the liability so incurred.[7]

(ii–3) *Contract guaranty: assignment of bond or of interest in contract.*—A bond executed by a bonding company in business for profit and which guarantees the performance of a construction company contract in existence is assignable where it contains no evidence that the right to have it performed shall not be assignable, but on the contrary shows that it was the intent of the parties that it could and would in all probability be assigned before the time for its completion should arrive; and it is assignable along with the principal contract.[8] But sureties are released from liability on

Feb. 28, 1899, 30 Stat. 906, c. 218, modeled after above Act of Aug. 13, 1894), *distinguished* and held not applicable in Zeigler v. Hallahan, 131 Fed. 205, 209, 210, 66 C. C. A. 5.

[6] First National Bank v. Fidelity & Deposit Co. 145 Ala. 335, 344, 5 L.R.A.(N.S.) 418, 8 Am. & Eng. Ann. Cas. 241, 117 Am. St. Rep. 45, 40 So. 415 (so declared in substance by the court, per Simpson, J., and so held); State v. Blanchard Construction Co. (State v. Massachusetts Bonding & Ins. Co.) 91 Kan. 74, 136 Pac. 905.

[7] Hoffman & Co. v. Title Guaranty & Surety Co. 255 Pa. 112, 99 Atl. 414.

[8] American Bonding & Trust Co. v. Baltimore & Ohio Southwestern Ry. Co. 124 Fed. 866, 882, 60 C. C. A. 52, 68,—Cochran, Dist. J., certiorari denied 191 U. S. 575, 48 L. ed. 308, 24 Sup. Ct. 846.

the bond of a firm of building contractors, where without the former's consent one member of the firm is permitted to assign his interest to his copartner and release himself from liability on said contract.[9]

(ii–4) *Contract guaranty: liability and nonliability of surety generally.*—It may be generally stated that if a bonding company engaged in the business of furnishing surety for compensation, and to whom the rules of strict construction applicable to voluntary or acommodation sureties do not apply, and against whom in cases of ambiguity that construction most favôrable to insured will be adopted, guarantees the faithful performance of a contract on the part of a construction company, and the latter does not faithfully perform, said bonding company will become liable for the damages sustained by the breach in the absence of some element of waiver or estoppel.[10] So where a bond is given to secure payment of sub-contractors, laborers and materialmen, it cannot be successfully contended that the trustees charged with the construction of a state building have no power to take such a bond; nor can recovery be precluded for want of consideration where the execution of said bond was necessary to secure an award of the contract, nor defeated on the theory that said bond was not required by the contract, if it was executed with it at the same time and as part of the entire contract.[11] And if a bond given by a surety company obligates it to pay all indebtedness incurred for labor and material furnished and "used in and about that contract work, or which might become the basis of a lien" it covers as within the intent thereof lumber furnished for and used in the making of forms for a concrete structure in accordance with the contract and specifications, but which by reason of such use is largely consumed and rendered valueless.[12]

When assignee of account due subcontractor is entitled to benefit of contractor's bond under Act of Congress of Aug. 13, 1894, c. 280, 28 Stat. 278, as am'd by Act Febry. 24, 1905, c. 778, 33 Stat. 811 (Comp. Stat. 1913, sec. 6923). See United States v. Brent, (U. S. D. C.) 236 Fed. 771.

As to effect of assignment to surety, see Barrett-Hicks Co. v. Glas, 14 Cal. App. 289, 111 Pac. 760.

[9] Friendly v. National Surety Co. 46 Wash. 71, 10 L.R.A.(N.S.) 1160, and note, 89 Pac. 177 (surety's liability is limited by the terms and to the extent of the obligation to which it consented to be bound).

[10] State v. Blanchard Construction Co. (State v. Massachusetts Bonding & Ins. Co.) 91 Kan. 74, 136 Pac. 905.

*As to reinsurance of surety on contractor's bond* and liability of reinsurer to original insured, see United States v. Brent (U. S. D. C.) 236 Fed. 771, *considered* under subdv. (e) this section.

[11] National Surety Co. v. Hall-Miller Decorating Co. 104 Miss. 626, 46 L.R.A.(N.S.) 62 (and note as to first point above stated) 61 So. 700.

[12] Chicago Lumber Co. v. Douglas Co. 89 Kan. 308, 44 L.R.A.(N.S.) 843, 131 Pac. 563.

But a claim for repairs upon a machine, leased by a contractor and used in his work, is not covered by a contractor's bond conditioned to pay the contractor's obligations for labor and material used in a street improvement.[13] And a surety is not bound to the faithful performance of a new contract between the owner and contractor under which the building was constructed, where said surety's obligation secured the performance of the original contract, which was made by reference a part thereof, and it differed only slightly from the terms of the new one.[14] Nor is a surety on a bond of a contractor for the transportation of mail liable for the loss by robbery of money belonging to the government which is placed in his mail without his knowledge or acquiescence, where although the contract provided that the contractor should account for and pay over all moneys of the government which might come into his possession, still he was only required to carry mail and not money as such, and only the safe delivery of money delivered to him for transportation with his knowledge was insured.[15]

(ii–5) *Contract guaranty: alteration of contract: discharge or release of surety.*—Where performance of a building contract is guaranteed by a surety any material and prejudicial variation of its terms will discharge the surety.[16] It is also declared that the courts generally hold that a paid surety can be relieved from its obligation of suretyship only where a departure from the contract is shown to be a material variance.[17] And to the extent that a building con-

[13] Standard Boiler Works v. National Security Co. 71 Wash. 78, 43 L.R.A(N.S.) 162 and note, 127 Pac. 573.

[14] Kracht v. Empire State Surety Co. 62 Wash. 339, 113 Pac. 773.

[15] American Surety Co. of N. Y. v. United States, 171 Fed. 408, 96 C. C. A. 364.

[16] Lloyd Investment Co. v. Illinois Surety Co. 164 Wis. 282, 160 N. W. 58. See also Barrett-Hicks Co. v. Glas, 14 Cal. App. 289, 111 Pac. 760.

[17] Justice v. Empire State Surety Co. (U. S. D. C.) 209 Fed. 105, 108, 43 Ins. L. J. 422 (paid surety; building contractor: judgment for defendants aff'd 218 Fed. 802, 134 C. C. A. 490),—Thompson, D. C., *citing* United States v. Fidelity & Guaranty Co. (U. S. C. C.) 178 Fed. 721 (contractor's bond: public works: discharge: extension of time: rule of strict construction inapplicable to relieve paid surety except case of actual injury); Brown v. Title Guaranty & Trust Co. 232 Pa. 337, 38 L.R.A.(N.S.) 698, 81 Atl. 410 (assumpsit against principal and surety on condemnation bond: case of contract of suretyship with landowner to secure payment to him of damages in case railroad did not under eminent domain: also rule that such company's insurers, etc.: distinction made between surety bond for profit and one which is not); Philadelphia v. Fidelity & Deposit Co. 231 Pa. 208, Ann. Cas. 1912B, 1085, 80 Atl. 62 (guaranty contract of insurance for sufficiency of work on public building: extension of time); Young v. American Bonding Co. 228 Pa. 373, 77 Atl. 623 (bond to secure building contract for completion of buildings, etc.: rule strictissimi juris not applicable where bond upon consideration: paid corporation organized to make such bonds).

tract becomes a part of the guaranty, the surety has a right to insist upon the terms of the contract as written, and he is released where the principal does something outside said terms, even though said surety is benefited thereby.[18] So a compensated surety for a building contractor is entitled to the same rights in the matter of consent to the alteration of the contract as is a voluntary surety, especially so where it is stipulated that changes must be agreed upon and indorsed upon the contract and if changes are made without compliance with said requirement the surety is released as said stipulation is as much for its benefit as for the owner.[19] But a guaranty company, which for a compensation, becomes surety upon the bond given by a building contractor for the faithful performance of his contract, cannot escape liability by reason of deviation from the exact terms of the contract, where such provisions were waived by the contractor and no damage is shown as resulting to the surety by reason thereof.[20]

Again, a compensated surety upon the bond of one who undertakes that his principal shall comply with the requirements of his contract, is not, without his consent, liable for his principal's refusal to perform during an extended term which the public authorities have attempted to impose upon him under the provisions of said contract, that they shall have the privilege of renewing the contract for a specified additional period at their option.[1] And in the case of an agency contract for sale of coal and said agent fails to report sales, render accounts, and pay over money as stipulated, and the employer relieves the agent from compliance with such a material provision of the contract, to the performance of which the surety bound himself, the courts will not force the surety to answer for such defaults of the agent. The question in such case is not one of mere neglect of the employer to comply with the terms of his contract, but there is a material alteration of the contract the performance of which was guaranteed by the surety.[2]

Principal case (209 Fed. 105) *cited* in Wells v. National Surety Co. 222 Fed. 8, 137 C. C. A. 546 (where surety on subcontractor's bond to contractor was held discharged by change in contract).

[18] First National Bank v. Fidelity & Deposit Co. 145 Ala. 335, 5 L.R.A. (N.S.) 418, 117 Am. St. Rep. 45, 8 Am. & Eng. Ann. Cas. 241, 40 So. 415.

[19] Lonergan v. San Antonio Loan & Trust Co. 101 Tex. 63, 22 L.R.A. (N.S.) 364, 130 Am. St. Rep. 803, 104 S. W. 1061.

[20] Cowles v. United States Fidelity & Guaranty Co. 32 Wash. 120, 72 Pac. 1032.

[1] United States (Use of District of Columbia) v. Bayley, 39 App. D. C. 105, 41 L.R.A.(N.S.) 422, and note.

[2] Alabama Fidelity & Casualty Co. v. Alabama Fuel & Iron Co. 190 Ala. 397, 67 So. 318 (rev'g judgment be-

But a surety company which has undertaken to insure a county for the faithful performance of an agreement to construct a bridge, is not released on the ground of material changes in the principal contract, where materials different from and inferior to those stipulated for are fraudulently substituted by the contractor.[3] And the giving of oral orders for changes in the work and extras, when the amount thereof is audited and allowed by the architect before payment does not operate to release the obligation imposed by a building contract insurance bond where there is a reserved right to have changes made and extra work done without limit on the written order of the owner or architect.[4]

(ii–6) *Contract guaranty: payment, advance payments, overpayments: liability and release of surety.*—Payment in full and acceptance of a plant by a city under a contract for its construction will release sureties on the contractor's bond under a condition that materials shall be paid for, where the contract provides that before payment is made the contractor shall present receipts in full for all materials furnished.[5] The surety is also released where payments are made before due by the terms of a building contract; and the owner is not permitted as against said surety to pay for materials before delivery thereof, although under a stipulation in the bond which recites the statute governing mechanics' liens, the owner may retain and pay such claims and credit them on the contract.[6] As

low for plaintiff). See Pittsburg-Buffalo Co. v. American Fidelity Co. 219 Fed. 818, 135 C. C. A. 488.

[3] Van Buren County v. American Surety Co. 137 Iowa, 490, 126 Am. St. Rep. 290, 115 N .W. 24.

[4] George W. Hormel & Co. v. American Bonding Co. 112 Minn. 288, 33 L.R.A.(N.S.) 513, 128 N. W. 12.

[5] Electric Appliance Co. v. United States Fidelity & Guaranty Co. 110 Wis. 434, 53 L.R.A. 609, 85 N. W. 648 (but rule that sureties are favorites of the law was applied in this case).

[6] First National Bank v. Fidelity & Deposit Co. 145 Ala. 335, 5 L.R.A. (N.S.) 418, and note, as to first point in text, 40 So. 415, 8 Am. & Eng. Ann. Cas. 241, 117 Am. St. Rep. 45. The court, per Simpson, J., said: "It is a maxim of law that all parties, whether principal or surety, who reduce their contracts to writing, have a right to insist upon the terms of the contract as written, and it does not lie in the power of the courts to say that, although a party has contracted to do one thing, yet he has done something else, which is more beneficial to the other party, and is therefore entitled to the enforcement of the contract. . . . We hold that under the contract and bond in this case, which constitutes one transaction, if the plaintiff did not pay for the work and material in the manner provided by the contract, but instead thereof, by an arrangement made either at the time the contract was made, or afterwards, with the contractor, without the consent of the surety, permitted the contractor to overdraw his account, so that considerable amounts of money were paid to him before any certificates were issued by the architect, and the material was paid for without any estimate and before delivery, and

pertinent hereto it is said in a Federal case, per Thompson, D. J., that: "After a somewhat careful examination of the cases, I have been unable to find any case in which the relaxation of the rule of strictissimi juris was extended as between the surety and the obligee in the bond to the extent of requiring proof of actual injury in case of breach of the terms of the bond by anticipation of payment by the obligee to the contractor. In such case for the reasons stated in Prairie State Bank v. United States,[7] and Fidelity & Deposit Co. v. Agnew,[8] and upon the authorities there cited, anticipation of payments by the obligee is held as a matter of law to be a material variance of the contract." [9] But it is held that advance payments not provided for in the contract will not discharge the surety if it affirmatively appears that under the circumstances the departure from the agreement was immaterial and nonprejudicial.[10] And the rule that if an obligee in the bond, to secure the performance of a construction contract, pays instalments before they are earned, or in excess of the amount due, the surety is released, does not apply where a county, to whom a construction guaranty bond has been given, is induced to make overpayments by the contractor's fraud particapated in by the county's engineer.[11] So where no direction is given by the contractor as to the application at the time when made of payments of money received from the owner, the fact that it was paid to materialmen and applied by the latter in discharge of an earlier indebtedness of the contractor for material used on other buildings does not enable the surety company to escape liability upon a bond for material furnished to and used by the contractor on a building.[12]

Overpayments made by the obligee of a bond, either to the contractor or his servants, where they do not operate to the surety's prejudice and which are necessary to satisfy labor claims and save the property from liens, do not release from liability a paid surety on the contractor's bond; nor in such case is there such a taking

without any regard to the retention of the percentage required, trusting to the certificates and estimates to be credited on said general account, then this was such a departure from the terms of the original contract as to release the obligation of the surety." Id. 346. Overruling in so far as it conflicts with this decision, Fidelity & Deposit Co. of Md. v. Robertson, 136 Ala. 379, 34 So. 973.

[7] 164 U. S. 227, 41 L. ed. 412, 17 Sup. Ct. 142, per Mr. Justice White.

[8] 152 Fed. 955, 82 C. C. A. 103.

[9] Justice v. Empire State Surety Co. (U. S. D. C.) 209 Fed. 105, 43 Ins. L. J. 422, 425, judgment for defendant affirmed 218 Fed. 802, 134 C. C. A. 490.

[10] Lloyd Investment Co. v. Illinois Surety Co. 164 Wis. 282, 160 N. W. 58.

[11] Van Buren County v. American Surety Co. 137 Iowa, 490, 126 Am. St. Rep. 290, 115 N. W. 24.

[12] Chicago Lumber Co. v. Douglas Co. 89 Kan. 308, 44 L.R.A.(N.S.) 843, 131 Pac. 563.

over of work by the owner from the contractor as to release the surety where the latter is notified of said payments and the necessity therefor and the contractor continues with the work. And if credit is given for extra work in excess of payments made during the earlier part of the work, no such material change or breach in the contract is thereby made as to release the surety.[13]

In a Federal case a bond was given in pursuance of a Federal statute conditioned not only upon the faithful performance of a contract to erect a government building and to permit any changes or additions made thereto, but there was also a covenant to promptly make payment to all persons supplying him with labor or material in the prosecution of the work, etc. In an action on the bond under this latter covenant it was held that the granting of an extension of the time of payment of a balance due on account of materials and the acceptance by a materialman of thirty and sixty day notes did not necessarily relieve the surety company under the rule that exonerates an ordinary guarantor in such cases of extension of time for the performance of the contract of his principal without his consent, where it did not appear that such extension was unreasonable or that the surety was prejudiced thereby.[14]

[13] Manhattan Co. v. United States Fidelity & Guaranty Co. 77 Wash. 405, 137 Pac. 1003.

[14] United States Fidelity & Guaranty Co. v. Golden Pressed & Fire Brick Co. 191 U. S. 416, 48 L. ed. 242, 24 Sup. Ct. 144 (*cited* with approval in Equitable Surety Co. v. McMillan, 234 U. S. 448, 451, 58 L. ed. 1394, 34 Sup. Ct. 803; American Bonding Co. of Balt. v. United States, 233 Fed. 364, 369, 147 C. C. A. 300; City Trust Safe Deposit & Surety Co. v. United States, 147 Fed. 155, 160, 77 C. C. A. 402 [but upon evidence held that taking of notes did not extend time of payment]; Shelton v. American Surety Co. 131 Fed. 210, 211, 66 C. C. A. 95; Chaffee v. United States Fidelity & Guaranty Co. 128 Fed. 918, 920, 63 C. C. A. 646; Shelton v. American Surety Co. [U. S. C. C.] 127 Fed. 736, 738). In the first part of the opinion in the principal case (191 U. S. 416) the court, per Mr. Justice Brown, said that: "Counsel for the Brick Company argued with much persuasiveness that this rule of strictissimi juris, though universally accepted as applicable to the undertaking of an ordinary guarantor, who is usually moved to lend his signature by motives of friendship or expectation of reciprocity, and without pecuniary consideration, has no application to the guaranty companies recently created, which undertake, upon the payment of a stipulated consideration and as a strictly business enterprise, to indemnify or insure the obligee in the bond against any failure of the obligor to perform his contract. It is, at least open to doubt, however, whether any relaxation of the rule should be permitted as between the obligee and the guarantor, which may have signed the guaranty in reliance upon the rule of strictissimi juris, and with the understanding that it is entitled to the ordinary protection accorded in guarantors against extensions of the time of payment. The government wisely protects itself in these cases by providing in the bond that the obligation of the surety shall extend to all changes in or additions to the con-

Under an Iowa decision a surety on a contractor's bond obligating itself to a certain district of a city "and to all persons who may be injured by any breach of this bond," "for all claims for labor and materials furnished in and about said building" is released from its obligation to one claiming under said condition where he has accepted, as a creditor, a composition agreement with the principal debtor and a dividend from the latter's assignee in insolvency; and the mere fact that the surety company has paid voluntarily one or more of the participating creditors does not operate to bind it to pay other creditors. The court, per Weaver, J., said: "If some one of the creditors succeeded in inducing the surety company to make up the loss he had sustained, it does not amount to a fraud upon other creditors . . . nor serve in any manner to vitiate or avoid the composition agreement which had been performed and satisfied according to its terms. . . . We cannot find that plaintiff's ignorance of the existence of the bond, or the fact that plaintiff would not have released its claim had it known the truth in this respect, affects the legal sufficiency of the composition. The surety thereon could rightfully remain silent and allow the debtors to compromise their claims with their creditors if they could; and if the creditors, either by composition, agreement or othewise made a valid release of their claims, the debts being extinguished, right of recovery against the surety ceased with the discharge of the principals. It would be an anomaly in law to say the discharge of the principle debtor is valid and yet hold the debt still existent for the purpose of charging the surety thereon." [15]

In a Kansas case a compensated surety guaranteed by bond the faithful performance of a state building contract in accordance with the plans and specifications prepared by a state architect and by reference the construction contract was made a part of the bond. Said contract provided that the state architect should make a certified estimate each month of the value of the labor and material used during that month, and that the state would pay to the contractor a specified per cent the balance to be withheld as a final payment, but that no payments should be made except upon his certificate of proper performance of the work for which the payment was due. The bond was to become null and void if payments were

tract which may thereafter be made. . . . We do not, however, deem it necessary to express an opinion upon this subject, as we prefer to rest our opinion upon the peculiar character of the covenant upon which this action is brought." And upon this point the rule of strict construction was not extended, but the rule of liberal construction in favor of the subcontractor was applied.

[15] American Blower v. Lion Bonding & Surety Co. — Iowa, —, 160 N. W. 939.

not promptly made as stipulated. The construction company abandoned its contract and the state completed the work by another contractor. Several matters were alleged in defense to an action on the bond and it was held that; in the absence of fraud or mistake, which were not set up in the answer, the state was obligated to pay the percentage as stipulated; that the architect's certificate was binding upon the original parties and also upon the surety under the terms of the bond, and his judgment and decision having been agreed upon by the parties they were bound where no fraud or mistake was shown; that he acted as an individual in making the estimates so that the parties' rights were not affected by the fact that he was a state officer; that it was sufficient if in making said certificates he acted in good faith relying upon information from others; that certificates endorsed "O.K." by the architect, although prepared by others were sufficient as to form, the use of such abbreviation being in accordance with common usage; that the state was not estopped from maintaining its suit on the bond because it made payments upon the certified estimates of the architect without seeing that said estimates were true and correct, nor by the fact that labor and material were included therein when in fact the latter had not been used in construction, although it had been furnished when the estimates were made; that the value of material and labor, however, which had been diverted by the state to other uses than in the construction work under the contract, should be deducted from the amount of the judgment.[16] But an architect's certificate which is not intended by him to be final or permanent does not conclude the surety company in the bond as to the amount due where it is obtained by misrepresentations of the contractor and without the exercise by the architect of his personal judgment as to the matters covered by said certificate.[17]

Again, although a contractor, a foreign company, has no legal right to do business in the state, yet inasmuch as it would be estopped to assert the invalidity as against the city as the other party to the contract, a corporation who had entered into a bond guaranteeing payment of all claims for labor and material is liable on its bond upon failure of the contractor to pay for material.[18] And if a building contractor's bond provides that he shall pay for all materials supplied for the building, it is not necessary for material men to postpone a suit on the bond until the owner of the building

[16] State v. Blanchard Construction Co. (State v. Massachusetts Bonding & Ins. Co.) 91 Kan. 74, 136 Pac. 905.

[17] Ilse v. Aetna Indemnity Co. 55 Wash. 487, 104 Pac. 787.

[18] Kuennan v. United States Fidelity & Guaranty Co. 159 Mich. 122, 123 N. W. 799.

has sustained pecuniary injury through the contractor's default.[19] So where the guaranty is that a construction company and its subcontractors would pay all indebtedness for labor and material furnished, this does not preclude materialmen who are not sub-contractors from claiming indemnity from the guaranty company.[20]

(ii–7) *Contract guaranty: exception of liability of surety: strikes.*—A bond stipulated not to cover loss resulting from "labor difficulties called strikes nor reconstruction or repair made necessary by reason" thereof, only exempts the surety company from liability for such strikes as are specified in the contract, which is made a part of the bond, as those for the consequences of which the contractor is not to be held liable.[21]

(ii–8) *Contract guaranty: supplemental agreement abrogating conditions precedent: right of action.*—In a suit in New Jersey on a surety bond, it appeared that one of the conditions precedent to recovery was that in case of default by the principal a written notice of a specified character should be sent to insurer within a limited time and that it should have the right within thirty days after the receipt of said statement to proceed, or to procure others to proceed, with the performance of said contract and "should be subrogated to all rights of the principal and any and all moneys or property that may at the time of such default be due, or that thereafter may become due to the principal under said contract, shall be credited upon the claim which the obligee may then or thereafter have against the surety, and the surplus if any applied as the surety may direct." It was also required that suit be brought upon the bond on or before a certain date. By a supplemental agreement the time of completion was extended as was also the time within which suit could be brought. It was decided that the earlier contract must yield to the latter to the extent of the repugnancy between the provision of the original and supplemental contract and therefore it was made impossible to comply with the clause as to thirty days' notice to enable defendant surety to decide whether to complete the work itself which must be regarded as superseded and abrogated, so that the failure of plaintiff to comply with it before bringing suit was not a valid defense.[22]

**2767. Expenditures necessitated by the loss: marine risk.**—There are certain expenditures which, although not expressly pro-

[19] Orinico Supply Co. v. Illinois Surety Co. 160 N. Car. 428, 42 L.R.A. (N.S.) 707, 76 S. E. 273.

[20] People (Use of Kuenzel) v. National Construction Co. 159 Mich. 133, 123 N. W. 801.

[21] Riviera Realty Co. v. Illinois Surety Co. 150 N. Y. Supp. 616, 165 App. Div. 114, one judge dissented and another dissented in part.

[22] Horwitz v. American Surety Co. 85 N. J. Law, 98, 89 Atl. 246.

vided for under the policy, are nevertheless recoverable because necessitated as a consequence of a peril covered by the insurance, and incurred for the benefit of the ship or the cargo; as expenses for repairs not consequent upon wear and tear, but by a peril insured against, necessitated in a port of distress, or in certain cases the wages or provisions for the crew or salvage, etc. This subject will, however, be more fully considered elsewhere. Charges and expenses incurred in handling and disposing of goods in case of a partial loss must be reasonable and proper, and for the purpose only of ascertaining the amount of loss in order to be estimated as a part of the loss. Charges for storage are not included, nor expenses for insurance paid by the consignee while in store at the place of delivery, although expenses for surveys, inspection, and sale at auction are properly a charge.[1]

**§ 2768. Explosion defined.**—It is said in a leading case that "the word 'explosion' is variously used in ordinary speech, and is not one that admits of exact definition. Its general characteristics may be described, but the exact facts which constitute what we call by that name are not susceptible of such statement as will always distinguish the occurrences. It must be conceded that every combustion of an explosive substance whereby other property is ignited and consumed would not be an explosion within the ordinary meaning of the term. It is not used as the synonym of combustion, and explosion may be described generally as a sudden and rapid combustion, causing violent expansion of the air and accompanied by a report. But the rapidity of the combustion, the violence of the expansion, and the vehemence of the report vary in intensity as often as the occurrences multiply. Hence, an explosion is an idea of degrees, and the true meaning of the word in each particular case must be settled not by any fixed standard or accurate measurement, but by the common experience and notions of men in matters of that sort," and it should be of sufficient force to result in damage to the insured property.[2] In the case above quoted from certain

[1] Lamar Ins. Co. v. McGlashen, 54 Ill. 513, 5 Am. Rep. 162. See Wilson Bros. Bobbin Co. v. Green, 86 L. J. K. B. 713, [1917] 1 K. B. 860, *considered* under § 2818 herein. See § 2717 herein.

As to expenses for survey of vessel, while in dry dock for repairs, to renew classification not then due and apportionment of dock charges and expenses, see Ruabon Steamship Co., Ltd. v. London Assurance, [1900] A. C. 6, 81 L. T. 585, 5 Com. Cas. 71, 9 Asp. M. C. 21, 69 L. J. Q. B. 86, [1898] 1 Q. B. 722, 78 L. T. 402, 67 L. J. Q. B. 548, 3 Com. Cas. 148, 8 Asp. M. C. 346, 369, [1897] 2 Q. B. 456, 77 L. T. 402, 66 L. J. Q. B. 841.

[2] United Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735, per McIlvaine, J.

As to "explosion," excepted risks and losses. See §§ 2584, 2586 et seq. herein.

inflammable vapors evolved in the process of rectifying came in contact with flame, and "a sudden and violent combustion of the vapor accompanied by a noise, described by one witness as being like the crack of a gun, by another as if a bundle of iron had been thrown on the pavement, by another as a crash," was found to be an explosion.[3]

**§ 2768a. "One explosion:" boilers in battery form: "explosion" defined in policy: Pabst Brewing Co. Case.**—In an especially noteworthy Federal case an action was brought to recover damages caused by the explosion of three steam boilers forming part of a six-boiler battery, said boilers were not separate entities for the purpose of insurance, but were coupled to a common header for joinder of several or all in steam service and were insured against loss or damage, except by fire, caused by the explosion, collapse, or rupture of said boiler or boilers, or any of them, but there was a limitation of the liability of insurer in case of loss or damage "resulting from any one explosion" to a sum not exceeding a specified amount, and in case of more than one explosion the lia-

[3] See also Briggs v. North America Ins. Co. 53 N. Y. 446; Boatman's Fire & Marine Ins. Co. v. Parker, 23 Ohio St. 85, 13 Am. Rep. 228; Everett v. London Assur. Co. 19 Com. B. (N. S.) 126; 34 L. J. Com. P. 299, 11 Jur. (N. S.) 546, 13 W. R. 862. Webster defines explosion as: "1. The act of exploding, bursting with a loud noise or detonation; a sudden inflaming with force and a loud report, as the explosion of gunpowder; 2. Steam engine: the shattering of a boiler by a sudden and immense pressure in distinction from rupture." "1. The act of exploding; a sudden expansion of a substance of gunpowder or an elastic fluid with force and usually a loud report; a sudden and loud discharge, as the explosion of powder; an explosion of fire-damp. 'Explosive mixtures of coal gas and air may be inflamed by sparks struck from metal or stone:' . . . Frankland's Experiments in Chemistry, p. 541; 2. A sudden bursting or breaking up or in pieces from an internal or other force; a blowing up or tearing apart, as the explosion of a steam boiler:" Century Dictionary, tit. "Explosion." "As the term is often rather loosely employed, 'explosion' may, for our purpose, be defined as the sudden or extremely rapid conversion of a solid or liquid body of small bulk into gas or vapor occupying very many times the volume of the original substance, and in addition highly expanded by the heat generated during the transformation. This sudden or very rapid expansion of volume is attended by an exhibition of force more or less violent, according to the construction of the original substance and the circumstances of explosion. Any substance capable of undergoing such a change upon the application of heat or other disturbing cause is called 'explosion:'" 8 Encyclopedia Britannica (9th ed.) 807, tit. "Explosives." "1. The act of exploding; a sudden, forcible expansion of a substance, as gunpowder, or an elastic fluid, usually accompanied by a loud sound; as an explosion of dynamite, an explosion of fire damp. 2. A sudden bursting or flying to pieces as a result of internal pressure; as the explosion of a boiler." Webster's Universal Dict. (1910) "Explosion."

bility of insurer was limited to a sum not in excess of the total amount of insurance which sum was three times that fixed for the limit of liability in case of one explosion. Three boilers of the battery were exploded in distinct succession and not concurrently and upon that premise: (1) It was held that the one was primary and the other two were secondary or incidental occurrences attributable thereto and that, inasmuch as this was a case of a battery of boilers, whereof the amount of damages could not be distinguished between the contributing cause, the loss was peculiarly within the definition that when concurring causes of the damage appear, the proximate cause to which the loss is to be attributed is the dominant, the efficient one, that sets the other causes in operation, and causes which are incidental are not proximate, though they may be nearer in time and place to the loss. (2) It was also determined that as to any defective condition of the second and third boilers it did not affect the question of proximate cause, for however much it may have contributed to the damage it was not an intermediate cause disconnected from the primary cause and self-operating which produced the injury. (3) It further appeared that one of the printed provisions of the policy was: "That by the term 'explosion, collapse, or rupture' as used in this policy, is to be understood a sudden, substantial tearing assunder of the boiler or any portion thereof, or the sudden crushing or forcing inward of the furnace or the flues or other parts of the boiler, caused by the pressure of steam; and 'boiler' is understood to include also the steam pipe, feed pipe and blow-off pipe up to and including the stop valve nearest the boiler in each of the same, the pipes of the water column, steam and water guages, and the safety valve." It was claimed, therefore, that this policy definition applied only to a "boiler as an individual thing" and as the plural number was not used it amounted to a definition of like restriction as used in the limitation clause above noted. As to this claim the court per Seaman, C. J., said: "We do not understand, however, that the definition cited tends in any degree to aid the contention that an explosion of one boiler which involves as well the explosion of others does not come within the meaning of this limitation of damages resulting from an explosion. It appears as one of the general provisions of the standard form of policy, and its obvious purpose is, as we believe, to prevent restricted application of the terms referred to, and so extend the meaning as to include all attachments of the boiler which were subject to pressure. Thus explosion of any of the numerous tubes and connections of the boiler in controversy is brought within the intendment of liability, including, as of course, resulting explosions and damages. Throughout the pol-

icy the term 'explosion' is used in a singular form, and we believe the limitation of liability for loss 'resulting from any one explosion' accurately and entirely names the cause or event insured against, both within the settled rule of efficient or proximate cause and in accord with common usage in reference to an occurrence which involves the explosion of more than one boiler. Whatever the extent of damages resulting from an explosion, the indemnity recoverable under the contract is alike, whether one or several of the boilers explode, either concurrently or in succession, and no mention of successive (incidental) explosions is needful or desirable in the limitation clause. The fact being established that the primary explosion in question occurred in one boiler, followed by explosion of two others plainly attributable to the first, we are satisfied that the above-mentioned doctrine of proximate cause becomes applicable to fix the one explosion as the cause of contract liability, and therefore strictly within the terms of the limitation." (4) Inasmuch as the issue of contract liability involved the interpretation of the clause limiting the recovery in case of "any one explosion" and in case of more than one explosion the entire liability was also limited, and in accordance with the conclusion as to proximate cause and there being one explosion, as above stated, the liability was held limited to recovery as for a single disaster in conformity with the statute of Wisconsin limiting the amount of loss for which an insurer in that state issuing a policy of boiler insurance could expose itself under any one accident. (5) Another point, although belonging to the question of evidence, is so intimately connected herewith that it will be noted here, and that is: as to the meaning of the word "Explosion," proof of common usage in the singular form, as applicable to the explosion of boilers in immediate succession, is held clearly admissible in order to ascertain the sense in which that term must have been understood between the parties. "This evidence embraced numerous reports in scientific and technical journals (American and English), official reports of disaster, and local publications—all showing like usage of the term 'explosion' where multiple boilers were exploded—and its rejection was erroneous under the view adopted by the trial court for its interpretation."[4] In a policy before the court in another Federal case, being an insurance covering steam boilers, "explosion" was thus defined: "By the term 'explosion' as used in this policy is

[4] Hartford Steam Boiler Inspection & Ins. Co. v. Pabst Brewing Co. 201 Fed. 617, 130 C. C. A. 45, 42 Ins. L. J. 555, Ann. Cas. 1915A 637, *cited* as to meaning of proximate cause in Delaware & Hudson Co. v. Ketz, 233 Fed. 31, 35, 147 C. C. A. 101, (case of injuries to servant). As to parol evidence to explain phrases and words, see § 3807 herein.

to be understood a sudden and substantial rupture of the shell or flues of the boiler or boilers caused by the action of steam." [5]

§ 2769. **Explosion under fire risks: steam boiler.**—We have considered elsewhere the question of loss by explosion, as connected with excepted risks.[6] But we believe that it may be stated here generally that under a fire risk the insurer is not liable for a loss by explosion where it has not assumed such risk, unless fire is the proximate cause thereof. The contract under a fire risk is to indemnify for loss by fire; it is not sufficient that the explosion which produced the loss was capable of causing or might have caused a fire. Fire is the effect of combustion, and is equivalent to ignition or burning; this does not necessitate that the property insured should itself be consumed or the identical property be even ignited, but there must be an actual ignition, and the loss must be the effect of ignition. In other words, the fire must be the proximate cause of the loss, whether the identical property itself be ignited or consumed, or other material or property near by be burned or ignited, in consequence of which a loss to the insured property follows from fire as the proximate cause. If, however, explosion be insured against, and it is the proximate cause of the loss, a recovery may be had.[7] The policy may, however, be so worded as to cover a loss by

[5] American Steam Boiler Ins. Co. v. Chicago Sugar Refining Co. 57 Fed. 294, 6 C. C. A. 336, 9 U. S. App. 186, 21 L.R.A. 572, s. c. 48 Fed. 198. *Cited* in German Savings & Loan Soc. v. Commercial Union Assur. Co., Ltd., 187 Fed. 758, 763, 109 C. C. A. 506.

[6] See §§ 2584, 2586 et seq. herein.

[7] In such of the cases cited below as are not directly in point, the opinions of the court will be found to support the rule in the text.

*United States.*—Insurance Co. v. Tweed, 7 Wall. (74 U. S.) 44, 19 L. ed. 65; Chicago Sugar Refining Co. v. American Steam Boiler Co. 48 Fed. 198, 21 Ins. L. J. 59, rev'd 57 Fed. 294, 6 C. C. A. 336, 9 U. S. App. 186, 21 L.R.A. 572; Waters v. Merchants' Louisville Ins. Co. 11 Pet. (36 U. S.) 213, 9 L. ed. 69, 1 McLean (U. S. C. C.) 275, Fed. Cas. No. 17,266.

*Illinois.*—Commercial Ins. Co. v. Robinson, 64 Ill. 265, 16 Am. Rep. 537 (see note to this case under § 2590 herein).

*Kentucky.*—Montgomery v. Fireman's Ins. Co. 16 B. Mon. (Ky.) 427.

*Louisiana.*—Tanneret v. Merchants' Mutual Ins. Co. 34 La. Ann. 249; Millaudon v. New Orleans Ins. Co. 4 La. Ann. 15, 50 Am. Dec. 550.

*Massachusetts.*—Dows v. Faneuil Hall Ins. Co. 127 Mass. 346, 34 Am. Rep. 384; Scripture v. Lowell Fire & Marine Ins. Co. 10 Cush. (64 Mass.) 356, 57 Am. Dec. 111, per Cushing, J.

*Missouri.*—McAllister v. Tennessee Ins. Co. 17 Mo. 306.

*New Hampshire.*—Kenniston v. Merrimack Ins. Co. 14 N. H. 341, 40 Am. Dec. 193.

*New York.*—Briggs v. North American Ins. Co. 53 N. Y. 446, 447; Evans v. Columbian Ins. Co. 44 N. Y. 146, 4 Am. Rep. 650; St. John v. American Mutual Fire & Marine Ins. Co. 11 N. Y. 516, 1 Duer (N. Y.)

explosion. Thus, a loss by explosion may come within the clause "all other perils," etc.,[8] and the words "fire originating from any cause" will cover loss arising from explosion.[9] The rule above stated is further subject to such qualifications and exceptions as are noted in the sections next following. Issuing a policy against damage from explosion of a boiler, with knowledge of a defect as to the setting thereof, obtained from a report of insurer's inspector, will estop insurer from urging such defect as a defense to a suit upon the policy, and does not preclude such insurance from being in force.[10]

§ 2770. **Same subject: spontaneous combustion.**—The above rule does not prevent recovery for spontaneous combustion causing fire, but includes such a loss.[11] In an ordinary marine policy the insurance against fire does not cover the case of spontaneous combustion caused by the inherent infirmity of the goods insured.[12]

§ 2771. **Same subject: where combustion and explosion inseparably connected.**—If the combustion and explosion are inseparably connected, if a combustible substance in the process of combustion produces explosion also and fire is the agent throughout, and there is a loss by both fire and explosion, it is held that the whole damage is covered by a policy insured against loss by fire.[13]

371; City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258; Babcock v. Montgomery Ins. Co. 6 Barb. (N. Y.) 637, per Pratt, J.

*Ohio.*—Boatman's Fire & Marine Ins. Co. v. Parker, 23 Ohio St. 85, 13 Am. Rep. 228; United Life, Fire & Marine Ins. Co. v. Foot, 22 Ohio St. 340, 10 Am. Rep. 735; Perrin v. Protection Ins. Co. 11 Ohio, 147, 38 Am. Dec. 728.

*England.*—Taunton v. Royal Ins. Co. 2 He. & M. 135, 33 L. J. C. N. 406, 10 Jur. (N. S.) 291, 10 L. T. 156, 12 W. R. 549; Hobbs v. Northern Assur. Co. 8 Ont. 343 (one judge dissenting) rev'd, 12 Can. Super. Ct. 631; Everett v. London Assur. Co. 19 Com. B. (N. S.) 126, 34 L. J. Com. P. 299, 11 Jur. (N. S.) 546, 13 W. R. 862; Stanley v. Western Ins. Co. 3 L. R. Ex. 71, 37 L. J. Ex. 73, 17 L. T. 513, 16 W. R. 369; Austin v. Drewe, 6 Taunt. 436, 4 Camp. 360, 2 Marsh. 130, Holt, 126, 16 R. R. 647, per Gibbs, C. J.; Gordon v. Rimmington, 1 Camp. 123, per Lord Ellenborough. But see dissenting opinion of Hunt, J. See note, as to loss caused by explosion, 34 Am. Rep. 387–89.

[8] Citizens' Ins. Co. v. Glasgow, 9 Mo. 411; British American Ins. Co. v. Joseph, 9 L. C. 448; Perrin v. Protection Ins. Co. 11 Ohio, 147, 38 Am. Dec. 728.

[9] Renshaw v. Fireman's Ins. Co. 33 Mo. App. 394.

[10] Hartford Steam Boiler Inspection Co. v. Lasher Stocking Co. 66 Vt. 439, 44 Am. St. Rep. 859, 29 Atl. 629.

On liability of insurer for loss caused by explosion, see notes in 19 L.R.A. 594, and 38 L.R.A.(N.S.) 474.

[11] See British American Ins. Co. v. Joseph, 9 L. C. 448, and cases and opinions in note under last section.

[12] Providence-Washington Ins. Co. v. Adler, 65 Md. 162, 57 Am. Rep. 314, 4 Atl. 121. See also Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 17, pp. 349, 350.

[13] Scripture v. Lowell Fire & Marine Ins. Co. 10 Cush. (64 Mass.)

**§ 2772. Same subject: where fire precedes or causes the explosion.**—If a fire precedes and causes the explosion, so that the fire becomes the proximate cause of the loss, this is covered by a policy against loss or damage by fire. The principal discussions, however, in cases of this character have been upon the point of proximate cause of loss; as in cases where the explosion is not followed by fire, or where the explosion is on other premises but is caused by fire, and the injury to the insured property is only from concussion, or where fire causes an explosion which in turn causes fire, and this is carried a long distance and is communicated to the insured property. The general principle, however, that the proximate cause of the loss must be reducible to a peril covered by the policy, and the loss must be not too remote a consequence of such peril, but a direct consequence thereof,[14] applies here, although it is also true that the rule is subject to modification.[15] It is difficult, nevertheless, to separate the different factors which necessarily enter into a discussion of this kind, as is illustrated by the case of an accidental communication of fire to gunpowder, or the ignition of some other substance which consumes with less rapidity; or in case where certain vapors evolved by certain processes in the business carried on upon the insured premises come in contact with fire, causing an explosion; or in case of explosion resulting from fire, owing to the peculiar character of the substance, such as flour-dust or starch-dust in manufactories. What constitutes a "fire," as

356, 57 Am. Dec. 111; Dows v. Faneuil Hall Ins. Co. (Dows v. Traders & Mechanics Ins. Co.) 127 Mass. 346, 34 Am. Rep. 384, per Gray, C. J. See Hobbs v. Guardian Fire Ins. Co. 12 Can. Supr. Ct. 631, rev'g 8 Ont. 343 (one judge dissented in court below). But see United Fire Life & Marine Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735, per McIlvaine, J. And see chapters on excepted risks and losses, fire and accident, and cases noted in next section. See also opinion of Neil, J., in Hall & Hawkins v. National Fire Ins. Co. 115 Tenn. 513, 112 Am. St. Rep. 870, 92 S. W. 402, 35 Ins. L. J. 507, 510.

[14] Taylor v. Dunbar, L. R. 4 Com. P. 206, 38 L. J. C. P. 178, 17 W. R. 382; Smith v. Universal Ins. Co. 6 Wheat. (19 U. S.) 176, 185, 5 L. ed. 235, per Story, J.; Babcock v. Montgomery County Mutual Ins. Co. 4 Comst. (N. Y.) 326, aff'g 6 Barb. (N. Y.) 637. See also as to first statement in above text, opinion in Hall & Hawkins v. National Fire Ins. Co. 115 Tenn. 513, 112 Am. St. Rep. 870, 92 S. W. 402, 35 Ins. L. J. 507, 509; Torpedo Top Co. v. Royal Ins. Co. — Ill. App. —, 42 Nat. Corp. Rep. 593, per Neil, J.

As to the terms "unless fire ensues" and "explosion of any kind" and also as to fire preceding and causing explosion, see Wheeler v. Phenix Ins. Co. of Brooklyn, 203 N. Y. 283, 38 L.R.A.(N.S.) 474, n, 96 N. E. 452, 41 Ins. L. J. 247.—Haight, J.

As to "explosion" excepted risks and losses, see §§ 2586 et seq. herein.

[15] Peters v. Warren Ins. Co. 14 Pet. (39 U. S.) 99, 110, 10 L. ed. 371; Waters v. Louisville Ins. Co. 11 Pet. (36 U. S.) 213, 220, 9 L. ed. 69, per Story, J.

that word is used in the policy, has also been discussed, and in this connection a burning lamp, a lighted candle, or gas jet, or other flame, have been considered. In these and other cases the courts have exhaustively discussed the question of liability of insurers and of proximate and remote cause, as applied to the facts in each case, and it is difficult to formulate any rule other than the general one first stated under this section, which assumes as the basis that fire is the agent and proximate cause of the loss. If the facts give room for a discussion whether there is succession of causes, or whether fire is the proximate cause of loss, and the policy is against loss by fire, the question must first be determined whether the fire is the proximate cause of the loss, and be so found before the insurer can be held liable. And although it has been broadly stated that if the explosion is caused by fire the latter is the proximate cause of the loss,[16] yet this statement could never have been intended to be taken broadly, but only in connection with the facts of each particular case before the court, for if the fire is only one of a series of causes, a remote cause and not the proximate cause of the loss, there can be no recovery, even though it precedes and causes the explosion. Accordingly, where a gunpowder magazine, about a mile distant, exploded from some unknown cause, and the injury sustained by the insured property was only from concussion without fire, it was held that this was not a loss or damage by fire, even upon the assumption that it was occasioned by a concussion caused by fire, it being said that this necessitated a seeking the cause of causes to arrive at the origin of the loss.[17] To further illustrate: In a Federal case where a blaze originated in a starch kiln, and in attempting to extinguish it a cloud of starch-dust was stirred up

[16] Waters v. Merchants' Louisville Ins. Co. 11 Pet. (36 U. S.) 213, 9 L. ed. 69, per Story, J.

[17] Everett v. London Assur. Co. 19 Com. B. (N. S.) 126, 34 L. J. Com. P. 299, 11 Jur. (N. S.) 546, 13 W. R. 862; Caballero v. Home Mutual Ins. Co. 15 La. Ann. 217. See Scripture v. Lowell Mutual Fire Ins. Co. 10 Cush. (64 Mass.) 356, 57 Am. Dec. 111, per Cushing, J. In cases of the character under consideration, the words of Erle, C. J., are important. "The relation of cause and effect is matter which cannot always be actually ascertained, but if in the ordinary course of events a certain result usually follows from a given cause, the immediate relation of one to the other may be considered as established," but events may be too distinctly connected with each other to stand in relation with cause and effect: Ionides v. Universal Marine Ins. Assoc. 14 Com. B. (N. S.) 259, 32 L. J. C. P. 170, 10 Jur. (N. S.) 18, 8 L. T. 705, 11 W. R. 858, 14 Eng. Rul. Cas. 271, per Erle, C. J. See Marsden v. City & County Assur. Co. L. R. 1 Com. P. 232, 240, 1 H. & R. 53, 35 L. J. C. P. 60, 12 Jur. (N. S.) 76, 13 L. T. 465, 14 W. R. 106, per Willes, J.; Waters v. Merchants' Louisville Ins. Co. 11 Pet. (36 U. S.) 213, 9 L. ed. 69, per Story, J.; Bacon's Maxims, reg. 1; Ætna Fire Ins. Co. v. Boone, 95 U. S. 117, 24 L. ed. 395.

which came in contact with the flame and exploded, this was held an "accident" under an insurance covering "explosion and accident," and a recovery was permitted for loss directly caused by explosion and a resulting fire. This decision was, however, subsequently reversed, on the ground that the explosion was merely an incident of the fire, and upon the further ground that the company had no power to insure against fire, and also because the policy expressly excepted loss or damage by fire resulting from any cause whatever.[18] Where the explosion on board a vessel was caused by fire, gunpowder being ignited, the fire was held the proximate cause of the loss.[19] It will be observed that in this case there was an explosion of gunpowder. In case of the explosion of a steam boiler, it is true that in one sense the explosion is the consequence of fire used to generate steam.[20] Under an unqualified policy against loss

[18] Chicago Sugar Refining Co. v. American Steam Boiler Co. 48 Fed. 198, 21 Ins. L. J. 59, rev'd 57 Fed. 294, 6 C. C. A. 336, 9 U. S. App. 186, 21 L.R.A. 572; Washburn v. Miami Valley Ins. Co. 2 Flip. (U. S. C. C.) 664, 2 Fed. 633, 9 Ins. L. J. 761 (similar case of flour-dust and explosion).

[19] Waters v. Merchants' Louisville Ins. Co. 11 Pet. (36 U. S.) 213, 9 L. ed. 691, 1 McLean (C. C.) 275, Fed. Cas. No. 17,266. *Cited* in:

*United States.*—The G. R. Booth, 171 U. S. 450, 453, 43 L. ed. 234, 237, 19 Sup. Ct. 9; Richelieu & Ontario Navigation Co. v. Boston Marine Ins. Co. 136 U. S. 408, 426, 34 L. ed. 399, 405, 10 Sup. Ct. 934; Washburn v. Western Ins. Co. 9 Ins. L. J. 426, Fed. Cas. No. 17,216; American Steam Boiler Ins. Co. v. Chicago Sugar Refining Co. 57 Fed. 294, 304 C. C. A. 336, 345, 9 U. S. App. 186, 21 L.R.A. 579.

*Illinois.*—Hewer v. Northwestern National Ins. Co. 144 Ill. 393, 402, 19 L.R.A. 594, 599, 33 N. E. 411; Case v. Hartford Fire Ins. Co. 13 Ill. 676, 681; Heuer v. Westchester Fire Ins. Co. 44 Ill. App. 429, 436; Gibbons v. German Ins. Co. & Savings Inst. 30 Ill. App. 263, 265.

*Indiana.*—Indianapolis Ins. Co. v. Mason, 11 Ind. 171, 180.

*Louisiana.* — Valestracci v. Fireman's Ins. Co. 34 La. Ann. 844, 846; Decuir v. Lejune, 15 La. Ann. 217; Millaudon v. New Orleans, 4 La. Ann. 15, 16, 50 Am. Dec. 550.

*Massachusetts.*—Lynn Gas & Electric Co. v. Meridian Fire Ins. Co. 158 Mass. 570, 576, 20 L.R.A. 297, 35 Am. St. Rep. 540, 33 N. E. 690; Scripture v. Lowell, 10 Cush. (64 Mass.) 356, 362, 57 Am. Dec. 111.

*Missouri.* — Renshaw v. Missouri State Mutual Fire & Marine Ins. Co. 103 Mo. 595, 609, 23 Am. St. Rep. 904, 15 S. W. 945.

*New York.*—Read v. Spaulding, 30 N. Y. 634, 86 Am. Dec. 426; St. John v. American Mutual Fire & Marine Ins. Co. 11 N. Y. 516, 545; Mathews v. Howard Ins. Co. 11 N. Y. 921; City Fire Ins. Co. v. Corlies, 21 Wend. 367, 369, 34 Am. Dec. 258; Briggs v. North British Marine Ins. Co. 66 Barb. 325, 328.

*Ohio.*—United Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio State, 340, 351, 10 Am. Rep. 75.

[20] See § 2796 herein. See St. John v. American Mutual Fire & Marine Ins. Co. 11 N. Y. 516, per Denio, J.; Thames & Mersey Marine Ins. Co. v. Hamilton, L. R. 12 App. C. 484, 56 L. J. Q. B. 626, 17 Q. B. D. 195, 57 L. T. 695, 36 W. R. 337, 6 Asp. M. C. 200, per Lord Halsbury, L. C. "Our opinion excludes, of course, all damage by mere explosion not involving ignition and combustion of

by fire, an explosion which is the result of an antecedent fire in the premises will not affect the liability of the insurer for the loss, though the principal damage resulted from the explosion, and not from the fire. It makes no difference whether an explosion was caused by accidental fire being communicated to coal, oil or gasolene, or whether it was caused by a gas-jet coming in contact with inflammable gas mixed with atmosphere which had escaped and filled the room.[1] Again, we have noted in a preceding section one case where combustion and explosion were held inseparably connected, gunpowder being accidentally exploded with contact with fire.[2] And where the loss is increased by explosion incident to the fire, and the fire is the proximate cause of the loss, the insured, it is held, may recover the entire loss.[3]

But it is held in an English case where an inflammable and explosive vapor emitted or evolved in the process of extracting oil from shoddy ignited, set fire to the premises, then exploded, and was followed by a further fire, that the insurers were liable for all damages caused by fire not the result of the explosion, but not for loss by the explosion, or for any of the consequences thereof. So far, however, as the loss by explosion was concerned, liability therefor was excepted by the terms of the policy. It was also de-

the agent of explosion, such as the case of steam or any other substance acting by expansion without combustion. . . . Cases are conceivable, other than by the use of gunpowder, of explosion without any combustion, which nevertheless being the result of the action of fire are still, it would seem, within the range of the general principle. Various mineral substances exist of value in commerce and the trade which explode by the action of fire without either ignition or combustion. In general, any close vessel, of whatever material composed, when filled with an expansive fluid is liable to explode by the action of heat, though it may be that the vessel and its contents are alike incombustible. The same thing happens under certain conditions to some forms of wood, which, although combustible, may by the action of fire explode without ignition, or which, as in the present case of a house, by having compressed within it some burning substance which is explosive as well as combustible, like gunpowder, may suffer the double injury of combustion in part or of part explosion:" Scripture v. Lowell Mutual Fire Ins. Co. 10 Cush. (64 Mass.) 356, 57 Am. Dec. 111, per Cushing, J.

[1] Renshaw v. Missouri State Mutual Fire & Marine Ins. Co. 103 Mo. 595, 23 Am. St. Rep. 904, 15 S. W. 945. See Stephens v. Fire Assoc. of Phila. 139 Mo. App. 369, 123 S. W. 63, 39 Ins. L. J. 232.

[2] But see Everett v. London Assur. Co. 19 Com. B. (N. S.) 126, 34 L. J. Com. P. 299, 11 Jur. (N. S.) 546, 13 W. R. 862; Cabalero v. Home Ins. Co. 15 La. Ann. 217; Scripture v. Lowell Mutual Fire Ins. Co. 10 Cush. (64 Mass.) 356, 57 Am. Dec. 111, per Cushing, J.; Taunton v. Royal Ins. Co. 2 H. & M. 135, 33 L. J. Ch. 406, 10 Jur. (N. S.) 291, 10 L. T. 156, 12 W. R. 549.

[3] Transatlantic Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403.

clared in this case that insurers were liable for all damages occasioned by the use of water to extinguish the fire.[4] So where a fire is the moving cause of the explosion, as where a building is blown up to stay the progress of a conflagration in progress, here fire is the cause of the loss, even though the original fire was produced by explosion, and insurers are liable.[5] If a loss or any other combustion result from an explosion, where the explosion is caused by a destructive fire already in progress, it comes within the general risk of a policy against fire only, and is a doctrine based on reason and justice and sustained by authority.[6] And where a fire occurs upon the premises insured by which an explosion of gunpowder takes place, the insurer is responsible for the loss which is the direct consequence of the combustion.[7] But where the building was blown down by a storm, and the storm blew fire in contact with escaping gases and air and created an explosion, this was held not a loss by fire.[8]

It will be seen from an examination of the decisions cited under this and the three preceding sections that the cases are not in harmony upon, or as to the point when fire and when explosion, is the proximate cause of the loss. Necessarily, as already stated, each case must rest largely upon the particular facts before the court, as well as upon the terms of the policy in that case. We believe, however, that in so far as we have attempted to formulate any rules under these sections relating to explosion, they accord with the weight of authority and opinion.

**§ 2772a. Boiler explosion "caused by unavoidable external violence:" marine risk.**—If a clause in a marine policy insures against loss or damage to a vessel or any part thereof, with the exception of that occasioned by the bursting of boilers "unless the same be

[4] Stanley v. Western Ins. Co. 37 L. J. Ex. 73, 3 L. R. Ex. 71, 17 L. T. 513, 16 W. R. 369. See United Life Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735; Briggs v. North American Ins. Co. 53 N. Y. 446, 66 Barb. (N. Y.) 325, 330 (in this case it was declared that a burning lamp is not a fire within the policy); Boatman's Fire & Marine Ins. Co. v. Parker, 23 Ohio St. 85, 13 Am. Rep. 228.

[5] Stanley v. Western Ins. Co. 37 L. J. Ex. 73, 3 L. R. Ex. 71, 17 L. T. 513, 16 W. R. 369; Greenwald v. Insurance Co. 3 Phila. (Pa.) 323; City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258. See Mutual Ins. Co. v. Tweed, 7 Wall. (74 U. S.) 44, 19 L. ed. 65, chapter "Excepted Risks and Losses —Fire."

[6] United Life Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735, per Mellvaine, J., *citing* Waters v. La Mar Ins. Co. 11 Pet. (36 U. S.) 213, 9 L. ed. 69; Scripture v. Lowell Mutual Fire Ins. Co. 10 Cush. (64 Mass.) 356, 57 Am. Dec. 111; Millaudon v. New Orleans Ins. Co. 4 La. Ann. 15, 50 Am. Dec. 550.

[7] Caballero v. Home Mutual Ins. Co. 15 La. Ann. 217.

[8] Transatlantic Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403.

caused by unavoidable external violence" such clause means only violence external to the boat, the subject of insurance, and, therefore, where the vessel's boilers exploded while she was lying at a landing and by reason thereof she sank and became a total loss and it does not appear that the explosion was other than one caused by the pressure of steam within the boiler, and there is no evidence on which to base an expert opinion that said explosion was due to unavoidable external violence, recovery is precluded.[9]

§ 2773. **Fallen building: what constitutes.**—A fallen building, within the meaning of a fire policy, is, as a general rule, one which has lost its distinctive character as the building insured before it is subjected to the operation of a peril within the policy.[10] If the building is standing complete or intact, the fact that its supports are weakened, that it is out of plumb, that it is greatly dilapidated, and not safely habitable, does not make it a fallen building.[11] In determining what constitutes a fallen building within a fire risk the character, construction, and relative situation to adjoining buildings are important.[12] If the building is so far demolished by a peril not within the policy as to become a mere mass or congeries of materials, it has undoubtedly lost its distinctive character as the building insured.[13]

[9] Quackenboss v. Insurance Co. of North America, 95 Miss. 872, 50 So. 444, 38 Ins. L. J. 1236.

As to exclusion of loss from bursting of boilers, etc., see §§ 2679, 2679a herein.

[10] *California.* — Breuner v. Liverpool & London & Globe Ins. Co. 51 Cal. 101.

*Illinois.*—Fireman's Fund Ins. Co. v. Congregation Rodolph Sholen, 80 Ill. 558.

*Massachusetts.* — Huck v. Globe Ins. Co. 127 Mass. 306, 34 Am. Rep. 273; Dows v. Faneuil Hall Ins. Co. 127 Mass. 346, 34 Am. Rep. 384; Lewis v. Springfield Fire & Marine Ins. Co. 10 Gray (76 Mass.) 159.

*Missouri.*—Nave v. Home Mutual Ins. Co. 37 Mo. 430, 90 Am. Dec. 394.

*Texas.* — Liverpool & London & Globe Ins. Co. v. Ende, 65 Tex. 118.

Falling building; excepted risks and losses, see §§ 2582 et seq. herein.

[11] Fireman's Fund Ins. Co. v. Congregation Rodolph Sholen, 80 Ill. 558, 8 Chic. Leg. News, 178.

[12] If a building consists of two parts or halves separated from each other by partition walls of brick, each of the two parts capable of standing or falling by itself, they are so far separate and distinctive buildings, even though there be connecting doors, that one part may be and the other part not be a fallen building. Thus, if substantially all the floors and roof of one part falls by a peril other than one insured against, leaving nothing standing but the outer walls, with the exception, perhaps, of a staircase or elevator, this part is a fallen building, but if the other half is not affected by such falling, but remains undisturbed, complete, and uninjured as to all its parts, it is not a fallen building: Walker v. Queen Ins. Co. Stowe v. Girard Fire & Marine Ins. Co. Huck v. Globe Ins. Co. 127 Mass. 306, 34 Am. Rep. 373. See Lewis v. Springfield Fire & Marine Ins. Co. 10 Gray (76 Mass.) 159.

[13] Nave v. Home Mut. Ins. Co. 37 Mo. 430, 90 Am. Dec. 394.

§ 2774. **Falling walls, buildings and structures.**—We have given consideration to this subject elsewhere in connection with excepted risks and losses under fire policies, but it may be stated here that in determining whether there has been a loss by fire, the walls of a building or structure having fallen, the court will consider whether the fire operated as a proximate cause of the loss upon the subject insured. That it could not so operate is clear if the building or structure insured has before the fire occurred ceased to exist as such, and has become a mere mass or congeries of materials, and has, although not entirely fallen, become so far demolished as to have lost its distinctive character as the particular building insured, owing to a cause not a peril insured against, such as inherent defects or weakness in the building itself, high winds, tornadoes, earthquakes, withdrawal of necessary supports, by digging away the underlying or adjacent soil, or some other cause not a peril within the policy.[14]

§ 2775. **Fallen building, etc.: wall weakened by previous fire.**—If an edifice, building, or structure insured against loss by fire is partially consumed, and the walls so weakened thereby that they fall during the progress of the fire, or so shortly thereafter that it may reasonably be held that fire is the efficient proximate cause of the loss, this is covered by a fire policy, and the same would be true where the walls of such partly consumed building fall upon and crush another structure. But the question may rest upon the factor of reasonable time, for the mere fact of the weakening of the walls by fire will not aid the assured where the weakened walls do not fall until some time thereafter, and then by some other cause, as by high wind, after several days.[15]

§ 2776. **Fear of danger: blockade: apprehension of embargo, etc.: marine risk.**—Whether the breaking up of a voyage from fear of capture, as where the port of destination is shut, is justified is an unsettled question in this country. In England it seems well estab-

[14] Dow v. Faneuil Hall Ins. Co. 127 Mass. 346, 34 Am. Rep. 384, per Gray, C. J.; Nave v. Home Mut. Ins. Co. 37 Mo. 430, 90 Am. Dec 394; Huck v. Globe Ins. Co. 127 Mass. 306, 34 Am. Rep. 273. See Pelican Ins. Co. 37 Mo. 430, 90 Am. Dec. 394; Co. 77 Tex. 225, 13 S. W. 980. But *examine* Lewis v. Springfield Fire & Marine Ins. Co. 10 Gray (76 Mass.) 159. See Phenix Ins. Co. of Brooklyn v. Jones, 16 Ga. App. 261, 85 S. E. 206.

On fall of building clause in fire insurance policies, see notes in 32 L.R.A.(N.S.) 604, and L.R.A.1917F, 1064.

Falling building: excepted risks and losses, see §§ 2582 et seq. herein.

[15] Gaskarth v. Law Union Fire Ins. Co. (Eng. Manchester Civ. Ct.) 6 Ins. L. J. 159; Johnston v. West of Scotland Ins. Co. 7 Ct. Sess. Cas. (S. & D. Rep. Scot.) 52.

lished that a mere denial of entry or interdiction of commerce at the port of destination, whether said port be in hostile occupation or there be a blockade or embargo whereby a loss is sustained, is not a peril embraced by the terms of the policy.[16]

**§ 2777. Same subject: cases.**—It is held in Louisiana that a restraint exists, even though there be no seizure, if the power of the blockading squadron is applied so effectually and directly as to break up the voyage, and if a vessel is prevented by a blockading squadron from entering her port of destination, and she is required to return to her port of departure, this entitles her owners to recover on a policy by which she is insured on a recovery against the "arrests, restraints, and detainments of kings, princes, people," etc.[17]

Under a Massachusetts decision the denial of entry or an interdiction of commerce is not a risk within the policy, nor the ground of a claim for total loss or abandonment, whether the vessel be prevented from entering or leaving port.[18]

In a Pennsylvania case the policy was on goods against unlawful restraints, etc., and a blockading squadron drove the vessel away from an intermediate port, and, the blockade being lawful, it was held not a loss covered by the policy.[19] In another case in the same state the warning not to proceed was indorsed on the register, and a distinction was made between the hailing and warning a vessel at sea and entering on board and indorsing the papers; that the writing on a sea letter and register carries with it its own

[16] 2 Arnould on Marine Ins. (Perkins' ed. 1850) *788; 2 Id. (Maclachlan's ed. 1887) 740; Id. (9th ed. Hart & Simey) secs. 804 et seq. pp. 1008 et seq. *citing* Parkin v. Tunno, 11 East, 22, 2 Camp. 59, 10 R. R. 422; Hadkinson v. Robinson, 3 Bos. & P. 388, 7 R. R. 786; Forster v. Christie, 11 East, 205, 10 R. R. 470, and other cases. See also Rodocanachi v. Elliott, 28 L. T. N. S. 840, 845, L. R. 8 C. P. 649, L. R. 9 C. P. 918, 43 L. J. C. P. 255, 31 L. T. 239, 2 Asp. M. C. 399. See also 2 Duer on Marine Ins. (ed. 1846) 628, who states the rule, but says: "Yet the language of the judges leaves us in doubt whether, if the ship enters the foreign port and the property is then seized and confiscated, the loss ought not to be attributed to a peril covered by the policy if when it was effected the existence of the risk was unknown to the assured." See Becker Gray & Co. v. London Assur. Co. 13 Mar. L. Cas. (Part IV. p. CXXX. O. S.) 318, 85 L. J. K. B. 1246, [1916] 2 K. B. 156, 114 L. T. 734, 21 Com. Cas. 258, 32 T. L. R. 511, [1915] 3 K. B. 418, 21 Com. Cas. 41, 31 T. L. R. 38, *considered* under § 2996a herein.

[17] Vigers v. Ocean Ins. Co. 12 La. Ann. 363, 32 Am. Dec. 118; *citing* Olivera v. Union Ins. Co. 3 Wheat. (16 U. S.) 183, 4 L. ed. 365.

[18] Amory v. Jones, 6 Mass. 318; Brewer v. Union Ins. Co. 12 Mass. *170; Cook v. Essex Fire & Marine Ins. Co. 6 Mass. 122; Tucker v. United Fire & Marine Ins. Co. 12 Mass. 288; Richardson v. Maine Fire & Marine Ins. Co. 6 Mass. 102, 4 Am. Dec. 92; Lee v. Gray, 7 Mass. 349.

[19] Thompson v. Read, 12 Serg. & R. (Pa.) 440.

evidence, to be seen by those who visit the ship thereafter, and that if she then attempts to proceed or return she is liable to be and uniformly is taken.[20]

In a New York decision it is declared that the fear of danger or misfortune is not the misfortune itself.[1] It is also held that where notice of the fact of a blockade was given the consignees received the goods at the nearest neutral port into which the vessel proceeded, and the claim of a total loss was sustained.[2] But it is also there held that assurers are not liable for a loss consequent upon proceeding upon the voyage in total disregard of a notice received and of the danger.[3] Again, it is decided that if there is no evidence that the port of destination is blockaded or trade interdicted, the mere apprehension of seizure or confiscation does not create a loss of the voyage, for the fear of loss is not the loss itself.[4]

Under a Federal Supreme Court decision it constitutes no loss within the policy for which insurers on freight are liable, where the vessel is abandoned by reason of false intelligence and the fear of danger occasioned thereby. In the case so holding, however, the vessel was warned, as in the Pennsylvania case above noted, not to proceed by indorsement on her papers.[5] But the master is not bound to regard an unauthorized threat of seizure by an individual claiming to exercise an authority not warranted; the master is not bound to abandon the voyage under such a threat or warning.[6] In another case in the same court the vessel was

[20] Savage v. Pleasants, 5 Binn. (Pa.) 403, 6 Am. Dec. 424. See argument of Brakenridge, J. See as to warning indorsed on papers, King v. Delaware Ins. Co. 6 Cranch (10 U. S.) 71, 3 L. ed. 155, 2 Wash. (U. S. C. C.) 300, Fed. Cas. No. 7,788, noted below; Ferguson v. Phœnix Ins. Co. 5 Binn. (Pa.) 544.

[1] In this case it was provided in the policy that if turned away the vessel might proceed to a port not blockaded, and, being warned not to proceed to certain ports, she proceeded to Gibraltar for advice, where she remained several days, and having received permission to proceed to Barcelona, she broke up her voyage on intelligence received, as she was getting under weigh, of the French and Spanish decrees: Craig v. United Ins. Co. 6 Johns. (N. Y.) 226, 5 Am. Dec. 222.

[2] Schmidt v. United Ins. Co. 1 Johns. (N. Y.) 249, 3 Am. Dec. 319.

[3] Schmidt v. United Ins. Co. 1 Johns. (N. Y.) 249, 3 Am. Dec. 319.

[4] Corp v. United Ins. Co. 8 Johns. (N. Y.) 277. See also Wilson v. United Ins. Co. 14 Johns. (N. Y.) 227. But see Saltus v. United Ins. Co. 15 Johns. (N. Y.) 523.

[5] King v. Delaware Ins. Co. 6 Cranch (10 U. S.) 71, 3 L. ed. 155, aff'g 2 Wash. (U. S. C. C.) 300, Fed. Cas. No. 7,788. See Savage v. Pleasants, 5 Binn. (Pa.) 403, 6 Am. Dec. 424, above noted.

[6] Williams v. Suffolk Ins. Co. 13 Pet. (38 U. S.) 419, 10 L. ed. 226, aff'g 3 Sum. (C. C.) 270, Fed. Cas. No. 17,738. *Cited* in Gloucester Ins. Co. v. Younger, 2 Curt. (U. S. C. C.) 238, Fed. Cas. No. 5,487; Natchez Ins. Co. v. Stanton, 2 Smedes & M. (Miss.) 382, 44 Am. Dec. 592.

laden before the institution of the blockade, and, being ordered back by the blockading squadron, it was held an unlawful restraint, and the insurers liable.[7] It is, however, also decided that a temporary restraint and delay to avoid capture not being shown to have defeated the object of the voyage, and being removed before any loss took place, and the real cause of the breaking up of the voyage and loss being a fear of loss by seizure, it was not a restraint within the meaning of the policy.[8]

[7] Oliveria v. Union Ins. Co. 3 Wheat. (16 U. S.) 183, 4 L. ed. 365.

[8] Smith v. Universal Ins. Co. 6 Wheat. (19 U. S.) 176, 5 L. ed. 235, *citing* Lubbock v. Rowcroft, 5 Esp. 50, 8 R. R. 830; Hadkinson v. Robinson, 3 Bos. & P. 388, 7 R. R. 786. *Examine* Symonds v. Union Ins. Co. 4 Dall. (4 U. S.) 417, 1 L. ed. 890, 1 Wash. (C. C.) 382, Fed. Cas. No. 12,875. See Andrews v. Essex Fire & Marine Ins. Co. 3 Mason (U. S. C. C.) 6, 21, Fed. Cas. No. 374, per Story, J.

*Opinions of Courts on the Above.*—"The loss must be occasioned by some peril actually insured against; the peril must act directly, and not circuitously, upon the subject of the insurance. It must be an immediate peril, and the loss the proper consequence of it, and it is not sufficient that the voyage be abandoned for fear of the operation of the peril:" Smith v. Universal Ins. Co. 6 Wheat. (19 U. S.) 176, 5 L. ed. 235, per Story, J. "Where underwriters have assured against capture and restraint of princes, and the captain, learning that if he enters the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating the total destruction of the thing insured. The doctrine (that assured might abandon in respect to a loss of the voyage) is only applicable to cases in which the loss is occasioned by a peril insured against, which, as it appears to me, must be a peril acting upon the subject insured immediately and not circuitously, as in the present case:" Hadkinson v. Robinson, 3 Bos. & P. 388, 7 R. R. 786, per Lord Alvanley, quoted in 2 Arnould on Marine Ins. (Perkins' ed. 1850) 786; 2 Id. (Maclachlan's ed. 1887) 740; Id. (9th ed. Hart & Simey) secs. 805, 806, pp. 1009 et seq. The assured "should proceed upon his voyage until the danger of an actual loss is made manifest:" King v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 300, Fed. Cas. No. 7,788, per Washington, J.

*Opinions of Text-writers on the Above.*—So far as Mr. Parsons expresses any opinion, he states in the text that the doctrine is unsettled, and in the note that the principle is generally correct that the fear of a peril insured against is not a good reason for an abandonment, but that the only question is, When is the principle to be applied? 1 Parsons on Marine Ins. (ed. 1868) 585 et seq. In the third edition of Mr. Phillips' Work he says: "In case of the master justifiably turning off to another port of discharge or to his port of departure merely to avoid certain capture at that of the original destination, the risk continues on the ship, cargo, or freight until arrival;" and again: "Where after the risk has begun the voyage is inevitably defeated by blockade or interdiction at the port of departure or destination, or by a hostile fleet being in the way, rendering the proceeding upon it utterly impracticable, or capture or seizure so extremely certain that proceeding would be inexcusable, the risk continues till the vessel has arrived at another port of discharge adopted in-

*"Trade in the war region:" apprehension of hostile operations.* In the following case the owners insured the ship against war risks because of facts which appear below, and the only points which by analogy make the decision pertinent here are those concerning what constitutes a "war region" and the effect of an apprehension of hostile operations.[9] According to the facts in said case the premium for war risk insurance payable by the owners was to be refunded to them by the charterers if the steamer was ordered by the latter "to trade in the war region." Said stipulation was made by a supplemental agreement to a charter party. It also appeared that in certain North American waters, off Nantucket Island, in October 1916, and in an area about one hundred miles south of where the vessel was trading and was ordered to trade in the future, there had been a case of activity of a German submarine whereby six ships had been destroyed. The question therefore was directly in issue concerning what constituted a war area and whether the activity as above stated of a single submarine was sufficient to constitute said waters where the vessel was ordered to trade such a part of the war region as to entitle the owners, who had paid a highly increased war risk premium, to recover the amount thereof from the charterers under the said supplemental agreement; also whether the facts established that the ship was trading in the war region. Although it was declared by the court that "the mere apprehension that an area might be one in which hostile operations would be carried on was not enough," still it was held that the state of things at the time the insurance was effected, in October, and at the time the ship was trading, as well as the fact that the rate of insurance had greatly increased should be considered, therefore the vessel had been ordered to "trade in the war region." In other words the vessel had been ordered to trade in waters which the said acts of the submarine had then at that time made a war region, and accordingly the plaintiffs were entitled to succeed in an action to recover from the charterers the premiums paid.[10]

stead of that originally intended, and also that an assured on the cargo has a right to abandon:" 2 Phillips on Ins. (3d ed.) 647, 655, 657, sec. 1115. See also Id. p. 666, sec. 1127. Mr. Arnould's opinion is in accord with that expressed as the English rule in the beginning of this subject. "Although," he says, "whether if the question were res integra this decision could be upheld as a sound application of the principles of law is another question." Mr. Maclachlan, referring to these doubts, says, however, "that the position so established is in accordance with the principles of marine insurance law, as applied under other circumstances; also besides those that are here specially discussed:" 2 Arnould on Marine Ins. (Perkins' ed. 1850) 788; 2 Id. (Maclachlan's ed. 1887) 741. See Id. (9th ed. Hart & Simey) secs. 804 et seq. pp. 1008 et seq.

[9] See §§ 2139a, 2569a herein.

[10] Maskinonge Steamship Co. v.

§ 2778. **Same subject: conclusion.**—It is no doubt true that a mere fear of danger or a peril insured against is too remote to be considered a peril operating to effect a loss or to justify an abandonment; nor is a mere apprehension of loss which is not justified by the facts a sufficient ground for relinquishing the voyage. The restraint must be something more than a merely expected or contingent one, but if we pass beyond the point of fear, mere expectation, or unjustified apprehension to that where the danger becomes so imminent that it is almost a certainty that the vessel will if she proceeds sustain an actual loss, the question is at once suggested whether the fear of the danger has not become merged to such an extent in the danger itself that there is an actual operative restraint; as where the vessel is turned away by a blockading squadron at the port of destination.[11]

§ 2779. **Fire.**—The questions of what constitutes a loss by fire and what is fire have given rise in numerous cases to exhaustive discussions, especially in those decisions which relate to explosion, lightning, falling walls, etc., and necessitates the inquiry whether "fire," as that word is used in policies covering that risk, is the proximate cause of loss under the circumstances of each particular case. What is "fire" is a question not clearly settled so as to be applicable to all cases. Reference must, however, be had to the meaning of that term as used in the contract, and should not be confined to any technical and restricted meaning dependent upon a scientific analysis of its nature and properties, and while it should be construed in its ordinary signification, still it should not receive that general and extended meaning which is sometimes applied to the term. It should be given that construction which conforms to the popular ordinary sense in which it is used. It is rather an effect, than an elementary principle; it is the effect of combustion, and is equivalent to ignition or burning; yet heat is not "fire." Timber may be contracted from the heat of the sun, and a loss be thereby sustained, yet it is not a loss by "fire," although there may be a loss from heat, and "fire," nevertheless, be the proximate

Dominion Coal Co. 33 T. L. R. 340 (C. A.) rev'g 33 T. L. R. 132.—Bailhache, J.

[11] "A just fear of one of the perils insured against," says Chancellor Kent, "has been deemed equivalent to vis major when that has been applied directly and effectually; as in the case of a blockading squadron so as to break up the voyage. The danger was imminent, and might be present and palpable, as well as apparently remediless and morally certain. If therefore, the danger be so great as to amount to almost a certainty of capture, it becomes a restraint in contemplation of the policy, and this is the doctrine best supported by authority:" 3 Kent's Commentaries (5th ed.) 293, 294.

cause of such loss.[1] So a burning lamp is not itself a "fire,"[2] nor is a burning gas jet itself a "fire" or a destructive force, against the immediate effects of which a policy is intended as a protection, even though a possible means of putting a destructive force in motion.[3] So the fire causing an explosion and which may constitute a ground of recovery under a clause excluding liability for loss by explosion must be something more than a mere blaze produced by lighting a match, gas jet, or lamp. An actual fire, in accordance with the commonly accepted meaning of that word, is what is intended.[4] These statements as to the lamp and gas jet should not be confused with the ignition or combustion which ensues by reason of the accidental contact with some part of the building of a gas jet or by the overturning of a lamp. Lightning per se is not "fire."[5] Fire, as noted elsewhere, when used for certain manufacturing and other special purposes, and while confined within the limits where it is usually kept for such purposes, is not "fire" within the terms of the policy.[6] Fire covers a loss by the breaking of machinery where the same is caused by the direct operation of fire upon electrical machinery.[7] Whatever may be held to be the meaning of the word "fire" in any particular case before the court, losses by fire will cover every loss, damage, or injury to the insured property of which "fire" is the proximate cause. It includes every loss necessarily following from the occurrence of a fire, if it arises directly

[1] Babcock v. Montgomery Ins. Co. 6 Barb. (N. Y.) 637, per Pratt, J.; Scripture v. Lowell Mutual Fire Ins. Co. 10 Cush. (64 Mass.) 356, 57 Am. Dec. 111, per Cushing, J.

"Fire" defined, see Sun Insurance Office v. Western Woolen Mill Co. 72 Kan. 41, 82 Pac. 513.

[2] Briggs v. North America Mercantile Ins. Co. 53 N. Y. 446, 447, per Peckham, J.; Fitzgerald v. German-American Ins. Co. 62 N. Y. Supp. 824, 30 Misc. 72.

[3] United States Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735, per McIlvaine, J. But see Boatman's Fire & Marine Ins. Co. v. Parker, 23 Ohio St. 85, 13 Am. Rep. 228.

[4] German American Ins. Co. v. Hyman, 42 Colo. 156, 94 Pac. 27, 16 L.R.A.(N.S.) 77; Metropolitan Casualty Ins. Co. of N. Y. v. Bergheim, 21 Colo. App. 527, 122 Pac. 812, 41 Ins. L. J. 1107, 1109.—Walling, J.; Mitchell v. Potomac Ins. Co. 183 U. S. 42, 46 L. ed. 74, 22 Sup. Ct. 22, 31 Ins. L. J. 570, *cited* in Vorse v. Jersey Plate Glass Ins. Co. 119 Iowa, 555, 560, 60 L.R.A. 838, 840, 97 Am. St. Rep. 330, 93 N. W. 569. And *citing* Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70; United Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 340; Briggs v. North American & Mercantile Ins. Co. 53 N. Y. 446, 449.

[5] Babcock v. Montgomery Ins. Co. 6 Barb. (N. Y.) 637; Kenniston v. Merrimack Ins. Co. 14 N. H. 341, 40 Am. Dec. 193. See § 2790 herein.

[6] Austin v. Drewe, 4 Camp. 360, 2 Marsh. 130, 6 Taunt. 436, Holt, 126, 16 R. R. 647; Millaudon v. New Orleans Ins. Co. 4 La. Ann. 15, 50 Am. Dec. 550. See Jameson v. Royal Ins. Co. 7 Ir. C. L. 126. See §§ 2768–72, 2796 herein.

[7] See § 2761 herein, "Electrical Machinery and Fixtures," etc.

and immediately from the peril or necessarily from judicially admissible and surrounding circumstances, the operation and influence of which could not be avoided. It is not necessary that the identical property, or even any part of it, be consumed or burned or even ignited. If the loss be the direct effect of ignition or burning, or be the result of bona fide efforts justified by the circumstances to save property, as in the case of removal of goods, the destruction of buildings to prevent the spread of a conflagration, the use of water to extinguish the fire, it is a loss by fire. The fire may not extend to the particular articles insured; they may be shriveled, cracked, or discolored by intense heat, the effect of an actual fire, or damaged by smoke, or may be broken or stolen while being removed or while other efforts are made to save them from the impending peril. So a loss from falling cinders, falling walls weakened by fire, or the fall of burning buildings may be a loss by "fire." This rule is clearly deducible from and well settled by the cases, and the principles involved run through the opinions of the courts and a long line of decisions.[8]

A policy against loss or damage by fire without qualification is broad enough to include all fires of whatever origin and all damages therefrom of whatever character.[9] So a risk covering all loss or damage by fire includes loss occasioned to goods in the building caused by the accidental ignition of soot in the chimney or the smoke arising therefrom.[10] If the identity of a building

[8] *United States.*—Magoun v. New England Marine Ins. Co. 1 Story (U. S. C. C.) 157, Fed. Cas. No. 8,961.

*Connecticut.* — Norwich & New York Transportation Co. v. Western Ins. Co. 34 Conn. 561.

*Louisiana.* — Balestracci v. Fireman's Ins. Co. 34 La. Ann. 844; Geisek v. Crescent Mutual Ins. Co. 19 La. Ann. 297; McCargo v. New Orleans Ins. Co. 10 Rob. (La.) 202, 43 Am. Dec. 180.

*Maine.*—White v. Republic Fire Ins. Co. 57 Me. 91, 2 Am. Rep. 22, per Dickenson, J.; Witherell v. Maine Ins. Co. 49 Me. 200.

*Massachusetts.*—New York & Boston Despatch Express Co. v. Traders & Mechanics Ins. Co. 132 Mass. 377, 42 Am. Rep. 440, per Endicott, J.; Metallic Compression Casting Co. v. Fitchburg R. R. Co. 109 Mass. 277; Scripture v. Lowell Mutual Fire Ins. Co. 10 Cush. (64 Mass.) 356, 57 Am. Dec. 111, per Cushing, J.; Lewis v. Springfield Fire & Marine Ins. Co. 10 Gray (76 Mass.) 159.

*Michigan.*—Brady v. Northwestern Ins. Co. 11 Mich. 425.

*New York.*—City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258; Patrick v. Commercial Ins. Co. 11 Johns. (N. Y.) 14, and cases throughout this chapter; Babcock v. Montgomery Ins. Co. 6 Barb. (N. Y.) 636; Austin v. Drew, 2 Marsh. 130, 6 Taunt. 436, 4 Camp. 360, 16 R. R. 647, Holt, N. P. 126, 127, per Gibbs, C. J.

[9] Renshaw v. Missouri State Mutual Fire & Marine Ins. Co. 103 Mo. 595, 23 Am. St. Rep. 904, 15 S. W. 945.

[10] Way v. Abington Mutual Fire Ins. Co. 166 Mass. 67, 55 Am. St. Rep. 379, 32 L.R.A. 608, 43 N. E. 1032. *Examine* § 2796 herein.

is not destroyed by its being blown from its foundation just before a fire, and there are no exceptions in the policy relative to the cause of fire, a recovery is not precluded thereby for a loss by fire originating from a stove or from lightning.[11] But where a lamp accidentally flames up and damage is sustained by reason of the smoke and soot therefrom, this is not a loss by fire.[12] And under a policy against all direct loss or damage by fire, the insurer is not liable for damage arising from smoke and soot escaping from a defective stovepipe and resulting from a fire intentionally built in a stove and kept confined therein, nor for damage caused by water used in cooling a portion of the building heated by such stovepipe, when the use of such water is not necessary to prevent ignition.[13] Nor is damage occasioned by escaping steam from a steam heat-pipe, although the furniture and books of a library are charred and injured thereby, a loss by fire.[14] And damage to goods by an explosion of gas is not a loss by fire within the meaning of a policy, where the goods were not burned, but damaged by the falling of a floor caused by the explosion, although the explosion was produced by the lighting of a match.[15] If the policy excludes explosion unless fire ensues, the policy insures against loss by fire, and even if a rider may suffice to annul such exemption clause and leave the policy as one of insurance against direct loss or damage by fire, it does not avail to interpolate the word "explosion," and the difficulty is not met by the suggestion that the striking of a match involves fire, and that the explosion was an incident of the fire where the fire does no damage except by reason of the explosion, as a loss of that kind is a loss by explosion and not by fire upon the principle that it is the proximate and not the remote cause that controls.[16] But whether explosion of certain substances is a loss by "fire" has, however, been noted elsewhere.[17]

[11] Farrell v. Farmers' Mutual Ins. Co. 66 Mo. App. 153, 2 Mo. App. Rep. 1297.

[12] Samuels v. Continental Ins. Co. (Pa. C. P.) 2 Pa. Dist. Rep. 397. See § 2796 herein.

[13] Cannon v. Phoenix Ins. Co. 110 Ga. 563, 78 Am. St. Rep. 124, 35 S. E. 775, 29 Ins. L. J. 1023.

On loss caused by excessive heat, smoke, or soot from heating apparatus without actual ignition, see note in 25 L.R.A.(N.S.) 501.

But as to "direct loss or damage by fire," *compare* Drumbolus v. Home Ins. Co. 37 Ont. L. Rep. 465, *considered* under § 2837 herein.

[14] Gibbons v. German Ins. & Savings Inst. 30 Ill. App. 263.

[15] Heuer v. Northwestern National Ins. Co. 144 Ill. 393, 19 L.R.A. 954, 33 N. E. 411. See Stephens v. Fire Assoc. of Phila. 139 Mo. App. 369, 123 S. W. 63, 39 Ins. L. J. 232.

[16] Ross v. Liverpool & London & Globe Ins. Co. 88 N. J. L. 340, 84 Atl. 1050, 42 Ins. L. J. 94.

On explosion clause in fire insurance policy, see note in 32 L.R.A. (N.S.) 607.

[17] See §§ 2768–72 herein.

§ 2780. **Fire: marine risk.**—The common form of a marine policy covers the risk of fire at sea in a steamer.[18] But the fact that a memorandum of insurance against fire on an unfinished vessel lying at a wharf is entered in the marine docket of an insurance company does not determine the nature of the contract and make it one of marine insurance.[19] If the ship be justified in putting into dry dock for repairs, and is there burned, she is covered by a marine policy insuring against fire.[20] Under an open policy, however, on provisions until landed the insurers are not liable for their destruction by fire after being landed.[1] In marine insurances, as stated elsewhere, the ordinary policy against fire does not cover spontaneous combustion caused by inherent infirmities of the insured cargo.[2] In an English case, however, insurance was effected upon freight valued at a specified amount on the voyage. The policies were in the ordinary form covering perils of "the seas, fire, jettisons, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the said subject matter of insurance or any part thereof." The vessel was chartered to carry coal from Newcastle to Valparaiso at a certain freight per ton payable on delivery. The coal was shipped in January, the vessel sailed the following month, and the next day it was discovered that a part of the cargo was hot and that the heat was rapidly increasing and for the general safety of ship, cargo and freight the

[18] Pattison v. Mills, 1 Dow. & C. (N. S.) 342, 2 Bligh (N. S.) 519.

Policy on steamer on Great Lakes insuring "against the risk of fire only, including general average and salvage charges arising therefrom" is a fire policy under Assurance Companies Act 1909, United London & Scottish Ins. Co., In re (Newport Navigation Cos' Claim) [1915] 2 Ch. 12, 84 L. J. Ch. 544, 20 Com. Cas. 300, 113 L. T. 400, 59 S. J. 529, 31 T. L. R. 424, aff'g 31 T. L. R. 261.

Contract insuring moored vessel against fire loss is not maritime: hospital ship, City of Detroit v. Grummond, 121 Fed. 963, 58 C. C. A. 101.

As to statutory exemption of shipowners from liability for fire: loss of cargo by fire during deviation, see The Indrapura (U. S. D. C.) 171 Fed. 929, 38 Ins. L. J. 1163.

[19] Eureka Ins. Co. v. Robinson, 36 Pa. St. 256, 94 Am. Dec. 65.

[20] Ellery v. New England Ins. Co. 8 Pick. (25 Mass.) 14, 20, per Putnam, J. See also Pelly v. Royal Exchange Assur. Co. 1 Burr. 341, 14 Eng. Rul. Cas. 30; Brough v. Whitmore, 4 Term Rep. 206, 2 R. R. 361. *Examine* Harrison v. Ellis, 7 El. & B. 465, 26 L. J. Q. B. 239, 3 Jur. (N. S.) 908, 5 W. R. 494; Martin v. Salem Ins. Co. 2 Mass. 420.

[1] Mansur v. New England Mutual Marine Ins. Co. 12 Gray (78 Mass.) 520. See Fire Ins. Assoc. v. Merchants & Miners Transportation Co. 66 Md. 339, 59 Am. Rep. 162, 7 Atl. 905, and cases in last note.

[2] Providence-Washington Ins. Co. v. Adler, 65 Md. 162, 57 Am. Rep. 314. *Examine* Boyd v. Dubois, 3 Camp. 133; Taylor v. Dunbar, L. R. 4 Com. P. 206, 38 L. J. C. P. 178, 17 W. R. 382; Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 17, pp. 349, 350. See c. xii. sec. 9, pp. 311 et seq.

master put into Sydney. As a result of surveys a greater part of the cargo was discharged and sold upon the recommendations of the surveyors. The vessel finally sailed from said port and delivered the remaining cargo of coal at Valparaiso. That portion of the freight which would have been earned under the charter party was lost, as no freight was paid or payable, as to the coal sold at Sydney. Neither unseaworthiness nor the proper condition of cargo was relied on as a defense, as the coal loaded at Sydney was necessarily and properly sold there as it could not have been reloaded and carried with safety to Valparaiso. It was held that even though the fire did not actually break out it was so reasonably certain that it would have broken out, and that if nothing were done, spontaneous combustion and fire would have followed, that something more than a mere fear of fire existed and the condition of things was such that there was an actual existing state of peril by fire so that the loss, if not one by fire, was nevertheless a loss ejusdem generis and covered by the general words "all other losses or misfortunes," etc.; therefore the defendants were directly liable for the loss of freight as a partial loss. The point, however, was not raised as to the right of defendants to deduct in settling the loss the amount which plaintiff and his co-owners as owners of the ship were liable to contribute in general average towards the loss of freight.[2a] And the ordinary policy covers damage by fire caused by lightning or by the fire of enemies,[3] and the destruction of a ship to prevent a capture.[4] Where a collision occurred by which a steamer, which was insured against fire only, was stove in and the fire in the furnaces was forced out from the boilers and set fire to the steamer, causing the vessel to sink, the jury found that the vessel would have floated

[2a] The Knight of St. Michael [1898] P. 30, 67 L. J. P. 19, 78 L. T. 90, 46 W. R. 396, 8 Asp. M. C. 360, 3 Com. Cas. 62, relying upon Stanley v. Western Ins. Co. 37 L. J. Ex. 73, L. R. 3 Ex. 71; Butler v. Wildman, 1 Camp. 123, 3 B. & Ald. 398, 22 R. R. 435; McGibbon v. Queen Ins. Co. 10 Low. Can. Jur. 227; Nobels Explosives Co., Ltd. v. Jenkins, 1 Com. Cas. 436; Porter's Ins. Law, p. 123.

[3] See § 2790 herein, and notes.

[4] Gordon v. Rimmington, 1 Camp. 123, 10 R. R. 656. Same principle in Kohn v. New Orleans Ins. Co. 12 La. (O. S.) 348. And *examine* Ætna Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395; Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 17, pp. 350–52, who says: "But when it is impossible to resist the enemy and to avoid being taken, it is commendable in them to set fire to the vessel and take refuge on shore with the crew. The insurers are liable for the loss happening under such circumstances." In a note thereto by Meredith, at page 351, it is said: "Emerigon, Valin, and Pothier agree that the wilful destruction of the ship under such circumstances is lawful, provided the crew make their escape. In England, the case of Gordon v. Rimmington, 1 Camp. 123, 10 R. R. 656, accords with the text, except that it affixes no such humane condition."

had not the fire burned away the light upper woodwork of the steamer. It was held that the insurers were liable for the damages caused by the fire and sinking of the vessel, but not for damages caused by the collision.[5] And where the insurer of a vessel assumes by express covenant all risk of damages thereto by fires, with the one exception of those caused by explosion of boilers, a subsequent clause in the policy in which the assured warrants in general terms that the insurer shall be free from any claims for loss or damage occasioned inter alia "by the collapsing of flues" will not relieve the insurer from liability for loss by fire occasioned by the collapsing of a flue.[6] Again, the meaning of the general word "at" after the enumeration of specific perils may, it is held, be extended by the introduction of the word "fire" into a specification of perils.[7] But if goods are shipped in a damaged condition and ignition or combustion ensues in consequence, the insurer is not liable, except as to such goods on board as in no way contributed thereto.[8] If, however, insured warrants that his yacht shall be laid up during a certain period within the life of the policy, said policy continues in force during that time, and in case a fire should occur upon the dock to which the vessel is fastened, and it is communicated to the yacht, causing its destruction, it is a loss by fire rendering assurer liable.[9]

§ 2781. **Freight.**[10]—If by reason of the perils insured against the ship sustains such loss that she is prevented from transporting the

[5] Norwich & New York Transportation Co. v. Western Ins. Co. 34 Conn. 561.

[6] Louisville Underwriters v. Durland, 123 Ind. 544, 7 L.R.A. 399, 24 N. E. 221.

[7] West India & Panama Telegraph Co. v. Home & Colonial Marine Ins. Co. 6 Q. B. D. 51, 50 L. J. Q. B. 41, 43 L. T. 420, 29 W. R. 92, 4 Asp. M. C. 341. But see Thames & Mersey Ins. Co. v. Hamilton, L. R. 12 App. C. 484, 56 L. J. Q. B. 626, 17 Q. B. D. 195, 57 L. T. 695, 36 W. R. 337, 6 Asp. M. C. 200.

[8] Boyd v. Dubois, 3 Camp. 133. See Montoya v. London Assur. Co. 6 Exch. 451, 20 L. J. Ex. 254, 17 L. T. (O. S.) 82, 86 R. R. 364; Koebel v. Saunders, 33 L. J. Com. P. 310, 17 C. B. (N. S.) 71, 10 Jur. (N. S.) 920, 10 L. T. 695, 12 W. R. 1106. Emerigon mentions a case where the ship was refused entry, and was set fire to from fear of the plague, and states that the insurers paid the loss without any difficulty. He also notes another instance where the authorities of the port directed the vessel to be burnt for the same cause, and the insurers being proceeded against were first held liable, but this sentence was reversed. In this latter case the defense was rested upon the fault of the captain: Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 17, pp. 348, 349.

[9] So declared by Haight, J., in Robinson v. Insurance Co. of North America, 198 N. Y. 523, 91 N. E. 373, 39 Ins. L. J. 791, rev'g 113 N. Y. Supp. 105, 129 App. Div. 1. The decision was, however, one principally of waiver of the warranty, as the assured caused the yacht to be removed. See Manheim Ins. Co. v. Tyner, 142 Ky. 22, 133 S. W. 1000.

[10] See § 2732 herein.

As to attachment and duration of

goods, or if the goods are lost so that freight may not be earned, there is a loss of freight.[11] The contract contemplates that the goods shall arrive at the port of delivery notwithstanding the perils specified.[12] But the owner of a cargo who has paid freight in advance to the owners cannot recover under a policy insuring prepaid freight, the money being advanced for freight of a cargo owned by assured, and not an absolute payment of freight, and the assured not having any interest in the earnings of the vessel either by way of pledge or lien, and it appearing by the bill of lading that the cargo must be carried to its destination or no freight would be earned, and that a recovery back of the sum advanced could be had for nonfulfillment of the contract to deliver by carrier.[13] In a New York case the advances were made to the master under the terms of the charter-party not in excess of one-third the freight and in part payment of freight, and it was held that such advance was freight earned, and the insurers were not liable therefor as for freight lost, even though it had been restored to the charterers by the master upon claim made therefor by them.[14] And if a cargo is waiting at a port, but a vessel on a voyage there is lost, the contract of the owner of the vessel to transship said cargo entitles him to freight which would have become due, he being in such a situation, with respect to the vessel and cargo, that nothing but a peril insured against prevents his earning freight.[15]

risk on freight, see §§ 1606 et seq. herein.

As to abandonment and total loss; freight, see §§ 2893, 2901, 2906 et seq., 2915 et seq. herein.

As to law of freight in prize proceedings (neutral vessels) see Article "Prize Cases in the English Courts Arising Out of the Present War," by Russell T. Mount, 17 Columbian L. Rev. pp. 185–207.

If the subject of insurance under certificates is freight the insurance is not invalid because two of the running policies under which certificates were issued were upon cargo, Tweedie Trading Co. v. Western Assurance Co. 179 Fed. 103, 102 C. C. A. 397, 39 Ins. L. J. 1342, aff'g 168 Fed. 962.

[11] Whitney v. New York Fireman's Ins. Co. 18 Johns. (N. Y.) 208; De Longeumere v. New York Fire Ins. Co. 10 Johns. (N. Y.) 201, 202; De Wolf v. State Mutual Fire Ins. Co. 6 Duer (N. Y.) 191; Stevens v. Columbian Ins. Co. 3 Caines (N. Y.) 43, 2 Am. Dec. 247; Meech v. Philadelphia Ins. Co. 3 Whart. (Pa.) 473; Davidson v. Willasdy, 1 Maule & S. 313, 14 R. R. 438; Barclay v. Sterling, 5 Maule & S. 6, 17 R. R. 245; Montgomery v. Egginton, 3 Term Rep. 362, 1 R. R. 718. See case under note 2a above.

[12] De Wolf v. State Mutual Fire & Marine Ins. Co. 6 Duer (N. Y.) 191. See also opinion of Thompson, D. J., near end of this section.

[13] Minturn v. Warren Ins. Co. 2 Allen (84 Mass.) 86.

[14] Kinsman v. New York Mutual Ins. Co. 5 Bosw. (N. Y.) 460.

[15] Adams v. Warren Ins. Co. 22 Pick. (39 Mass.) 143; Hart v. Delaware Ins. Co. 2 Wash. (U. S. C. C.) 346, Fed. Cas. No. 6,150; McGaw v. Ocean Ins. Co. 23 Pick. (40 Mass.) 405, 409, per Shaw, C. J.; Robinson v. Manufacturers' Ins. Co. 1 Met. (4 Mass.) 146, per Shaw, C. J.; Davy v.

If a cargo of cotton is so greatly damaged and injured by a sea peril that it is sold by the consent of the master and shippers at the port of departure, where the vessel has put back because of injuries sustained, and the vessel takes another cargo and proceeds on a different voyage, the insurers on freight are not liable.[16] Again, a vessel under a policy of freight insurance while on her voyage was disabled, unloaded her cargo, and was laid up for repairs, but winter set in and she was unable to proceed on account of the ice, whereupon the master voluntarily surrendered the cargo free of freight to the underwriters of the shippers. It was held that the free surrender was premature, and that no recovery of freight money could be had on the cargo thus surrendered.[17] In another case the vessel was not in seaworthy condition for the voyage when she sailed. She never arrived at her port of destination, but after encountering violent storms and leaking badly, she put into port and was there allowed to fill while lying in the harbor, and part of her cargo was discharged to enable surveyors to examine her hull. Her leaky condition was not the result of the strain of the voyage, and although upon a survey certain damage was found due to sea perils, as to which damage she could have been repaired, still it was also found that the greater part of the damage was due to wear, tear, rot, or other natural defects. She was condemned, but the condemnation was based upon the fact that the master reported to the surveyors that he was without funds and that the owners refused to give any money to pay the expense, and that he could not discharge any more cargo or effect any repairs. It was held that insurer was not liable for the failure of the vessel to earn freight. It was also decided that such a condemnation would not warrant a finding that the voyage was broken up by reason of the perils insured against and that such sale, and condemnation were without weight as evidence on which to hold insurer liable. The court, per Thompson, D. J., quotes from a Federal Supreme Court decision[18] as follows: " 'The contract of insurance upon freight is that the goods shall arrive at the port of delivery notwithstanding the perils insured against; and that, if they fail thus to arrive, and the owner is thereby unable to earn his freight, the underwriter will make it good. It does not undertake that the goods shall be delivered in a sound or merchantable state, or that

Hallett, 3 Caines (N. Y.) 16, 19, 2 Am. Dec. 241. See chapters on Insurable Interest herein.

[16] Jordan v. Warren Ins. Co. 1 Story (U. S. C. C.) 342, Fed. Cas. No. 7,524.

[17] Allen v. Mercantile Mutual Ins. Co. 44 N. Y. 437, 4 Am. Rep. 700.

[18] Hugg v. Augusta Insurance & Banking Co. 7 How. (48 U. S.) 595, 12 L. ed. 834.

the vessel in which they are shipped shall be safe against the dangers of the sea, but that it shall be in the power of the insured to earn his freight; that is, that the perils insured against shall not prevent the ship from earning full freight for the assured in that voyage. If the ship and cargo remain, notwithstanding the disasters, in a condition to continue the voyage, it is in his power to earn freight, and he is bound to proceed; but if damage happens to either, and the voyage is broken up, so that no freight can be earned, the owner is entitled to recover, as for a total or partial loss, according as he may or may not have earned freight pro rata itineris. If the damage happens to the vessel, and that can be repaired at the port of distress in a reasonable time, and a reasonable expense, it is the duty of the owner to make the repairs, and to continue the voyage and earn his freight. . . . In every case, before he can recover of the underwriter, he must show that he was prevented by one of the perils insured against from completing the voyage and, for that reason, had failed to entitle himself to freight from the shippers.' "[19] This subject as to loss of freight is further considered elsewhere.[20]

§ 2782. **Hail.**—Insurances are effected upon crops against hail. As stated substantially in the first edition of this work, the question of what constitutes a loss by hail within the meaning of that term and peculiar thereto, had not been before the courts so far as we could ascertain. Questions have, however, arisen as to the extent of loss by hail, evidence in relation thereto, and the amount or measure of recovery or of damages where crops have been injured thereby, but the consideration thereof comes within the discussion of those subjects herein. Although the following authorities may be considered here.

In an Iowa case there was question as to insured's duty in case of a partial loss to care for the remaining portion of the crop, to the best of his ability, or as he and the insurer's representatives should agree and exempting insurer in case of such neglect and also requiring when such damaged crop should be harvested a true account of the grain, etc., grown upon the land covered by the insurance, and that the same should be kept and delivered to insurer certified by disinterested witnesses; and this requirement was held sufficiently complied with when delay in taking care of the crop was forced by the condition of the weather so that a part thereof was not gathered until late and a statement was made nearly a year there-

[19] Stetson v. Insurance Co. of North America (U. S. D. C.) 215 Fed. 186, 44 Ins. L. J. 554.

[20] See total loss, etc., proximate and remote cause, insurable interest, valuation, etc.

after of the amount of yield of said part which was arrived at by averaging acreage and the unharvested part with that gathered.[1]

Where an application was made for a policy of hail insurance on wheat, but before it was issued the wheat was destroyed, it was declared that there was nothing to insure at the time the policy was issued, so that insurer could incur no liability by reason of having issued it, and insured could derive no benefit therefrom. While this is applied in a decision holding on said grounds that a note given for the premium in such a case was wholly without consideration and void, nevertheless the converse of the proposition would be equally true so that recovery on the policy under such circumstances would be precluded.[2] But a recovery may be had for damages suffered to a growing crop of corn by reason of the destruction thereof by hail, even though no liability arises from any contract of insurance, as when said injury or loss to the plaintiff is occasioned solely on account of the negligent failure of insured's agent to forward within a reasonable time an application for insurance on said crop; and a hail insurance company which issued the policy the day after destruction of said crop, is liable to the extent of such damages as might have been recovered had the policy been issued and in force before such loss occurred.[2a] And if assurer's liability, under a policy in a mutual insurance company, indemnifying insured against loss of crops by hail, is to terminate on a certain date, a recovery cannot be had for such a loss after noon of that date, where this last time limit is fixed by amendment of the by-laws under a reserved power in the contract and by-laws to amend.[2b] Again, where there is a statutory "condition precedent to establish any claim or liability" on the part of a policy holder who sustains a loss by hail, such requirement must be complied with before in-

[1] Barry v. Farmers' Mutual Hail Assoc. 110 Iowa, 433, 81 N. W. 690, 29 Ins. L. J. 261 (The questions of evidence as to the yield of like crops etc., and the measure of recovery or damages were in issue in this case). As to same storm and action against same defendant see Barry v. Farmers' Mutual Hail Assoc. 114 Iowa, 186, 86 N. W. 290; McIlrath v. Farmers' Mutual Hail Assoc. 114 Iowa, 244, 86 N. W. 310, 30 Ins. L. J. 728 (also covering amount or measure of recovery or damages and evidence). See also Condon v. Des Moines Mutual Hail Ins. Assoc. 120 Iowa, 80, 94 N. W. 477 (as to evidence upon the point of damages and yield of other crops): Mutual Hail Ins. Co. v. Wilde, 8 Neb. 427, 1 N. W. 384 (as to appraisement and mode of determining damage).

[2] Van Arsdale-Osbourne Brokerage Co. v. Patterson (1916) — Okla. —, 154 Pac. 1131.

[2a] Boyer v. State Farmers' Mutual Hail Ins. Co. 86 Kan. 442, 121 Pac. 329, 41 Ins. L. J. 786.

[2b] Flakne v. Minnesota Farmers' Mutual Hail Ins. Co. 105 Minn. 479, 117 N. W. 785. As to right of mutual hail association to amend by-laws, see Elliott v. Home Mutual Hail Assoc. 160 Iowa, 105, 140 N. W. 431. See also §§ 377 et seq. herein.

sured under such statute is entitled to have "his claim for such amount as the company is liable for, set off against any note of . . . which the company may hold." [2c]

§ 2783. **Hire: chartered freight: delay: derangement of machinery or engines: want of repairs: "free from any claim consequent on loss of time."**—If the terms of a charter-party provide that in case the voyage is delayed more than twenty-four working or running hours by reason of the breaking down of engines or machinery, or for want of repairs preventing the vessel working, then the payment of hire shall cease until the vessel is again in an efficient state to prosecute her voyage, and a policy is on freight chartered against loss by the perils of the sea, fire, etc., the insurer is liable for a loss of hire immediately caused by a peril insured against, whereby the vessel is delayed beyond the time specified. So the clause of the charter-party is put in operation by the perils of the sea, so as to render the insurers liable, where there is such a derangement or breaking down of the machinery or engines through perils of the sea that it becomes necessary to tow her into port, and she is delayed beyond the time specified. In the cases from which the above statement is deduced one was where the vessel was damaged by fire, a peril insured against, whereby the delay was necessitated; the other was where a peril of the sea caused the breaking of machinery, whereby the delay was rendered unavoidable, yet in both cases the efficient cause of the loss was a peril insured against, and by such peril the clause in the charter-party was put in operation.[3]

Where there was a special clause providing that chartered freight and freights are "warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise" and the subject matter was described as "upon freight of frozen meat," Mathew, J., said: "It was not disputed that the words 'or otherwise,' meant other perils insured against. . . . Frozen meat must be shipped at the time specified in the contracts with the shippers and the shipments cannot be delayed. Where the vessel is disabled from fulfilling her engagements, frozen meat, in the ordinary course, would be forwarded in another vessel. A delay involving no great length of time, due to damage by perils insured against, either to ship or machinery, would prevent the vessel from earning freight contracted for." The action was brought to recover total loss on freight on such a cargo. Shortly after arrival

[2c] Union Mutual Ins. Co. v. Huntsberry, — Okla. —, 156 Pac. 327; Rev. L. 1910 Ann. sec. 3552.

[3] The Bedouin, 63 L. J. Adm. 30 [1894] P. 1, 6 R. 693, 69 L. T. 782, 42 W. R. 292, 7 Asp. M. C. 391; The Alps, 62 L. J. Adm. 59, [1893] P. 109, 68 L. T. 624, 41 W. R. 527, 7 Asp. M. C. 337.

at the port of discharge, the vessel discharged her outward cargo and the vessels refrigerating machinery was so damaged by a fire which occurred on board that she was disabled from carrying a cargo of frozen meat. Materials for repairs of said machinery could not be procured at that port and must have been brought from England, and it was determined by the owners to send the vessel there for repairs with such ordinary cargo as she could procure. It was decided that the ship was damaged by a peril insured against and her capacity to carry frozen meat was suspended until her machinery had been repaired, and the earning of freight was therefore rendered commercially impossible, and the loss was "consequent on loss of time" within the words of the warranty. It was also said: "An attempt was made to distinguish the present case from the decision in Bensaude v. Thames & Mersey Marine Ins. Co.,[4] on the ground that this was not chartered freight; but the warranty applies not only to chartered freight, but to all freights, and the several contracts of affreightment made with shippers would seem to have the same operation as if they were grouped in a charter-party. In each case the result of the peril insured against would have been the same—namely to disable the ship from fulfilling her engagements in proper time. It seems to me no such distinction can be reasonably made." [5]

§ 2784. **"Hull and machinery" does not cover "disbursements."**—"Hull and machinery" of a steamship does not cover those things included by "disbursement" policies, such as coals, stores, and expenses.[6]

§ 2784a. **Hull and machinery: "latent defects:" peril of "trial trips."**—In an English case the insurance was upon the hull and machinery of a torpedo boat destroyer, then being built, and the perils which were insured against under a time policy were: "Fire in shops and on board, on stocks, trials, and all marine risks to completion and acceptance by the admiralty" and also perils of the seas, "and all other perils, losses, or misfortunes," and the policy further provided by a clause attached thereto: "This insurance also specially covers loss of or damage to hull or machinery through the negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery, boilers, or hull, . . . with leave to go on trial

[4] 66 L. J. Q. B. 666 (1897) A. C. 609, 77 L. T. 282, 46 W. R. 78, 8 Asp. M. C. 315, 2 Com. Cas. 33, 238 (1897) 1 Q. B. 29 (same clause).

[5] Turnbull, Martin & Co. v. Hull Underwriters Assoc. 69 L. J. Q. B. 588 [1900] 2 Q. B. 402, 82 L. T. 818, 5 Com. Cas. 248, 9 Asp. M. C. 93.

[6] Roddick v. Indemnity Mutual Marine Ins. Co. 2 L. R. Q. B. D. 380, 384, 385, 64 L. J. Q. B. 733, 1 Q. B. 836, 14 R. 516, 72 L. T. 860, 44 W. R. 27, 8 Asp. M. C. 24, per Lord Esher, M. R., and Kay, L. J.

trips." While she was on trial, the connecting rod of the starboard high pressure engine broke. The jaws of the connecting rod split and broke causing great damage. It was held that weakness of design was the cause of the fracture and that such weakness of design was not covered by "latent defect in the machinery;" that "breakage of shafts" did not cover breakage of connecting rods, but that peril of "trials" was a peril insured against and the damage to the machinery occurring during said trial was covered.[7]

§ 2785. **Improper navigation of ship.**—In case of an agreement of members of a shipping association to indemnify one another inter alia for "loss or damage of or to any goods or merchandise caused by the improper navigation of the ship," a neglect of the shipowner to efficiently close a loading port before the completion of the loading, whereby the goods are damaged by sea water leaking in during the voyage, is damage by "improper navigation" under the agreement, although the ship is not endangered or her navigation impeded by the leakage.[8]

§ 2786. **Insolvency of purchasers of goods: annual returns from trade: credit insurance.**—Insurers may become liable for the loss by insolvency or bankruptcy of purchasers of goods, or for the loss of gross annual returns from trade within a limited time or subject to certain conditions, where it is permitted to effect such contracts. The liability will, however, as in other cases, depend upon the observance of the stipulations of the contract, and the insurers will become released by nonobservance.[9]

(a) *Construction generally: riders.*—In so far as these contracts are those of insurance under the rules of construction generally applied in this country, care should be taken in applying the English decisions covering such credit guaranty bond or insurance con-

[7] Jackson v. Mumford, 51 Wkly. Rep. 91, 8 Com. Cas. 61, 9 Com. Cas. 114, 52 W. R. 342, 20 Times L. R. 172. See Hutchins Bros. v. Royal Exchange Assur. Corp. [1911] 2 K. B. 398, 105 L. T. 6, 80 L. J. K. B. 1169, 12 Asp. M. C. 21, 27 T. L. R. 482, 16 Com. Cas. 242. See §§ 2169a, 2736 ("Inchmaree" clause: latent defects) herein.

As to damage to hull and machinery through negligence of master or through latent defects: breakage of propeller blades, see New York & Porto Rico Steamship Co. v. Aetna Ins. Co. 204 Fed. 255, 122 C. C. A. 523, Aff'g 192 Fed. 212.

[8] Carmichael v. Liverpool Sailing Ship Owners Mutual Indemnity Assoc. 56 L. J. Q. B. 428, 19 Q. B. D. 242, 57 L. T. 550, 35 W. R. 793, 6 Asp. Mar. C. 184. See also as to the words "improper navigation," Canada Shipping Co. v. British Shipowners' Mutual Protective Assoc. 6 Asp. Mar. C. 422, 58 L. J. Q. B. 462, 23 Q. B. D. 342, 61 L. T. 312, 38 W. R. 87.

[9] Solvency Mutual Guarantee Ins. Co. v. Freeman, 7 Hurl. & N. 17; Solvency Mutual Guarantee Co. v. Froane, 7 Hurl. & N. 5; Solvency Mutual Guarantee Co. v. York, 3 Hurl. & N. *588.

As to validity of credit guaranty insurance, see §§ 12, 2516 herein.

tracts for the reason that even in insurance law in England the rule of strict construction finds greater favor with the courts than does our rule of construction against insurer.[10]

Generally stated if a rider is attached to the policy and provides that "it shall in all respects have the same effect as if its provisions had been incorporated in the body of" a certain section of the policy as to rating of the debtor, both the policy and the rider constitute only one contract and the terms of the latter enter into the construction of the former in determining the limit of liability as to both rated and unrated accounts, the calculation of losses, the amount from which the initial loss must be deducted and what, if any, amount is recoverable by assured.[11] The effect of a rider may, however, be merely such as to antedate the policy for a certain period where it is made so as to relate back to cover all outstanding accounts which had been created during the regular course of business in said certain period preceding the policy date.[12]

(b) *"Initial loss:" construction generally.*—This distinction should be observed that credit guaranty insurance differs from other kinds of insurance in this, that the insured or indemnified carries what is designated as an initial loss which must be first borne by the latter before assurer, or the indemnifier, becomes liable.[13] So that under the terms of the policy the assured's, or indemnified's percentage of the loss may be much larger than that assumed by assurer, as in a New York case where under the terms of the contract the initial loss assumed by assured was about seventy two per cent of the total loss while the loss sustained by assurer was only about twenty five per cent of the total loss.[14] Again, although these

[10] That construction in favor of assured, etc., in case of ambiguity, see Philadelphia Casualty Co. v. Fechheimer, 220 Fed. 401, 136 C. C. A. 25; Paskusz v. Philadelphia Casualty Co. 206 N. Y. 22, Ann. Cas. 1915A, 652, 106 N. E. 749. See also § 221b, herein.

That it rests primarily upon court to construe such bond, see American Credit Indemnity Co. v. Henry A. Hitner's Sons Co. 228 Fed. 654, 143 C. C. A. 176, aff'd Henry A. Hitner's Sons Co. v. American Credit Indemnity Co. 239 Fed. 689, 152 C. C. A. 523.

[11] American Credit Indemnity Co. v. Jung, 195 Fed. 177, 115 C. C. A. 129, 41 Ins. L. J. 1236, rev'g Jung v. American Credit Indemnity Co. 180 Fed. 510, 39 Ins. L. J. 1649. See further as to effect of riders, subdiv. (h) this section.

When application, bond, and schedule referred to are one contract, see Lexington Grocery Co. v. Philadelphia Casualty Co. 157 N. Car. 116, 72 S. E. 870, 41 Ins. L. J. 168. See 191a herein.

[12] Philadelphia Casualty Co. v. Cannon & Byers Millinery Co. 133 Ky. 745, 118 S. W. 1004.

[13] While this distinction is apparent in the cases it is *noted,* per Pardee, C. J., in American Credit Indemnity Co. v. Jung, 195 Fed. 177, 115 C. C. A. 129, 41 Ins. L. J. 1236, 1240.

[14] Pringle Brothers v. Philadelphia Casualty Co. 218 N. Y. 1, 112 N. E.

contracts are those of insurance and of indemnity,[15] still the indemnity contemplated, as set forth in the contract under the initial loss stipulation, may not have any inception for the reason that the loss may never reach the limit fixed as that to be first borne by assured before assurer's liability commences. The effect of this stipulation relates more particularly to adjustment and recovery and is therefore more fully considered elsewhere herein.[16] It may be stated here, however, that if by the construction of a subsequent and obscure clause, difficult to understand or requiring expert knowledge for its comprehension, the preceding clauses plainly and unequivocally expressed, by which the initial loss of the indemnified is fixed, are nullified, the subsequent clause must be ignored.[17] So where the amount of the initial loss is clearly fixed by the policy at a certain amount it will not be increased by another condition so obscurely worded that it can hardly be understood.[18]

(c) *"First bill" construed.*—The term "first bill," used in a policy issued to cover loss sustained through nonpayment of the first bill of goods sold to new customers not to be in excess of a specified sum, covers the particular articles contracted for at one time irrespective of the time within which payment shall be made of the bill therefor, and it does not include all goods, not exceeding said limited amount, which were sold and delivered between the first sale and the maturity of the bill for the same.[19]

(d) *Rating in commercial agency.*—If the policy is not against loss sustained by reason of the insolvency of persons of every class but expressly covers loss only from credit sales to persons rated as to capital and credit in Bradstreet, this does not include loss by the failure of persons, such as corporations, whose capital is not there rated. This is so held in a New Jersey case.[20] But where a bond is

465, rev'g 130 N. Y. Supp. 330, 153 App. Div. 180, 42 Ins. L. J. 328, and overruling Steinwender v. Philadelphia Casualty Co. 126 N. Y. Supp. 271, 141 App. Div. 432, 40 Ins. L. J. 128, aff'd 131 N. Y. Supp. 1145, 146 App. Div. 951.

[15] See §§ 271, 339h herein.

Mercantile reporting company amending certificate to provide damages in case financial reports are inaccurate is not carrying on insurance business within section 170 subdiv. 2 of the New York Insurance Law. People (ex rel. Daily Credit Service Corp.) v. May, 147 N. Y. Supp. 487. 162 App. Div. 215, aff'd 212 N. Y. 561, 106 N. E. 1039.

[16] See § 3454b herein.

[17] American Credit Indemnity Co. v. Wood, 73 Fed. 81, 19 C. C. A. 264.

[18] Jaeckel v. American Indemnity Co. of N. Y. 54 N. Y. Supp. 505, 34 App. Div. 565, aff'd 164 N. Y. 598, 59 N. E. 1124, *citing* and *relying* upon American Credit Indemnity Co. v. Wood, 73 Fed. 88, 19 C. C. A. 379.

[19] Philadelphia Casualty Co. v. Cannon & Byers Millinery Co. 133 Ky. 745, 118 S. W. 1004.

[20] Robertson v. United States Credit System Co. 57 N. J. L. 12, 29 Atl. 421, 17 N. J. L. Jour. 209.

conditioned that no credit shall be covered unless the debtor has a certain rating in a specified mercantile agency book and one of the debtors to whom goods were sold had establishments in B and other cities and the required rating was given under the heading B and the headings to other cities contained the entries "see" B said cross references were repetitions of the B rating.[1] In a New York case a credit policy stipulated that the class of customers within its protection and the limit of credit to which each would be entitled was that described in an annexed schedule which distinguished between old customers, or those to whom insured had shipped goods within eighteen months before the shipment of the first item included in the account upon which the loss had been incurred, and new customers, or those to whom no goods had ever been sold, or to whom none had been shipped within eighteen months, and all customers, old or new possessing one of the capital or credit ratings in the schedule were covered by the policy. It appeared from a key, which was no part of the policy, that the symbols consisted of a letter and figure as "G-3" the letter indicating a capital rating and the figure a credit rating. As to old customers, however, "possessing a capital and credit rating other than as specified in the above schedule, or who are rated entirely blank both as to capital and credit, or whose names are not printed in the designated mercantile agency book, shall be covered for goods shipped during the term of the" bond. Sales were made during the term of the policy to old customers, whose rating was designated by a figure only, the letter or capital column being blank as "—4." The sales resulted in a loss. It was held that a customer may have, in such case, a "capital and credit rating other than as specified in the above schedule" though one element of said rating is a blank, accordingly the loss was recoverable.[2] Again, an agreement may cover the same period as the policy to which it is attached so as to operate as an acceptance of customers rated by a mercantile agency not recognized by said policy; so where upon objection raised that assured should be permitted to use another mercantile agency at the time of delivery of the policy, than that specified and required by the policy, a memorandum was made thereon extending liability to persons rated in said other agency, such liability of insurer will not be limited to business trans-

[1] Strouse & Bros. v. American Credit-Indemnity Co. 91 Md. 244, 46 Atl. 328, 1063.

[2] Paskusz v. Philadelphia Casualty Co. 213 N. Y. 22, Ann. Cas. 1915A, 652, 106 N. E. 749, rev'g 131 N. Y. Supp. 421, 140 App. Div. 763, 41 Ins. L. J. 181.

As to detrimental change of rating see Henry A. Hitner's Sons Co. v. American Credit Indemnity Co. 239 Fed. 689, 152 C. C. A. 523, aff'g American Credit Indemnity Co. v. Henry A. Hitner's Sons Co. 228 Fed. 654, 143 C. C. A. 176, *considered* under subdiv. (h) this section.

acted after the aforesaid date of delivery, but covers both classes of customers and all business transacted with them after the term of insurance commences; and in case the system requires a rating both as to capital and credit, the customer may be included who is rated by the agency designated by the policy only as to credit, and also by the other agency, both as to capital and credit.[3]

(e) *"Experience" as basis of credit: "highest previous indebtedness."*—In a Kentucky case the "experience" of assured in dealing with its customers was made the basis of credit instead of a rating in a commercial agency; and for the purpose of determining whether credit should again be given, the policy further provided that the "highest previous indebtedness" should be the test, and it was decided that "experience" meant a satisfactory experience, and referred to a business transaction which was closed by payment for the goods purchased, for until then the creditor would not be justified in further extending credit to the debtor; also that an indebtedness which had not been paid would be a present and not a "previous" indebtedness. It was further decided that a creditor would not be justified in again extending credit to an old customer until payment of a note given for goods sold on credit, for until said payment the transaction was not closed so as to constitute it an "experience;" nor in such case would "experience" warrant extending further credit to a customer who had returned, because of inability to pay therefor goods sent C. O. D. If, however, the character of the goods sent was not that contracted for, or they were not of the kind bought, and were returned for that reason, credit might be extended to such customer and the transaction ignored the same as though it had never taken place.[4] In a North Carolina case the

[3] Shakman v. United States Credit System Co. 92 Wis. 366, 32 L.R.A. 383, 53 Am. St. Rep. 920, 66 N. W. 528.

[4] Philadelphia Casualty Co. v. Canon & Byers Millinery Co. 133 Ky. 745, 118 S. W. 1004. The court, per Lassing, J., said: "The introduction of credit insurance in commercial life is of practically recent date, not only in Kentucky but in the United States as well, and this court has not heretofore been called upon to construe any contract of this character; nor are we familiar with the decision of any court construing a contract of insurance similar to that presented in this case, most all insurance of this character is based upon credit ratings as given by recognized commercial agencies, such as Dun or Bradstreet; but this contract is based upon 'experience,' and the 'experience' of the insured, in dealing with its customers, is made the basis of credit. Some confusion has arisen in the practical application of this term. Appellee contends that it means 'business transactions,' while appellant's interpretation of it is 'a business transaction which is closed' that is, the sale of a bill of goods for which the purchaser has paid. This latter is evidently the meaning that should be given the term as used in the policy, for, in fixing the basis of credit, the policy further provides that the highest previous indebtedness shall be

court, per Allen, J., says: "The contract before us is based on experience, not on rating, and this means 'the plaintiff's experience with the several customers. In other words, the defendant was willing to insure the credit of each of plaintiff's customers to an amount that plaintiff's experience with such customers indicated would be a reasonably safe credit' " and said definition is evidently adopted.[5] The following is also pertinent. "The experience of wholesale and retail dealers has doubtless shown that it is reasonably safe to sell to men who are not solvent but who have good character and good habits, and who are accustomed to pay." [6]

In diametrical opposition to the Kentucky decision, above noted, it is now finally determined in New York, that the words "highest previous indebtedness" mean that the liability of insurer and the indemnity to assured is to be determined in an amount not exceeding the highest previous indebtedness of the debtor *for goods shipped, within the time stated,* not exceeding the amount specified and does not mean the highest indebtedness which any debtor *had paid before the execution of the bond.* This is the construction placed by the New York Court of Appeals upon a clause in a credit indemnity bond providing that assured "shall be covered for an amount not exceeding the highest previous indebtedness for goods shipped by the indemnified to the debtor within twelve months prior to shipping the first item of goods included in the account upon which the loss occurred, not exceeding, however, five thousand dollars. But the loss on any such customer shall not be covered unless the preliminary notice thereof has attached to it a copy of the account, *showing the prior experience with such debtor.*" As to the meaning of "experience" it would therefore not be dependent upon that derived from a knowledge of the financial responsibility of the customers proven by the amount of indebtedness that they had shown themselves able to meet and pay. As to the meaning of "prior experience" it is not limited to isolated transactions but

taken as an 'experience' which will justify the indemnified in again extending credit to an old customer. Now an indebtedness which has not been paid could not be called a 'previous' indebtedness, for it would be a present indebtedness. An experience which would justify a creditor in again extending credit to a debtor must be a satisfactory experience, and no experience could be said to be satisfactory unless the goods sold were paid for."

[5] Lexington Grocery Co. v. Philadelphia Casualty Co. 157 N. Car. 116, 72 S. E. 870, 41 Ins. L. J. 168, 172. The above quotation is taken from the opinion of the court in the Steinwender Case (126 N. Y. Supp. 271) *considered* below, *citing* also the Ky. case (133 Ky. 745, 748) *considered* above.

[6] Lexington Grocery Co. v. Philadelphia Casualty Co. 157 N. Car. 168, 72 S. E. 870, 41 Ins. L. J. 168, per Allen, J., asserted as a reason why experience and not solvency had been adopted.

extends to that gained by assured by observation or trial with customers with whom they had dealings, coupled with careful investigation and such experience would be of greater value than that based upon the theory that experience is dependent upon or derived from a knowledge of the financial responsibility of the customers proven by the amount of a previous indebtedness which they had paid, and in this connection the court in holding as above considers the requirement of the notice of loss incumbent upon assured to furnish under the above clause.[7]

[7] Pringle Brothers v. Philadelphia Casualty Co. 218 N. Y. 1, 112 N. E. 465 (rev'g 130 N. Y. Supp. 330, 153 App. Div. 180, 42 Ins. L. J. 328, and overruling Steinwender v. Philadelphia Casualty Co. 126 N. Y. Supp. 271, 141 App. Div. 432, 40 Ins. L. J. 128, which is aff'd 131 N. Y. Supp. 1145, 146 App. Div. 951). The court, per Hogan, J., quotes from the opinion of Scott, J., in the Steinwender Case as to "experience," and continuing says: "The contract of indemnity in question in complete form, as I have stated, is voluminous and covers a class of insurance so recently in operation that few decisions of the courts have been made relating to the same. . . . Insurance contracts should be free from ambiguity and couched in language which clearly defines the liability of the indemnitor and the rights of the indemnified. Had the defendant in the contract in question intended to limit its liability to the 'highest previous indebtedness' which had been *paid* by a debtor, it would have been a simple matter to use language which would clearly express such limitations, and at the same time enable the indemnified to understand the liability of the indemnitor to him.

I do not concur in the reasoning or determination of the appellate division. As I read the clause of the contract, the liability of the defendant and the indemnity to plaintiffs under Schedule A (D. D.) was to be determined in an amount not exceeding the highest previous indebtedness of the debtor *for goods shipped, within the time stated,* not exceeding $5,000, and not, as determined in this case and the Steinwender case, 'the highest indebtedness which any debtor *had paid before the execution of the bond.*' The latter construction not only interpolates the word 'paid' in the contract but extends the highest previous indebtedness beyond the time specified in the contract. The construction I have given to the clause under consideration of necessity compels me to dissent from the reasoning upon which the same is based. In clause DD is found the following: 'But the loss on any such customer shall not be covered unless the preliminary notice has attached to it a copy of the account showing the prior experience with such debtor.' The decision below proceeds upon the theory that 'experience' as used in the clause in question would be 'that derived from a knowledge of the financial responsibility of the customers proven by the amount of indebtedness that they had shown themselves able to meet and pay.' The 'preliminary notice' mentioned may be termed a notice of loss. It was a printed blank furnished by and required to be obtained from the defendant. It was in substance a notice of claim against an insolvent debtor and required the insured to state name and residence of the debtor, rating, if any, reasons why loss is covered other than on debtor's rating, with papers and information to substantiate such reason, the date and amount of each shipment, by what line goods were

(f) *"Experience" not "solvency" as basis of credit.*—If the bond expressly makes experience the basis of credit as applied by reference

shipped, what security or collateral held, whether or not any offer of compromise had been made, what if any effort to compromise had been made, and if so, what steps had been taken to secure the claim and statement of grounds of conclusion that the claim is a loss, and statement of terms of sale and discount.

"The 'copy of the account showing prior experience with such debtor' required plaintiffs to furnish with the notice of loss an account showing the dealing between plaintiffs and the debtor for goods shipped, date of shipments, credits extended, extent and value of goods sold, payments made and balance due, or substantially a complete copy of the account from the plaintiffs' books. A failure to attach a copy of the account showing the prior experience with such debtor under the language used would exclude it from participation in the policy. This statement was not to be furnished until after the loss had been sustained.

"Plaintiffs were engaged in the mercantile business, and necessarily had extensive dealings with numerous customers preceding an issuance of the policy in suit. They could not conduct business with any degree of safety unless they were acquainted with the financial responsibility and standing of the customers to whom they sold goods. Such information might be obtained through commercial agencies if the prospective customer was rated, by reference deemed by plaintiffs reliable or by personal investigation. It is reasonable to assume that plaintiffs before making sales to customers secured information from some source which enabled them to determine the amount of credit they could conservatively extend in each case. The amount of such credit may have been limited in the first instance and later on extended by reason of a knowledge of customers acquired by dealings with them; such knowledge founded upon actual experience would be a basis from which they could determine the risk they were ready to assume. Their business relations with a customer may have been satisfactory. Extended credit may have been granted for numerous reasons, such as the habits and industry of a customer, increased business conducted by him at small expense, promptness in payment of bills, and other traits which may have been considered sufficient experience to extend further credit. At the time the policy in question was issued plaintiffs were within the definition of 'experience' as stated by Justice Scott, for their knowledge of customers with whom they had dealings was gained by observation or trial, and in all probability by careful investigation. Such experience would be of greater value than an experience dependent alone upon the amount of previous indebtedness paid. Their 'prior experience' was not limited to an isolated transaction but clearly extended to that experience they had gained by observation or trial with customers with whom they had dealings. Neither should we overlook the fact that under the policy the plaintiffs assumed a larger percentage of the loss than was assumed by the defendant. The facts in this case disclose the total sales made by the plaintiffs for the year aggregating $689,542.16. The total losses sustained by them according to the referee's figures was $9,556.99. Under the terms of the contract the initial loss assumed by the plaintiffs was $6,895.42, or about seventy-two per cent, of the total loss. The loss sustained by the defendant was $2,661.57; approximately twenty-eight per cent of the total loss. In addition, plaintiffs were required to pay an annual premium of five per

to a certain schedule which specified the class of debtors as old customers, new ones, and those who are solvent, owing outstandings, but said schedule in defining old and new customers does not mention insolvency at the time of the execution of the bond and does stipulate, with reference to outstandings, that insurance covers only those debtors who were solvent when the bond was executed, the intent of said bond will be held to insure the debts of old and new customers created after the execution of the bond, even though insolvent, conditioned that the credit extended was based on experience; to decide otherwise and hold that solvency instead of experience constitutes the basis of credit in such case would be to determine that claims against debtors who were insolvent at the time of the execution of the bond, although based on experience were not protected under the bond, experience, therefore, will be held the basis of credit even though the policy in another section makes solvency a requisite for credit to old and new customers, for such clause being inconsistent is ineffective within the rule of construction against insurer in case of ambiguity.[8]

cent or upward on a maximum liability of ten thousand dollars.

"The construction I have placed upon this contract is the more reasonable interpretation of the language employed, and this conclusion results in the reversal of the order and judgment of appellate division."

In the above cited, overruled Steinwender case, it was declared in substance and effect, per Scott, J., that instead of the arbitrary and certain liability based upon a customer's rating with the commercial agencies the parties may by agreement substitute in place thereof as a test of liability for any customer, a stipulation that "experience shall be the basis of credit;" and when "experience" is so substituted as the test of liability it means the assured's knowledge of the financial responsibility of his customers, gained by actual observation and trial, and proven, not by the amount of indebtedness which they had incurred without paying nor by the extent of a debtor's willingness to incur debts, but by the amount which the debtors had been allowed to incur with a reasonable assurance that they would pay, based upon the fact that they had shown themselves able to meet and pay their indebtedness, so that they would constitute a reasonably safe credit. "Experience," therefore, is not founded on supposition, but upon knowledge gained through actual, satisfactory financial dealings and tested financial responsibility. And when these words "experience" etc., are used in connection with, or by reference to the words, "an amount not exceeding the highest previous indebtedness" said phrases must be read together and the words "highest previous indebtedness" do not mean the largest amount for which the customer was ever indebted prior to taking out the bond, whether that indebtedness was ever paid or not, but does mean the highest indebtedness which any debtor paid before the execution of the bond; and an indebtedness unpaid and existing at the time the bond was issued would not be intended as it would be a "present" and not a "previous" indebtedness.

[8] Lexington Grocery Co. v. Philadelphia Casualty Co. 157 N. Car. 116, 72 S. E. 870, 41 Ins. L. J. 168.

(g) *Distinction between and meaning of terms "subsequent bond;" "expiration" of bond, and "termination:" "successive" bond.*—Another important factor peculiar to these credit guarantee insurance or indemnity contracts is, that a distinction is expressly made between the terms "subsequent bond," "expiration of this bond," and "termination." A "new bond" is a "subsequent bond" issued when the term of the old bond comes normally to an end, and in describing losses to be covered under a new bond on sales of merchandise shipped within a certain number of months next prior to the "expiration of this bond" said phrase is used instead of "termination," the latter word being intended to indicate the ending of the bond by other events. Again, bonds may not be "successive" but one may be intended as a substitute for another and so affect the application of clauses of the contract, as where a bond is surrendered and canceled in order to obtain a new bond; or provisions as to a subsequent bond may have reference only to expiration of the original bond by lapse of time instead of which said original is surrendered and a substitute bond obtained.[9]

(h) *Losses under renewal or new subsequent, etc., bonds on prior sales or shipments: losses after "expiration" of prior bond.*—A credit guaranty bond which constitutes a renewal of the original or prior bond will cover losses occurring during the term of said renewal on goods shipped during the term of said original bond prior to the date of the new bond, where the first bond expressly so stipulates, even though the second bond provides that losses on goods shipped on or after the date thereof, should be only included thereon and not under the first bond, but does not otherwise refer to said stipulation; and such losses are not limited to that class thereof covered by the second bond, but are those losses within the classes covered by the first bond, even though not of a class insured against under the renewal. It was also decided that it was intended by the parties that the renewal bond should cover losses on goods shipped after the date of the execution of the renewal bond, and it was effective from said date, and even though there was a reference to the "date of the execution" it was merely a printed clause designed to apply if the bond had taken effect after the date of its execution instead of, as here, prior thereto.[10] And where the certificate of

[9] Henry A. Hitner's Sons Co. v. American Credit Indemnity Co. 239 Fed. 689, 152 C. C. A. 523. aff'g American Credit Indemnity Co. v. Henry A. Hitner's Sons Co. 228 Fed. 654, 143 C. C. A. 176.

[10] Philadelphia Casualty Co. v. Fechheimer, 220 Fed. 401, 136 C. C. A. 25. In this case the first bond was No. 1318 renewed by bond No. 2071. The first bond provided: "Outstandings covered under renewal bond: seventh. If this bond is renewed on or before the date of termination thereof by the issuance of a new bond, the losses occurring dur-

guaranty is supplementary to the bond of indemnity and only sales and shipments of merchandise and advances to manufacturers made

ing the term of the renewal on goods shipped during the term of this bond shall be included in the calculation of losses under said renewal, the same as if the goods had been shipped." Before the date of termination of this above bond another bond was issued which provided: "In consideration of issuing the attached bond, it is agreed and understood that losses occurring on goods shipped on and after October 1, 1903, shall not be included under bond 1318, but under the attached bond, subject to the conditions thereof." This was the only reference to the previous bond by which it differed in several of its provisions. The first bond by its terms indemnified against loss of accounts due insured from customers for goods shipped between January 1, 1903, and December 31, 1903, and the second bond No. 2071, furnishing such indemnity on shipments between October 1, 1903 and September 30, 1904. Certain losses of plaintiff occurred during the term of the second bond on shipments made prior to the commencement of such term and during the term of the first bond. The question was whether bond 1318 was renewed by bond 2071 within the meaning of clause quoted, so that losses occurring during the term of the latter bond on shipments made during the term of the former bond can be included in the calculation of losses under said latter bond. The court, per Tuttle, Dist. J., said: "It is urged that because it is not recited in the latter bond that it is a renewal of the earlier one, and because there is no direct evidence that the parties agreed that it should be so considered, therefore it is not such a renewal within the meaning of the first bond, and the losses last mentioned are not protected by it. We are unable to agree with such contention. We think that by the clause quoted the parties intended to, and did, agree that if, on or before the expiration of the first bond, defendant should issue to plaintiff a new bond, such clause should become operative. It is unnecessary to determine whether the second bond is itself technically a renewal bond, because it is clear that the parties themselves have stipulated that such renewal should be effected 'by the issuance of a new bond.' It is obvious that those parties were not interested in, if they understood, the technical legal meaning of the term 'renewal.' What they were interested in, and unquestionably understood, was the protection to be extended to losses occurring after, on shipments made before, the termination of the old bond, 'by the issuance of a new bond,' on or before such termination. And when such new bond was so issued the 'outstandings' referred to were thereby 'covered.'

"2. Are the losses occurring during the term of the renewal bond, on shipments made during the term of the original bond, the losses contemplated defined by the original bond?

"The kind of losses on shipments made during the period of the second bond recoverable thereunder differed materially from the kind of losses recoverable under the conditions of the first bond. Thus the only losses against which plaintiffs were indemnified by the second bond were those 'sustained on claims against debtors by or against whom, between the dates of the execution and termination of the bond, judicial proceedings of any kind have been taken, establishing such debtors insolvency' while the first bond gave indemnity against losses arising on claims against the following debtors.

" 'A debtor for an amount not exceeding $250, where the preliminary notice of loss has attached to it a report from the designated mercantile agency, or from some collection

during the year beginning the term of the certificate, such sales, etc., during the year preceding that of the beginning of the bond term may, by force of the renewal clause be included within the scope of the bond.[11] In another case the action was brought upon two bonds of indemnity against loss by insolvent debtors. The first bond contained the condition, that in case it should be renewed, losses on

agency or attorney practising in the place where the debtor did business, that the claim against such debtor is uncollectable through legal proceedings; . . . a debtor who has effected a compromise with his creditors; . . . a debtor by or against whom a petition to be declared a bankrupt or insolvent has been filed under the Federal bankruptcy law or under some insolvency or assignment law of any of the United States or any territory thereof; . . . a debtor against whom an execution in favor of the indemnified or some other creditor has been returned unsatisfied;' and losses arising under certain circumstances mentioned in said bond.

"It is contended by defendant that, if the first bond be considered as renewed by the second, so that losses on shipments during the term of the former, occurring during the term of the latter bond, may be included in the calculation of the losses under said latter bond, only such losses can be so included as are within the class of losses specifically covered by such bond when occurring on shipments made during its term.

"We think that to so hold would require a forced and unnatural construction of the clause in question. It will be observed that by this clause it was agreed that 'the losses occurring' during the term of the renewal, on shipments made during the term of the original policy, should be included in the calculation of losses under such renewal. In the absence of any express definition of the word, we think it evident that by 'the losses' was meant the losses against which plaintiffs were then being insured. And the basis for calculating these losses was then being fixed, in the language of the policy already quoted. If the parties had desired to make the provability of such losses subject to the terms and conditions of the renewal policy such an intention could easily have been expressed in appropriate language, as was done by the insertion in the second bond of the following provision, above referred to:

"'In consideration of issuing the attached bond, it is agreed and understood that losses occurring on goods shipped on and after October 1, 1903, shall not be included under bond No. 1318, but under the attached bond, subject to the terms and conditions thereof.'

"Even if the language of clause 7 alone is not sufficient to require the payment under the renewal policy of the 'losses' as defined in 1318, incurred during its term upon goods shipped before October 1, 1903, we think also that the language just quoted is a clear recognition by the parties that, except as expressly provided thereby, the losses mentioned in clause 7 are those 'included under bond No. 1318,' and not 'under the attached bond, subject to the terms and conditions thereof.' . . . We think that the losses on goods shipped during the period of the first bond and before October 1, 1903, but occurring during the period of the second bond, which may be included in the calculation of losses under the second bond, are not limited to the class of losses covered by said bond, but are the losses coming within the classes covered by the first bond."

[11] Talcott v. Gray, 59 N. J. Eq. 595, 42 Atl. 603.

sales covered according to the terms, conditions, and limitations thereof, resulting after its expiration upon shipments made during the term thereof might be proven under and subject also to the terms and conditions of such renewal; and in case the bond was a renewal it covered losses occurring during the term thereof on shipments made during the term of the preceding bond and might be proven thereunder, subject also to the terms, conditions and limitations of the preceding bond. This condition was subject to the provision that the premium had been paid on such renewal at or before the expiration of the preceding bond. The second bond was in effect for one year after expiration of the first which it renewed, and both bonds contained the precise condition above stated and differed only as to the initial loss to be borne by insured and in the limitation of liability by a loss by a single debtor. It was held that the clear purpose and intent was to carry forward and indemnify insured against losses which might result from sales and shipments during the period of the first bond, but which would not be provable under the prescribed terms of the bond within the period of its duration; that the renewal constituted an extension of the protection afforded by the existing bond in case of losses arising from sales covered according to the "terms, conditions, and limitations" of the bond current when the sales were made and the losses occurring during the term of this "the renewal bond" on shipments made during the term of the preceding bond may be proven hereunder subject also to the terms, conditions and limitations of the preceding bond; that is, such losses were provable under and against the renewal bond, subject to the terms, conditions, and limitations of said preceding bond; that the words "may be proven hereunder" referred to the penalty of the bond, and not to its terms, conditions and limitations, and the preceding bond is to be looked to, for the terms, conditions and limitations of claims originating during the currency thereof in order to prevent an irreconcilable conflict which would arise if both bonds were held to govern as to "terms, conditions, and limitations."[12] Where the loss insured against is the insolvency of debtors owing insured for merchandise sold and delivered between certain dates on the later one of which the policy was to expire and it was also stipulated that should the policy be renewed on or before its expiration losses occurring thereafter on sales made during the existence of said bond should be provable in the same manner as though occurring under the new policy, it was decided that under this stipulation there could be a recovery for losses suffered after the said date of expiration of the term on sales made

[12] American Indemnity Co. v. Champion Coated Paper Co. 103 Fed. 609, 43 C. C. A. 340.

during the said term although the bond was not renewed, provided, however, that final proofs of loss were made as required under a condition that notice and final proofs be given, the first within a specified time after receiving notice of a debtors insolvency and the latter within a certain number of days after expiration of the policy, although the above-stated condition as to losses on sales, etc., constituted by the terms of the bond an exception to the requirement as to notice of insolvency and final proofs of loss.[13] In a recent case, the bond in controversy was issued April 6, 1912, in place of a bond which covered a term from March 18, 1912, to March 17, 1913, both days inclusive, the first bond being surrendered and canceled at request of insured in order to obtain a new bond that would increase the amount at risk. The original bond indemnified assured against loss on sales of merchandise upon credit to persons, firms, etc., with a certain rating by a named mercantile agency, said merchandise to be shipped during the term of this bond, in the usual course of business, but losses "occurring prior to April 4, 1912, the date of the payment of the premium, although the bond may have been delivered" were not covered. A rider was attached covering "losses and indemnities occurring during the term of this bond, but *after* April 4th" on goods sold, shipped and delivered by the indemnified during a period between December 18, 1911, and March 17, 1912 "both days inclusive," "if otherwise coming within the provisions of this bond." This rider still contained the limitations as to losses occurring prior to April 4th. At the time the application was made notes had been given for the premium which bore interest from that date, and another rider provided that the indemnified's two notes aggregating the amount of premium of this bond, receipt of which was acknowledged, in payment of said premium, should be the same in effect, provided they were paid at or before maturity as if the entire amount of premium had been paid by check, but if said notes were not paid at or before maturity then losses occurring prior to payment thereof should not be recoverable or provable under said bond "all other terms and provisions of the said bond to remain in full force and effect." The amount of accruing or accrued interest evidently did not operate to effect any change in the bond. Said notes were paid at maturity thereby making it certain that the bond was in force according to its terms which fixed that date as of April 4th regardless of the actual date of maturity of said notes. It was also stipulated that no loss on goods should be covered if the debtor to whom the shipments had been made between

[13] Sloman v. Mercantile Credit Guarantee Co. 112 Mich. 258, 70 N. W. 886.

said dates of December 18, and March 17, should suffer a detrimental change of rating of the debtor between the first shipment and April 4th the arbitrary date of payment. A loss occurred during the term of the bond and was sustained after April 4th, and it was held that it would therefore be covered by the bond unless the credit rating of the bankrupt debtor had been detrimentally changed, but it was held that such detrimental change had been made. It was also decided that provisions as to losses being covered when occurring during the terms of a new bond on sales and merchandise shipped and delivered under the old bond, did not apply as the bonds were not "successive," one being intended as a substitute for the other, and also that said provision contemplated a new bond issued when the term of the old bond came nominally to an end or expired by lapse of time; also that the conditions and limitations of the new bond were controlling where they were inconsistent with the conditions and limitations of the old.[14]

Under a New York decision where the original bond covers only losses during its term and applies only to goods shipped after the date of its execution or its issuance but a rider provides that "outstandings on the books of the indemnified" on said date, shipped during a period commencing four months prior thereto "shall be covered upon the same conditions and shall be included in the same manner as if the goods had been shipped since" the date of the bond, said rider clause has the effect of extending backward the liability on said bond so as to cover shipments made during the preceding four months as specified and it has the same effect upon other liability, or limitation of liability clauses dependent upon the date of said bond and losses arising from shipments thereunder.[15]

[14] Henry A. Hitner's Sons Co. v. American Credit Indemnity Co. 239 Fed. 689, 152 C. C. A. 523, aff'g American Credit Indemnity Co. v. Henry A. Hitner's Sons Co. 228 Fed. 654, 143 C. C. A. 176. The following clause was in controversy "*Advantages of Subsequent Bond*—In case this company issues to the indemnified a new bond, and the premium therefor is paid prior to the expiration of this bond, losses occurring during the term of the new bond on sales of merchandise shipped and delivered within the twelve months next prior to the expiration of this bond, shall be covered and may be proven under the new bond, subject to its provisions and limitations, the same as though the goods had been shipped during its term, and the governing rating of the debtor under this bond at the date of each shipment shall apply. From the net losses so covered and proven, in conjunction with all others covered and proven under the new bond, there shall be deducted the initial loss provided for by the new bond before any liability on the part of this company shall accrue; but the amount of the shipments made during the said prior twelve months shall not be taken into the calculation of sales in computing the amount of the initial loss under the new bond."

[15] Steinwender v. Philadelphia Casualty Co. 126 N. Y. Supp. 271,

By construction of a renewal and preceding bond, both containing the same condition as to said matter, the protection of the preceding bond was extended to losses sustained by sales and shipments made thereunder and covered according to the terms, conditions, and limitations of the bond current when the sales were made, but said claims were not provable under the terms of the previous bond during its life. In connection with this point there was a controversy upon the question whether the "initial loss" and "single debtor liability limit" of the first or renewal policy were applicable when the losses proven are upon sales and shipments made during the period of the original bond, but which do not result in losses within the meaning of the policy until after its expiration and during the term of its renewal, for while said policies contained the same condition with respect to the first point above stated they differed as to initial loss and single debtor limitation. It appeared that the guaranty against loss not in excess of a specified sum resulting from the insolvency of debtors was "over and above the loss" of a certain amount "agreed first to be borne by the said indemnified on total gross sales and amounting to . . . or less." It was further provided that "no amount against any one such insolvent debtor shall be covered for more than" a sum equal to one-half that fixed in the policy as the indemnity or the limitation of insurer's liability. It was held that by this single debtor limitation no claim as to such debtor in excess of that fixed as above stated was "covered" by the bond; that in order to recover the full indemnity fixed by the policy there must be proof of covered losses equal to the sum of the indemnity and the loss to be first borne by assured, that is, the guaranty in such case was against loss not exceeding the sum specified as indemnity over and above the initial loss or sum agreed to be first borne by assured and that claims provable under the bond include only said amount to be first borne by the indemnified and the amount of the bond; this also means that in order to recover the full indemnity fixed by the policy there must be proof of covered losses equal to the sum of the indemnity and the loss to be borne by insured.[16]

141 App. Div. 432, 40 Ins. L. J. 128, aff'd (mem.) 131 N. Y. Supp. 1145, 146 App. Div. 951, overruled on another point (although the above point is affected in so far as it is dependent upon the point on which the case is overruled) in Pringle Brothers v. Philadelphia Casualty Co. 218 N. Y. 1, 112 N. E. 465, rev'g 130 N. Y. Supp. 330, 153 App. Div. 180, 42 Ins. L. J. 328.

[16] American Credit Indemnity Co. v. Champion Coated Paper Co. 103 Fed. 609, 43 C. C. A. 340. "By the single debtor limitation is meant that condition of the policy which excludes from the protection of the bond any amount of a claim against

A renewal bond will also cover losses accruing during its term on goods sold and delivered during the term of the preceding bond where the preceding bond so stipulates and before the expiration of the first bond assurer's agent sought for a renewal thereof from assured and the latter agreed to accept the same provided it covered back sales under the old bond and a note for the premium was taken and both it and the policy were antedated and this was so held even though several days elapsed between the date of expiration of the old bond and the date when said agreement for renewal was made, it appearing that insurer neither repudiated the agreement nor the note given for the premium.[17]

In a Massachusetts case there was a bond of indemnity within certain limits against loss from insolvency of debtors as defined therein on their total gross sales amounting to a certain sum, or less, to be made between specified dates, both "inclusive" and the bond was to expire on the last of said dates. A rider provided that losses were covered "on sales and shipments," made during a period of about two and a half months ending on a date the same as that specified as the beginning of the risk under said bond, and that the same might be proven thereunder. The insolvency causing the losses in question occurred after the date specified as that on which the bond was to expire. A demurrer on the ground that the bond did not cover insolvency occurring after the date of expiration of the bond was sustained.[18]

But under a Pennsylvania decision, when the bond of a credit indemnity company provides that, "in case this company issues to the indemnified a new bond prior to the expiration of this one, losses occurring during the term of the new bond on sales of merchandise shipped within the twelve months immediately prior to the expiration of this bond, shall be covered and may be proven under this new bond, subject to the provisions and limitations, the same as though the goods had been shipped during its term" and a new bond is so issued, there can be no recovery for losses occurring during the pendency of the second bond on goods sold during the pen-

a single debtor in excess of an agreed sum or proportion." Id. 612. "The agreed loss to be first borne by the assured called the initial loss must be deducted from the gross amount of provable or 'covered' losses." Id. 614.

[17] American Credit Indemnity Co. v. Hecht & Co. 137 Ky. 261, 125 S. W. 697, 129 S. W. 340, 39 Ins. L. J. 800. The point was urged in defense in connection with the above, that the policy provided that no agent of the company should have power to waive or alter any of its provisions, but the claim was not sustained, Id. See upon this point, § 439 herein.

[18] Hogg v. American Credit Indemnity Co. 172 Mass. 127, 51 N. E. 517. Bond defines "Insolvency." Id. 128 note.

dency of the first to a class of customers included in the old bond, but excluded by the provisions of the new.[19] Again, a provision in a bond that in case it is renewed, loss on sales covered, "resulting after said date of expiration upon shipments made during the term of this bond, may be proven under and subject also to the terms and conditions of such renewal." There was a similar provision in case the bond in suit was a renewal. It was held that renewals were thereby encouraged as the means by which bondholders could get the benefit of continuous insurance and it was necessary to resort to such means or there would be no protection for losses "resulting after date of expiration upon shipments made during the term of this bond." There was a demurrer to the declaration which was sustained on the ground that the bond did not cover losses from

[19] National Airline Chemical Co. v. American Credit Indemnity Co. 228 Pa. 588, 77 Atl. 920. The court, per Potter, J., said: "Very similar provisions under somewhat corresponding provisions in bonds issued by this same defendant company have arisen in two cases in the United States Circuit Court of Appeals for the sixth Circuit; American Credit Indemnity Co. v. Athens Woolen Mills, 92 Fed. 581, 34 C. C. A. 161, and American Credit Indemnity v. Champion Coated Paper Co. 103 Fed. 609, 43 C. C. A. 340. The decisions in those cases were based on a construction of a clause numbered 8, of the bonds there in question, which was the corresponding clause to number 7 in the present case. The clauses were so construed as to extend the benefit of the old bond to cover sales in goods made under that bond, in accordance with its terms and conditions, though the losses did not accrue during the life of the first bond. After these decisions were made, the defendant company apparently changed the language of its bonds, in order to protect itself against the construction placed upon clause 8, and substituted the present clause 7, in the bonds involved in the case at bar, for clause 8, in the bonds which were before the court in the cases above cited. . . . Clause 8, as construed in the opinion of the Federal court, provided that losses occurring after the expiration of the original bond 'may be proven under such renewal bond in accordance with the terms and conditions of such renewal:' Clause 7 of the present bond goes further and is much more explicit, in that it provides that such losses 'shall be covered and may be proven under the new bond, subject to its provisions and limitations, the same as though the goods had been shipped during its term.' The difference between the two provisions is apparent. Under the former clause it was held that the losses intended to be protected by the renewal were those covered by the terms of the bond current when the sales were made. As the clause now stands in the contract, we think it constitutes a clear stipulation that in extending the term of protection of the first bond into the period covered by the second bond, the loss, if any, is to be adjusted as though it had occurred upon goods sold and shipped during the term of the second bond. The change seems to have been made by the defendant company for the express purpose of meeting the adverse construction of the clause by the court as above referred to; and it seems to us to be sufficiently clear and definite to accomplish the purpose intended."

insolvency during the term of the bond.[20] A credit guarantee policy insuring against loss sustained by the insolvency of debtors owing insured for merchandise sold and delivered during the term of the policy and also covering losses suffered after the expiration of said term on sales made during the life thereof, does not cover a claim consisting wholly of attorneys' fees, expenses, interest, and protest fees.[1]

(i) *Same subject: recovery of such losses dependent upon payment of premium or guaranty fee.*—Whether a renewal bond covers losses on goods shipped under a prior bond, may depend upon whether the premium or guarantee fee has been paid as stipulated. This is instanced by a New Jersey case, where it was conceded that a renewal certificate succeeded a prior certificate and it was claimed in defense that the premium or guarantee fee for which said renewals was made, had not been paid before the expiration of the original or prior certificate, and therefore there was not a compliance with the condition that, "if this certificate has been paid for on or before the date of the expiration of the certificate held by the above-named party last prior to this one, then, in that case, losses occurring during the life of this certificate, on goods shipped during the term of the last prior one, shall be included in the calculation of losses under this certificate, in the same manner as if the goods had been shipped and the losses had occurred during the life of this certificate." The original policy contained a provision against loss of credits for goods shipped and losses occurring during the term thereof, and also provided, in case of renewal, for recovery of losses thereunder on goods shipped during the life of the original.[2] Losses occurred under the original policy terms and conditions which were adjusted and allowed, but were retained and not paid by insurer. Subsequent to the expiration of the policy, it was agreed that upon cancelation thereof said losses should operate as payment of a renewal premium. It was decided that the defense of nonpayment of the premium or guarantee fee was not sustained, as such agreement constituted such payment "on or before the date of the expiration"

[20] Hogg v. American Credit Indemnity Co. 172 Mass. 127, 51 N. E. 517. Bond defines "Insolvency," see note Id. 128.

[1] Sloman v. Mercantile Credit Guarantee Co. 112 Mich. 258, 70 N. W. 886.

[2] Provision was, "If this certificate is renewed by the said above named party on or before the date of its expiration, at the regular terms of the company, in force at the time of such renewal, then, in that case, losses occurring after the expiration of this certificate, on goods shipped between the commencement and the expiration thereof, shall be provable under the renewal, in the same manner as if losses occurred on goods shipped after the commencement of the renewal."

of the original policy, although the adjustment of said losses under the prior certificate and the cancelation thereof and the execution and delivery of the renewal did not take place until after the expiration of the original certificate. It was immaterial under the circumstances that the execution and delivery of the renewal were postponed as aforesaid; and the points of the agreement and the acts done thereunder being established the payment related back to the life of the prior policy and was of the time during which such losses occurred, so that the mere delay consequent upon negotiations, entering into the formal written agreement and embodying it into the form of a certificate of renewal did not alter or extinguish the obligation, for equity in such a case will impute an intention to fulfil the obligation, and will assume it to have been fulfilled if necessary to protect and enforce the just rights of the parties by applying the principle or maxim that equity looks upon that as done which ought to be done.[3] And if a renewal policy is taken out at the suggestion of insurer's agent, for the purpose of securing protection against impending losses upon sales made during the period of the first bond, and in conformity with a further suggestion by said agent a short note is given and accepted as payment of the premium, and insurer cashes a check given to its order to satisfy said note and the renewal policy acknowledges receipt of the premium, it cannot be successfully contended that a condition requiring payment of the premium on a renewal on or before the expiration of the bond has not been complied with so as to prevent proof of any claims originating under the preceding bond.[4]

(j) *Losses on claims under extension at time of payment of premium or guaranty fee.*—Where losses on claims under extension at the time of payment of the guaranty fee were, under both bond and certificate, not to be included in the calculation of losses, it was held that the requirement that debtors give promissory notes as evidence of their indebtedness on open accounts, which notes were made payable at a later date than the open accounts would have become due, does not constitute an extension contrary to any provision of the policy or contract.[5]

(k) *"Irreconcilable" losses: when agreement to await result of bankruptcy proceedings abrogates or waives contractual limitation of time of suing.*—A one year's contractual limitation in a credit guaranty policy as to the time of bringing suit may be abrogated by

[3] Lauer v. Gray, 55 N. J. L. 554, 37 Atl. 53.

[4] American Credit Indemnity Co. v. Champion Coated Paper Co. 103 Fed. 609, 43 C. C. A. 340.

[5] Strouse & Bros. v. American Credit-Indemnity Co. 91 Md. 244, 46 Atl. 328, 1063, 29 Ins. L. J. 980. "Extension" defined. Id.

agreement, for inasmuch as such a provision is intended for the protection of insurer it may be waived, and is waived, or abrogated and not merely suspended, where an action is brought to recover under said credit indemnity bond for losses on merchandise accounts of a bankrupt, and the policy stipulates for liability for "irreconcilable" losses only, and it is agreed to await the result of the bankruptcy proceedings to determine whether there is a loss on said claim; that is, the adjustment of the loss was not to be taken up until the final liquidation in bankruptcy. This also applies even though there are various other proposals, including one to submit the matter to arbitration, where the only result of said proposals is the agreement to allow said bankruptcy proceedings to take their course as aforesaid.[6]

(l) *Same subject: when statute of limitation commences to run.*—If it is agreed that the adjustment of loss is not to be taken up until the final liquidation of a bankrupt debtor's estate in bankruptcy, and this agreement abrogates a one-year contractual limitation of the time of suing under a credit guaranty bond, the statute of limitations does not begin to run so as to bar suit brought within six years after making said substituted agreement of abrogation; nor will a contention be sustained in such case that the cause of action accrued within a certain number of days after filing proofs of loss under the bond of stipulations, especially so where the bond provides that adjustment be made by taking into calculation the "actual irrevocable loss," for the agreement abrogating, or waiving the one-year period of limitation is inconsistent with said contention.[7]

(m) *Effect of assurer's insolvency or assignment upon its liability, also upon time limitation for suing: effect of adjustment and settlement.*—An assignment by a credit insurance company breaches the contract and insured is entitled to recover on a quantum meruit without furnishing final proofs of the year's losses, within the time limit required after the expiration of said year.[8] And inasmuch as assurer by its assignment or insolvency breaches the contract and renders it inoperative, claims for unearned premiums are not claims or liabilities under the insurance contract, therefore an action upon the policy need not be brought within the time limit fixed in the policy for bringing suit.[9] So where insurer

[6] Philadelphia Casualty Co. v. Thatcher, 236 Fed. 869, 150 C. C. A. 131, 49 Ins. L. J. 239.

[7] Philadelphia Casualty Co. v. Thatcher, 236 Fed. 869, 150 C. C. A. 131, 49 Ins. L. J. 239.

[8] Smith v. National Credit Ins. Co. 65 Minn. 283, 33 L.R.A. 511, 68 N. W. 28. See §§ 3591, 3595, 3598b herein.

[9] McCallum v. National Credit Ins. Co. 84 Minn. 134, 86 N. W. 892. See

becomes insolvent before losses are sustained, by a policy holder, whether on sales made by him before or after the date, recovery thereon is precluded and claim can be sustained only for the unearned premium, there being no reserved value in the policy nor any method of reinsuring. Depue, J. said: "The order in the insolvency proceedings put an end to the business of the company and terminated its contracts, leaving the holders of policies to be indemnified as indemnity might be awarded." [10] Again, if upon insurer's insolvency and general assignment for the benefit of creditors, it settles and adjusts a loss and agrees to pay the amount found due, a new and independent contract is thereby created which changes the liability from that under the insurance contract to one under the settlement, and the period within which action is required to be instituted under the policy terms does not apply to an action brought upon said settlement.[11]

(n) *Copartnership as "indemnified" or as debtor.*—Persons who compose a firm when the bond is made are the "indemnified" thereunder, and if they were the persons who owned and sold the goods during the period covered by the bond and were carrying on the same business, the style of the copartnership is unimportant.[12] Where goods are bought by one member of a firm and charged to him, and said firm carried on business in several places in one of which there was another partner, and the houses for which the goods were bought were designated on plaintiff's ledger, it was decided that it was a question for the jury whether the said firms were identical or independent.[13]

(o) *Evidence of sales: jury.*—Where it is a condition that liability is limited to actual sales of goods owned, sold, and delivered by assured, evidence to prove such sales, etc., is sufficient to go to the jury where there is proof by the salesman who took the orders therefor, that they were forwarded and also proof by the shipping clerk that they were packed and delivered to common carriers and bills

Smith v. National Credit Ins. Co. 65 Minn. 283, 33 L.R.A. 511, 68 N. W. 28. See § 1408d herein.

As to effect of limitation, as to time for suing, on action to recover back premiums, see § 3197 herein.

[10] Gray v. Reynolds, 55 N. J. Eq. 501, 37 Atl. 461. One judge dissented as to sales made prior to insurer's insolvency.

[11] McCallum v. National Credit Ins. Co. 84 Minn. 134, 86 N. W. 892, *distinguishing* Willoughby v. St. Paul German Ins. Co. 68 Minn. 373, 33 L.R.A. 511, 71 N. W. 272.

As to effect of negotiations for adjustment, or adjustment where policy requires suit to be brought within certain time, see §§ 3207 et seq., 3220 herein.

[12] American Credit Indemnity Co. v. Wood, 73 Fed. 81, 19 C. C. A. 264.

[13] Strouse & Bros. v. American Credit-Indemnity Co. 91 Md. 244, 46 Atl. 328, 1063, 29 Ins. L. J. 980.

of lading and invoices mailed to the purchasers and that the same were never returned.[14]

**§ 2787. Insolvency of debtors: meaning of "loss: credit insurance."**—If a policy stipulates for insurance to an amount not exceeding a specified sum against "loss sustained by reason of the insolvency of debtors owing the insured for merchandise," the word "loss" means the actual loss sustained by reason of such insolvency; that is, not the amount of indebtedness due from the insolvent debtor at the time of his suspension, but the balance remaining due after deducting from the entire indebtedness payments made by the debtor.[15]

(a) *What constitutes insolvency within intent of credit guaranty insurance bonds.*—Under a New York decision if a credit guaranty bond insures against loss on sales sustained by the insolvency of debtors, who have made a general assignment for the benefit of their creditors, under a policy prepared for use, not in any particular state or locality but throughout the country generally, said provision is to be construed with reference to the effect which such a transaction has upon the debtor in the business community and this depends upon the character of the instrument, of the purpose and nature of the transaction and the completeness of the transfer rather than upon the name or form of the transaction, for the language used will be construed to mean what the words import in the commercial world, outside of any technical construction. If the purpose and effect of the transfer is to dispose of all the debtor's assets and so prevent the payment of his debts, or there is any transfer by a person of all his stock and business which covers substantially all his property, whether for the benefit of a single creditor or for all, whether the assignment be in the form prescribed by state statutes or under the common law, or be in any form calculated to effect the above results it will constitute a loss within the intent of the policy; so written transfers by which debtors convey substantially all their property to pay or secure debts, the property being at once delivered and the debtors thereupon ceasing at once to do business constitute general assignments for creditors within the meaning of policy terms first above mentioned.[16] If the return unsatisfied, of an

[14] Strouse & Bros. v. American Credit-Indemnity Co. 91 Md. 244, 46 Atl. 328, 1063, 29 Ins. L. J. 980.

[15] Mercantile Credit Guarantee Co. v. Wood, 68 Fed. 529, 15 C. C. A. 563.

As to the meaning of the word "loss," or "losses" in an application for credit guaranty or indemnity insurance, in connection with representations or warranties, see L. Black & Co. v. London Guarantee & Accident Co. Ltd. 216 N. Y. 560, 111 N. E. 241, rev'g 144 N. Y. Supp. 424, 159 App. Div. 186, 43 Ins. L. J. 301, *considered* under § 2002a, subd. (e) herein.

[16] People v. Mercantile Credit Guarantee Co. 166 N. Y. 416, 60 N. E. 24, rev'g 67 N. Y. Supp. 447, 55

execution in favor of assured is among the definitions of insolvency in the policy, but the requirement therein as to notice of a debtor's insolvency does not mention it but does require answers as to a debtor's failure, the date, nature, etc., the meaning of said word depends upon its commercial sense and there is such a "failure" where the business of the debtor is suspended by reason of confessions of judgment and seizure of his stock by the sheriff.[17] Where, however, upon trial, proof of claims where goods were sold during the period covered by bond, but on which no judgment was returned unsatisfied until after expiration of bond, is properly excluded.[18] And although liability is limited to a case where an execution has been returned unsatisfied on a judgment obtained for merchandise sold to the debtor during the period covered by the policy, insurer is not relieved from liability upon a claim based upon such a policy provision merely because of failure to return an execution until three days after the expiration of the policy, where it appears that there has been a compliance with the other requirements and the only applicable requirement as to returning said execution is that it shall be before the time fixed for presenting verified proofs of loss and this is done.[19] In a Kentucky case it was claimed that the proof on trial did not show that the losses were from insolvency

App. Div. 594. The court, per O'Brien, J., said: "When the defendant indemnified against the insolvency of debtors who had made a general assignment for the benefit of creditors, the contract is not to be interpreted technically, but the language must be held to mean what the words import to the commercial world. Hence the character of the instrument or the nature of the transaction must be determined by the effect it has upon the debtor in the business community and not by the name which the parties see fit to give to it. It may be a statutory assignment, a mortgage, a confession of judgment or some other contrivance, the purpose and effect of which is to dispose of all the debtor's assets and disable him from paying his debts. In such cases the loss is fairly within the scope of the indemnity secured to the insured by this policy. It is the completeness of the transfer and its effect upon the debtor in business, and not the name or form of the instrument or transaction that gives it character. Any transfer by a trader or merchant of all his stock and business, when it covers substantially all his property, may be an assignment within the meaning of the policy in spite of the form or name given to it." Id. 420, 421.

What is not a "general assignment;" common law presumed to exist in another state; return of execution unsatisfied; loss construed as to payments made or security held and deductions therefor. See Goodman v. Mercantile Credit Co. 45 N. Y. Supp. 508, 17 App. Div. 474.

[17] American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co. 95 Fed. 111, 36 C. C. A. 671.

[18] Talcott v. National Credit Ins. Co. 41 N. Y. Supp. 281, 9 App. Div. 433, aff'd 163 N. Y. 577, 57 N. E. 1125.

[19] People v. Mercantile Credit Guaranty Co. 166 N. Y. 416, 60 N. E. 24, rev'g 67 N. Y. Supp. 447, 55 App. Div. 594.

within the meaning of the definition of that word in the policy which provided that the debtor should be deemed insolvent when a petition in bankruptcy was filed by him under the laws of the United States, or when he made a general assignment for the benefit of his creditors. It was further claimed that such a petition or assignment was not shown by the exhibit filed with the petition, but this gave a list of debtors who had failed, their residence, rating, nature of insolvency, etc., under the head of nature of insolvency, specifying "bankruptcy" in some cases and "assignment" in others. It also appeared from the proof that upon the failure of each debtor insurer was promptly given notice thereof as required by the terms of the policy, and finally proofs of loss were filed as required, whereupon insurer denied liability upon the ground first above stated. The evidence was not negatived by assurer who offered no proof on the trial, and no complaint was made as to the sufficiency of the proofs of loss. It was decided that the claim came too late; also that it was the duty of the court at any stage of the proceeding to disregard errors not affecting the substantial rights of the parties complaining, and that it was "satisfied the ends of justice did not warrant a reversal for the matter complained of in regard to the proofs of the claim," accordingly judgment for plaintiff was affirmed.[20]

Again, inasmuch as bonds of this character concern contracts relating to the business affairs of merchants and their "insolvency" the indemnity against insolvency must, in the absence of some clearly evidenced intent to the contrary appearing in the contract itself, be such as that word imports as understood by merchants and as defined by bankrupt and insolvent laws relating to merchants and mercantile transactions; and the insolvency intended must mean the usual legally defined insolvency which is an inability of the debtor to pay his debts as they fall due in the ordinary course of business, irrespective of any formal adjudication or an actual insufficiency of assets to meet liabilities; therefore provisions in a bond defining and limiting the term insolvency while affording evidence of a status or condition of insolvency nevertheless they do not create that status or condition, so that proof of insolvency may be given in other ways than that specified in the bond. As where such clauses provide that "general assignments of, or attachments against insolvent debtors, the absconding of the debtors, or executions returned nulla bona, shall constitute insolvency" also that "the appointment of a receiver or a 'sell-out,' or the death of a debtor does not establish insolvency, but the indemnified may prove such claim during the term of this bond or renewal thereof, pro-

[20] American Credit Indemnity Co. v. Hecht & Co. 137 Ky. 261, 125 S. W. 297, 129 S. W. 340, 39 Ins. L. J. 800.

vided legal proof shall be given establishing the insolvency of the debtor." [21]

Where the purpose of the contract is to make experience and not solvency the basis of credit with reference to claims specified in a certain referred to schedule as those insured, a clause of a subsection which is obscure and difficult to interpret in that it enumerates certain evidences of liability, or specifies the only claims on which losses occur for which liability exists, will not be applied to all the claims covered by the bond so as to make solvency the test of credit and therefore it refers wholly to the remedy and does not conflict with other parts of the policy so as to except losses because of insolvency of customers. This applies where said subsection provides as to small claims not to exceed one hundred and fifty dollars and none of the facts in said preceding enumeration exist, but a designated mercantile agency, a collection agency, etc., has reported that the debtor has absconded, leaving no assets, and that such claim is uncollectable and the issue of execution would be useless, and that any claim which is more than three months overdue shall not be covered by said clause but shall be, so far as the same is covered by the bond be included in the calculation of losses, provided the insolvency and one of the facts enumerated in the preceding part of said subsection occurs between the date of the execution and termination of said bond.[22]

[21] Strouse & Brothers v. American Credit-Indemnity Co. 91 Md. 244, 46 Atl. 328, 1063, 29 Ins. L. J. 980. McSherry, C. J., said: "A thing which in its very nature cannot constitute insolvency, though it may constitute *evidence* of insolvency, cannot, by being *called* insolvency, be other than it intrinsically is; namely, a means of proving the existence of insolvency. This must be so unless the thing to be proved is identical with the thing that proves it—unless insolvency as a fact, and the evidence which proves that it is a fact, are one and the same thing. But the two are manifestly different. In American Credit Indemnity Co. v. Carrollton Furniture Manufacturing Co. 95 Fed. 111, 114, 36 C. C. A. 671, there was a suit against the same defendant on a bond issued by it after 1893, clause 11A was materially modified. Insolvency was limited and defined by the modified clause thus indicating that the defendant did not itself consider that the precise clause now before us imposed a limitation as it stood prior to the change."

[22] Lexington Grocery Co. v. Philadelphia Casualty Co. 157 N. Car. 116, 72 S. E. 870, 41 Ins. L. J. 168. The schedule referred to covered three classes of debtors, old customers, new ones and those who were solvent, owing outstandings. Under the decision experience and not solvency was the basis of credit even though another section made solvency a requisite of extension of credit to old and new customers. Subsections "a" and "b" were provisos and read: "(a) That such losses shall have been sustained on claims against debtors, each of whom is covered by Schedule A attached hereto, signed by the president and secretary and countersigned by the actuary and one of the registrars of the company, and which is made a part hereof: Provided fur-

If the insolvency insured against occurs and is proven under the terms of the second or renewal bond, the meaning of, or what con-

ther, that when a mercantile agency is designated in the application as a basis for some or all of the credits to be covered by this bond, that the last book printed by such agency prior to the shipment of the goods shall be the basis for covering such shipments from and including the first of the month appearing on such book.

"(b) That only claims on which losses occur, which exist (1) against a debtor who has effected a general compromise with his creditors; (2) against a debtor by or against whom a petition to be declared a bankrupt or insolvent has been filed under the Federal bankruptcy law, or under some insolvency or assignment law of any of the United States or any territory thereof; (3) against a debtor against whom an execution in favor of the indemnified or some other creditor has been returned unsatisfied; (4) against a debtor whose stock in trade has been sold in judicial proceedings; (5) against a debtor against whom, upon the ground of insolvency, a writ of attachment or replevin of other process has been issued; (6) against a debtor who, upon the ground of insolvency, has transferred his stock in trade to a trustee or assignee under some assignment law for the benefit of his creditors; (7) against a debtor who has died, leaving his estate insufficient to pay his debts in full, and such fact is certified to by the executor or administrator or any court having jurisdiction thereof, and such certificate or a copy thereof is attached to the preliminary notice of loss; (8) against a debtor who being a corporation, firm or individual for whom a receiver has been appointed upon the ground of insolvency; (9) against a debtor where the legal proceedings show that, to defraud his creditors or avoid the payments of his debts, he has sold out or transferred his stock in trade; (10) against a debtor who has given a chattel mortgage for the benefit of his creditors; (11) against a debtor who has been found to be insolvent through judicial proceedings; (12) where a claim does not exceed $150 and none of the above state of facts have arisen, but the designated mercantile agency, a collection agency, or a practising attorney in or near the place where the debtor did business reports, in writing, as to each of such claims, and such report is attached to the preliminary notice of loss, that the debtor has absconded, leaving no assets applicable to the payment of his debts, or that such claim is uncollectable and the issue of an execution would be useless, and that during a period of at least thirty days prior to the making of such report diligent efforts have been made to collect such claim or claims, and any claim which is more than three months overdue prior to commencement of said bond, and any claim that has been placed in the hands of such mercantile agency, collection agency, or attorney prior to the execution of said bond shall not be covered by this (12th) clause, but shall, so far as the same are covered by this bond and riders attached hereto, be included in the calculation of losses, provided the insolvency and one of the foregoing facts as enumerated in this subsection 'b' occurs between the date of the execution and the termination of this bond."

The court, per Allen, J., said: "(4) Subsections 'a' and 'b' are provisos to the first stipulation or agreement in the bond; and subsection 'a' provides that the debtors included in the bond are those covered by Schedule A, while subsection 'b' enumerates the evidences of liability by the defendant.

"Clause 12 of subsection 'b' is obscure, and it is difficult to ascertain its meaning. Some word is evidently omitted before the word 'shall,' and

stitutes insolvency will not be governed by that bond but by the terms of the first one, having in view the language of both bonds,

the test of insolvency is to be applied to some claim. It cannot be applied to the claims of $150 first mentioned in the clause, because it says that, in addition to insolvency, one of the foregoing facts enumerated in subsection 'b' must exist; and it is provided as to the claims first mentioned that it is not necessary for any of the foregoing facts to exist, and it cannot be applied to all the claims covered by the bond, because that would give it an effect which would withdraw claims covered by Schedule A, and would make solvency the test.

"If we bear in mind the purpose of the contract, and that experience is the basis of credit, that the claims to be insured are those covered by Schedule A, and that subsection 'b' is intended to furnish the evidences of liability, and read clause 12 in the light of these facts, we think the purpose of the clause was to provide evidences of liability that would be satisfactory for small claims that did not exceed $150, and that these small claims are divided into three classes, and that the proviso applies only to those three months overdue, or such as had been placed in the hands of a mercantile agency prior to the execution of the bond. As thus construed the clause reads as follows:

"'(12) Where a claim does not exceed $150, and none of the above state of facts have arisen, but the designated mercantile agency, a collection agency, or a practising attorney, in or near the place where the debtor did business, reports in writing as to each of said claims, and such report is attached to the preliminary proof of loss, that the debtor has absconded, leaving no assets applicable to the payment of his debts, or that such claim is uncollectable, and the issue of an execution would be useless, and that during a period of at least thirty days prior to the making of such report diligent efforts have been made to collect such claim or claims, they shall, so far as they are covered by this bond and riders attached hereto, be included in the calculation of loss and also any such claim which is more than three months overdue prior to the commencement of this bond, or that has been placed in the hands of such mercantile agency, collection agency, or attorney prior to the execution of this bond, shall be included, provided the insolvency and one of the foregoing facts from 1 to 11 inclusive, as enumerated in this subsection "b," occurs between the date of the execution and the termination of this bond.'"

In this connection it is declared by the court per Tuttle, Dist. J., in a Federal case that: "Among the losses insured by the first policy were losses, 'against a debtor for an amount not exceeding $250, where the preliminary notice of loss has attached to it a report from the designated mercantile agency, or from some collection agency or attorney practising in the place where the debtor did business, that the claim against such debtor is uncollectable by legal proceedings.' . . . It is unnecessary to construe this provision, because a reference to the findings and to certain exhibits mentioned therein discloses the fact that a petition in bankruptcy had been filed against the firm in question, and defendant had duly filed a proof of claim thereon, this loss was therefore insured, in any event, under the clause covering such losses 'against a debtor by or against whom a petition to be declared a bankrupt or insolvent has been filed under the Federal bankruptcy law, or under some insolvency or assignment law of the United States or any Territory thereof.'" Philadelphia Cas-

as where the insurance is against loss by the insolvency of debtors and the bond provides that no loss shall be proven after its expiration, provided, however, that in case said bond is renewed and the premium on such renewal is paid at or before the expiration of the bond, loss resulting after such date of expiration, on shipments made during the term of such bond may be proven during the term of the renewal bond next immediately succeeding. These bonds were similar in nearly all respects.[23]

(b) *Bankruptcy of debtor after assured discontinues business and policy terminates.*—A loss by bankruptcy of a debtor occurring after assured have discontinued their business, even though the goods are sold and the debtor is adjudged a bankrupt during the policy term, is not recoverable where the bond is conditioned that a

ualty Co. v. Fechheimer, 220 Fed. 401, 136 C. C. A. 25.

[23] American Credit Indemnity Co. v. Athens Woolen Mills, 92 Fed. 581, 34 C. C. A. 161. It was provided: "The term 'insolvency of debtors' whenever used in this bond is defined," etc., although the court, per Taft, Cir. J., said: "It is doubtful whether we ought to consider the foregoing clause as before us in reaching a conclusion in this case." The old bond was No. 1,540, clause 8, provided as to recovery of "loss resulting after such date of expiration on shipments made during the term of this bond," etc., clause 11 defined insolvency. Clause 8 of bond No. 244, the renewal bond, was: "In case this bond as renewed, and the premiums on such renewal is paid, at or before the expiration of the bond, loss resulting after said date of expiration upon shipments made during the term of the bond, may be proven under such renewal bond in accordance with the terms and conditions of such renewal. In case this bond is a renewal, and the premium has been paid at or before the expiration of the preceding bond, losses occurring during the term of this bond, on shipments made during the term of said preceding bond may be proven hereunder." Taft, Cir. J., also declared: "The material words of the clause are: 'In case this bond is a renewal, . . . losses occurring during the term of this bond on shipments made during the term of the preceding bond may be proven hereunder.' Does proof under the renewal bond require that the insolvency shall be established according to the definition of that bond? Standing alone it may be conceded that this would be the natural meaning of the words; but we are to construe this clause with clauses 8 and 11 of bond No. 1,540. We are to consider that, by that clause, it is clearly intended to extend the benefit of the old bond to cover sales of goods made under that bond, though losses unforeseen did not occur during its life; and we ought not to defeat that intention and just expectation of the assured, unless the words of the renewal bond necessarily require it. Do they require it? We think not. In the light of the circumstances and the necessity for reconciling the clauses of the two bonds, the words of clause 8, of bond No. 2,443, may be reasonably construed to mean merely that the formal proof of loss is to be made under the renewal bond during its life, while clauses No. 8 and 11 of bond No. 1,540, shall be given effect by holding that the fact of the loss is to be settled by the terms of the old bond."

discontinuance of business by assured shall terminate the policy except in case of a temporary interruption of business consequent upon a fire, strike, death, or withdrawal, or admission of a member of a firm; and there is such a discontinuance of business and termination of the risk within the intent of the stipulation where it appears that after assured's plant had been destroyed by fire they endeavored to obtain other quarters but concluded to locate an office and did so by taking desk room with two of their former employees, who had opened up the same line of business, but they did no business for over a year, except to collect old accounts and subsequently this business of said company was purchased by assured and one member of said concern was taken in as a partner.[24]

§ 2788. **Land dangers: marine risks.**—As noted elsewhere, the underwriter under marine insurances is not answerable for loss or damage sustained prior or subsequently to the attachment and termination of the risk, and therefore it is a general rule that damages or losses sustained to goods on land are not within the policy, although there are exceptions to this rule in certain cases where during the continuance of the risk the goods are temporarily landed.[1]

§ 2789. **Leakage and breakage: marine risks.**—Losses happening to certain liquids and merchandises through leakage and breakage rest upon the principle that, owing to the peculiar character or intrinsic nature of the commodity, the diminution or damage proceeds from the proper vice of the thing and the insurers are not chargeable, for such ordinary and inevitable loss may happen, however safe the voyage may be. This is the doctrine of all the law-writers, and a distinction is also made between ordinary and extraordinary leakage.[2] So if by the pitching and rolling of heavy seas, the stowage not being faulty, there is extraordinary leakage, as where the contents of casks have been broken out or been wholly or partly emptied, it is a question whether such loss was occasioned by a peril insured against, and if so and no percentage is fixed limiting the insurer's liability, he would be bound for such extraordinary leak-

[24] Cohen v. American Credit Indemnity Co. 119 N. Y. Supp. 700.

[1] See Pelly v. Royal Exchange Assur. Co. 1 Burr. 341, 14 Eng. Rul. Cas. 30; Brough v. Whitmore, 4 Term Rep. 206, 2 R. R. 361.

[2] Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 9, pp. 311, 312; c. x. sec. 2, p. 242, *citing* Valin, Pothier, The Guidon, and The Ordonnance, Louis XIV.; 2 Arnould on Marine Ins. (Perkins' ed. 1850) 759 et seq.; 2 Id. (Maclachlan's ed. 1887) 722 et seq.; 2 Id. (9th ed. Hart & Simey) secs. 779, 780, pp. 973–4; 2 Phillips on Ins. (3d ed.) 619, sec. 1090.

As to exception as to leakage, breakage, dampness, etc., see § 2719 herein.

age;[3] provided there is no stipulation otherwise. The insurer may in some contracts limit the percentage beyond which he is only liable, and in other policies these losses are expressly excepted, but the insurer may also without doubt, by special agreement, assume such losses. Whether a leakage is natural or ordinary may depend upon whether the voyage is long or short, and also upon the nature of the article taken in connection with the length and character of the voyage.[4] Mr. Arnould says that in England there is no fixed rule as to what shall be considered ordinary leakage and breakage on given articles on a given voyage, and that the forms of policy used in France and other foreign countries generally stipulate the percentage or average amount of liability.[5]

§ 2789a. **Ordinary leakage and "extraordinary leakage" distinguished.**—Although the printed part of the policy excludes liability for leakage of liquids, etc., unless occasioned by stranding or collision with other vessels, yet if the memorandum clause provides that in consideration of an additional premium the insurance shall cover leakage of certain oils one-half of one per cent of the quantity laden, to be first deducted as ordinary leakage and the excess of such one-half of one per cent to be considered as extraordinary leakage, said loss to be paid if amounting to three per cent on the amount insured, such clause draws a distinction between ordinary and extraordinary leakage not between sea perils and perils not of the sea, and constitutes an agreement to pay such extraordinary loss above three per cent and the account cannot be barred by parol evidence of any understanding between the parties to the contrary.[6]

§ 2790. **Lightning.**—Damage by lightning without any combustion is not within the terms of a policy providing against losses by fire;[7] for it is declared that it is not sufficient to show, where the building is not consumed or set on fire, that fire is one of the constituent elements of electricity, but that assured must show that

[3] See Crofts v. Marshall, 7 Car. & P. 597, 48 R. R. 828, per Lord Denman; Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 9, p. 312.

[4] See Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 9, p. 311.

[5] 2 Arnould on Marine Ins. (Perkins' ed. 1850) *760 et seq.; Id. (Maclachlan's ed. 1887) 723 et sec. See 2 Id. (9th ed. Hart & Simey) sec. 779, p. 974.

[6] Indemnity Mutual Marine Ins. Co. Ltd. of London v. United Oil Co. (U. S. D. C.) 88 Fed. 315.

[7] Kenniston v. Merrimac County Mutual Ins. Co. 14 N. H. 341, 40 Am. Dec. 193; Scripture v. Lowell Fire & Marine Ins. Co. 10 Cush. (64 Mass.) 356, 57 Am. Dec. 111.

Loss of live stock by lightning, see § 2791 herein.

On loss by lightning, see note in 26 L.R.A. 267.

electricity is fire, and that the rendering and destruction of the building insured is the result of that particular principle, and that as this cannot be done, damage by lightning is neither ignition nor combustion; it is not a loss by fire.[8] Damage caused purely by lightning is not covered by insurance of the property damaged against losses "by fire" or "by reason of fire or by means of fire,"[9] and the rending and destruction of the building by lightning, without ignition or combustion, is not a loss "by fire by lightning" within the meaning of such a clause in the policy.[10] So recovery for loss of a barn by being wrecked by lightning, but not burned cannot be had under a policy in a mutual company insuring against loss by fire, although the custom has been to pay such losses and to levy assessments therefor on the policy holders, since such payments were merely misappropriations of funds by the company.[11]

Again, if the contract provides for liabilities for "losses on property burned or damaged by lightning," the fact that the building is merely struck by lightning and shattered and damaged does not make the insurers liable.[12] Although if the policy be against "all direct loss or damage caused by lightning," the insured may recover his whole damage where lightning is the proximate cause of the loss; otherwise he may recover only such damages as are directly caused by lightning.[13]

But a specific provision for liability for any loss or damage caused by lightning renders the insurers liable for all known effects of lightning, and not merely for losses thereby when ignition or combustion follows, even though the policy also provides against all loss or damage "by fire."[14] And if the insurance is against loss by fire or lightning between specific dates, agreeing to make good

[8] Babcock v. Montgomery County Mutual Ins. Co. 6 Barb. (N. Y.) 637, per Pratt, J. (a learned and exhaustive discussion on electricity).

As to injuries caused by atmospheric electricity, and as to an electric light company not being an insurer, see Joyce on Electric Law (2d ed.) sec. 445f.

[9] Kenniston v. Merrimac County Mutual Ins. Co. 14 N. H. 341, 40 Am. Dec. 193.

[10] Babcock v. Montgomery County Mutual Ins. Co. 4 Const. (N. Y.) 326, aff'g 6 Barb. (N. Y.) 637.

[11] Sleet v. Farmers' Mutual Fire Ins. Co. — Ky. —, 19 L.R.A.(N.S.) 421n, 113 S. W. 515.

On custom to pay certain class of losses as affecting liability of insurer for such loss not covered by the policy, see note in 19 L.R.A.(N.S.) 421.

[12] Andrews v. Union Mutual Fire Ins. Co. 37 Me. 256.

[13] Beakes v. Phœnix Ins. Co. 54 N. Y. St. Rep. 290, 71 Hun (N. Y.) 613, 24 N. Y. Supp. 544.

[14] Spensley v. Lancashire Ins. Co. 54 Wis. 433, 11 N. W. 894. See Russell v. German Fire Ins. Co. 100 Minn. 528, 10 L.R.A.(N.S.) 326, 111 N. W. 400, 36 Ins. L. J. 481, 486, per Lewis, J.

all loss so sustained to assured, his executors, administrators, and assigns, and assured assigns all loss or damage not exceeding his interest in the property, the company cannot, in the absence of some provision therefor, avoid payment on the ground that assured died before the loss occurred.[15] If the lightning is followed by combustion and consequent loss, this is covered by an insurance under a "fire" policy.[16]

In some cases decisions relating to losses by lightning have been cited as applicable to cases of explosion by gunpowder, but the court in a Massachusetts decision says such cases bear upon the question of such explosion, if at all, only by a very distant analogy.[17] The destruction of a house by the explosion of a powder house across the street, which is struck by lightning, is not included in the risk covered by a policy which insures against damage caused by lightning, but exclude any loss by explosion.[18]

Where the wording of the policy or contract is sufficiently broad to cover all known effects of lightning, as where it provides for liability against "any loss or damage caused by lightning," this will include a loss by a tornado where the evidence shows a presence in the tornado of electrical disturbance, presenting the usual characteristics of lightning, and such lightning is the active agent in destroying the property, and it is error to grant a nonsuit under such facts.[19] Recovery, however, for a building shattered by lightning and the destruction of which is completed by a high wind, must be limited to the direct loss caused by lightning, excluding the additional damage by the wind, under a policy for damage by lightning, but expressly excluding damage by cyclone, tornado, or wind storms.[20] And injury to goods from water and debris into which they are propelled by the falling of a wall caused by lightning, is a direct and natural consequence of the lightning discharge if a clause is attached to a policy covering all direct loss or damage

[15] Richardson v. German Ins. Co. 89 Ky. 571, 13 S. W. 1, 12 Ry. Law R. 37, 8 L.R.A. 800.

[16] Babcock v. Montgomery County Mutual Ins. Co. 4 Comst. (N. Y.) 326, aff'g 6 Barb. (N. Y.) 637; Gordon v. Rimmington, 1 Camp. 123, 10 R. R. 656, per Lord Ellenborough; Beaumont on Ins. 37; Ellis on Fire Ins. 25.

[17] Scripture v. Lowell Mutual Fire Ins. Co. 10 Cush. (64 Mass.) 356, 57 Am. Dec. 111, per Cushing, J.; referring particularly to Kenniston v. Merrimac County Mutual Ins. Co. 14 N. H. 341, 40 Am. Dec. 193, and Babcock v. Montgomery County Mutual Ins. Co. 4 Comst. (N. Y.) 326, aff'g 6 Barb. (N. Y.) 637.

[18] German Fire Ins. Co. v. Roost, 53 Ohio St. 581, 36 L.R.A. 236, 60 Am. St. Rep. 711, 45 N. E. 1097.

[19] Spensley v. Lancashire Ins. Co. 54 Wis. 433, 1 N. W. 894 (two judges dissenting).

[20] Beakes v. Phœnix Ins. Co. 143 N. Y. 402, 26 L.R.A. 267, 38 N. E. 453. See Warmcastle v. Scottish Union & National Ins. Co. 201 Pa. 302, 50 Atl. 941.

caused by lightning "meaning thereby the commonly accepted use of the term lightning." [1] But where a gristmill and sawmill annex are so located with relation to a dam that it is a question under the evidence whether a rise of water or lightning caused the loss, there can be no recovery for a loss by lightning, especially so, where there are no marks of fire on any of the wreckage although there was a heavy storm accompanied by a sharp flash of lightning and the fall of timbers leaving the mills a mass of ruins, which was splintered, it also appearing that said ruins were below the dam, and the bulkhead of the dam at one end of the sawmill was gone and the water was very high and had changed its channel running under the sawmill and through where the gristmill had stood.[2] Again, the jarring of an insured building caused by jarring of the ground consequent upon a discharge of lightning, is not covered by a policy against all direct loss by lightning, and even though the breaking and falling of plastering in insured's house instantly followed vivid flashes of lightning, and there was also other damage and the facts were such that the jury were justified in concluding that such loss and damage was caused by lightning, still where the jury were instructed that if they believed from the evidence that there was a discharge of lightning or electricity and that the shock caused by said electrical discharge struck and injured the walls of the plaintiff's building, he was entitled to recover, it was held that such instruction was erroneous, and a judgment below for insured was reversed.[3]

In marine policies, if the subject of insurance is burned by lightning, this is a loss by "fire." [4] Emerigon, referring to "accident from fire," says: "It may have been caused by lightning. . . . It is not to be doubted that if the accident had happened by lightning or by the fire of enemies it is at the charge of the insurers. . . . 'The insurers,' says Pothier, 'are bound for fire when it is from a peril (cas fortuit), such as lightning, or that the ship has taken fire in a combat.'" [5] Cushing, J., in Scripture v. Lowell Mutual Fire Insurance Company,[6] says, referring to Emerigon, that "the question of loss by lightning is very summarily disposed

[1] Cummings v. Pennsylvania Fire Ins. Co. 153 Iowa, 579, 37 L.R.A. (N.S.) 1169 (annotated on admissibility of insurance agent's memoranda or letters as to policies and risks), 134 N. W. 79, 41 Ins. L. J. 490.

[2] Clark v. Franklin Farmers' Mutual Fire Ins. Co. 111 Wis. 65, 86 N. W. 549.

[3] Kattleman v. Fire Assoc. of Phila. 79 Mo. App. 447, 2 Mo. App. Rep. 750.

[4] Gordon v. Rimmington, 1 Camp. 123, 10 R. R. 656, per Lord Ellenborough.

[5] Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 17, pp. 347, 348.

[6] 10 Cush. (64 Mass.) 356, 57 Am. Rep. 111.

of in the older authorities by treating electricity as fire from heaven;" but it would seem from the above quotation that Emerigon refers to the "accident from fire . . . caused by lightning." So also Pothier, and Meredith in his translation has in connection with the subject the side note "Fire happening through mere chance."

**§ 2791. Live stock: same, slaves classed as animals.**[7]—If live stock is insured during transit, and a part of the stock jumps off the inclined plane over which they are being driven from the cars to a boat, and sustain injuries from which they shortly thereafter die, the insurers are liable.[8] And if horses are insured against all risks, including death from any cause whatever, under a voyage policy, the insurers are liable for death caused by bruises brought about by the motion of the ship in heavy seas.[9]

Where the owner of a horse is insured against the death of the animal from accident or disease, the insurer is not liable where the horse, which is suffering from an incurable disease, is killed two hours before the expiration of the policy, the killing not being required by an act of mercy, and this is true though the act is authorized by the president and secretary of the company.[10] So recovery, under an insurance against loss by death of a horse may be had where insured acting upon advice of experts in such matters consents to its being killed in consequence of an incurable compound comminuted fracture of the leg.[11] And if death of a mare from foaling is insured against, a recovery can be had therefor, as the cause of death, where she is so greatly injured thereby that she can survive only a short time and she is in such a state of suffering that she is killed.[12]

Live stock or cattle are frequently covered by a policy upon them while "contained in" certain buildings, etc. This question is, however, considered elsewhere.[13]

[7] See § 2797 herein.

When liability attaches: statute, see Johnston v. Indiana & Ohio Live Stock Ins. Co. 94 Neb. 403, 143 N. W. 459; same, payment of premium as factor, see Cecil v. Kentucky Live Stock Ins. Co. 165 Ky. 211, 176 S. W. 986.

[8] Ætna Ins. Co. v. Stivers, 47 Ill. 86, 95 Am. Dec. 467.

[9] Coit v. Smith, 3 Johns. Cas. (N. Y.) 16.

On animal insurance, see note in 44 L.R.A.(N.S.) 569.

When recovery precluded on policy on horse against marine risk and mortality: statement of pedigree of horse, see Yorkshire Ins. Co. v. Campbell, (1917) A. C. 218, 86 L. J. P. C. 85, 115 L. T. 644, 33 T. L. R. 18; under Australian marine insurance act 1909, sec. 39, which is same as marine insurance act of England, sec. 33 (see Appendix C. herein).

[10] Tripp v. Northwestern Livestock Ins. Co. 91 Iowa, 278, 59 N. W. 1.

[11] Live Stock Ins. Assoc. v. Edgar, 56 Ind. App. 489, 105 N. E. 641.

[12] National Life Stock Ins. Co. v. Elliott, 60 Ind. App. 112, 108 N. E. 784.

[13] See § 1747 herein.

An injury to mules by the escape of steam without fault of the officers of the steamboat is a loss by the peril of the river.[14]

Insurance of live stock against loss by lightning includes their loss through the burning of a building immediately caused by lightning.[15] In many cases, however, the question whether or not there can be a recovery of loss of live stock by lightning turns especially upon points purely of the effect of marks upon the body in conjunction with the fact whether or not there was a discharge of lightning so immediately prior to the loss as to have been the cause thereof. The determination, therefore, of questions of this kind must rest upon the particular circumstances of each case, and decisions covering the same must be largely illustrative. So where a brood mare was found dead in a pasture and there was a sharp conflict in evidence upon the point whether or not there was any lightning in the vicinity at the time of the accident, and also as to marks of lightning, the issues were held to be for the jury, and as the evidence indicated death by lightning the court refused to disturb its verdict.[16] But although during the night a storm had occurred, accompanied by lightning, it was held that the fact that a mule colt had been found dead thereafter, was not proof of death by lightning in the absence of any marks, abrasion of the skin, burning or otherwise, showing that death was so caused.[17]

A recovery may be had for the loss of live stock insured against loss due to tornadoes, cyclones, and windstorms, where the loss would not have happened but for a windstorm, and it is the primary and efficient cause of such loss.[18]

While slaves were a subject of commerce, and were capable of being bought and sold, they were considered a legitimate subject of insurance, as goods or merchandise. This traffic being no longer permitted, the cases thereon which are cited below are chiefly valuable because of the principles involved. The early writers class negro slaves and animals under the same head, holding that death of slaves and animals through material causes was owing to the in-

[14] Union Ins. Co. v. Groom, 4 Bush (Ky.) 289.

[15] Hapeman v. Citizens Mutual Fire Ins. Co. 126 Mich. 191, 86 Am. St. Rep. 535, 85 N. W. 454.

[16] Cottrell v. Munterville Mutual Fire & Lightning Ins. Assoc. 145 Iowa, 651, 124 N. W. 619, 39 Ins. L. J. 508. See Heaton v. St. Paul Fire & Marine Ins. Co. 89 Kan. 840, 132 Pac. 1007.

[17] Warren v. Farmers' Mutual Fire Ins. Co. 130 Mo. App. 226, 109 S. W. 88.

[18] Jordan v. Iowa Mutual Tornado Ins. Co. 151 Iowa, 73, 130 N. W. 177, 40 Ins. L. J. 1065. See also Oklahoma Farmers' Mutual Indemnity Assoc. v. Smith, 25 Okla. 495, 106 Pac. 861.

On causes of loss covered by cyclone, hurricane, tornado, or windstorm insurance, see note in L.R.A 1915B, 1094.

herent vice of the thing, and not a loss for which insurers were liable except by express agreement, but otherwise if they were drowned in a tempest, killed by the enemy or by jettison, or by any other accident which is a peril within the policy.[19]

**§ 2792. Loss after termination of risk consequent upon injury during life of policy.**—There has been some discussion upon the point whether the insurer is liable for a loss resulting after the termination of the risk from an injury sustained from a peril insured against during the life of the contract. This question involves to some extent the point considered elsewhere concerning whether the ship has been moored in "good safety" under a marine risk.[20] If it be assumed that the ship cannot be in good safety at any time after the happening of the accident which is the proximate cause of the loss, one factor in the question ceases to exist, for the risk in such case does not terminate. Accordingly, where the ship received her death wound during the insured voyage, but was kept afloat by artificial means more than twenty-four hours and foundered in port, sustaining a total loss, it was held that she was not in safety at any time after the accident, and that the underwriters were liable.[1] But in case of an insurance on a ship under a time policy, and three days prior to the expiration of the time she received her death wound, although she was kept afloat by pumping until three days after the time, it was held that the loss had not happened until after the risk ended, and the insurers were not liable.[2] Again, considering the question under marine insurances, the point presented differs from that where the cause of the diminished value of the vessel existed before the ship's arrival, and the actual loss occurred from a totally different cause arising after the termination of the risk; as where a vessel under a time policy was damaged and kept afloat until moored safely, although it was necessary to keep the pumps going while her cargo was being discharged, and she was subsequently taken to dry dock for surveys and repairs, where, after the time limit of the risk had ended, she was destroyed by fire, and it was held that there could be a recovery for the diminished value of the vessel arising from the sea damage, and that the expenses for repairs could be considered in ascertaining the sum.[3]

[19] Emerigon on Ins. (Meredith's ed. 1850) c. xii. secs. 9, 10, pp. 313–16, *citing* Valin and Pothier; Summers v. United States Ins. & Trust Co. 13 La. Ann. 504; Moore v. Perpetual Ins. Co. 16 Mo. 98; Gregson v. Gibbert, 3 Doug. 232; Tatham v. Hodgson, 6 Term Rep. 656.

[20] See §§ 1537–46 herein.

[1] Shaw v. Felton, 2 East, 113, 6 R. R. 394, 13 Eng. Rul. Cas. 631.

[2] Meretony v. Dunlop, *cited* in Lockyer v. Offley, 1 Term Rep. 260, 1 R. R. 194. See comment on this case in Knight v. Faith, 15 Q. B. 649, 19 L. J. Q. B. 509, 14 Jur. 1114, 81 R. R. 725, per Lord Campbell, C. J.

[3] Lidgett v. Secretan, 40 L. J. Com.

It is also held that if an injury is occasioned within the time covered by the policy, which results in a total loss after the expiration of the policy, the insurer is liable for the actual injury arising within the time of the policy.[4] In a New York case, under a policy insuring horses against all risks, including death from any cause whatever, it was held that insured was entitled to recover the value of a horse that was injured on the voyage by reason of heavy seas, so that he died three days after landing, the court declaring that the question was, How much damage might have been ascertained at the time he was landed?[5] If the extent of the damage sustained during the continuance of the risk cannot be ascertained until after the risk ends, there seems no reasonable ground on which the insurer can avoid responsibility for the loss according to the fact, whether it be partial or total.[6] And where the damage so sustained and ascertained depreciated the vessel's value one-half, it was held that the insurers were liable as for a total loss.[7] So where the proximate cause of the loss was the stranding of the vessel during the term covered, and the vessel was got off, carried into the harbor, examined, and sold, there being no abandonment, this was held a partial loss recoverable from the underwriters.[8]

In case of an insurance upon a man's life for a specified time, it is undoubtedly true that if some short time before the term expires he receives a mortal wound, of which he dies after the term, the insurer is not liable.[9] Although an insurance of this character has been compared with and declared to rest upon the same principles as those governing a time policy on a ship,[10] nevertheless the two

P. 257, 6 L. R. Com. P. 616, rev'g in part 39 L. J. Com. P. 196, 5 L. R. Com. P. 190, 40 L. J. C. P. 257, 6 C. P. 616, 24 L. T. 942, 19 W. R. 1088, 1 Asp. M. C. 95.

[4] Howell v. Cincinnati Ins. Co. 7 Ohio, 276, 284, pt. 1.

[5] Coit v. Smith, 3 Johns. Cas. (N. Y.) 16.

[6] Lidgett v. Secretan, 40 L. J. Com. P. 257, 6 L. R. Com. P. 616; rev'g in part 39 L. J. Com. P. 196, 5 L. R. Com. P. 190, 24 L. T. 942, 19 W. R. 1088, 1 Asp. M. C. 95; Furneaux v. Bradley, reported in 2 Marshall on Ins. (ed. 1810) 584; Park on Ins. 166.

[7] Peters v. Phœnix Ins. Co. 3 Serg. & R. (Pa.) 25.

[8] The court in this case said substantially that under a time policy, if the damages be sustained by a peril insured against during the life of the risk, and the amount of loss be not ascertained until after the term, and the vessel is kept afloat till then by proper measures, by giving notice of abandonment or by obtaining evidence of the sum required for repairs, there exists no valid reason why there should not be a recovery for a total or partial loss according to the facts: Knight v. Faith, 15 Q. B. 649, 19 L. J. Q. B. 509, 14 Jur. 1114, 81 R. R. 725.

[9] *Examine* Howell v. Knickerbocker Life Ins. Co. 3 Rob. (N. Y.) 232.

[10] 1 Marshall on Ins. (ed. 1810) *264, adopting the words of Willes, J., in Lockyer v. Offley, 1 Term Rep. 260, 1 R. R. 194.

cases do not rest upon the same principle, so far as the question here under consideration is concerned, for in the case of the ship the injury received is from a peril insured against, and the insurance is against loss or damage from certain perils, while in case of the life risk the insurance is against loss from the death itself, not against death when resulting from or caused by certain perils or diseases, injuries, or accidents. In accident policies it is generally provided that the insurer is only liable where the death occurs within a specified time, as ninety days after or from the time the accident happens.[11]

In a fire risk, if it is impossible to remove the goods or articles insured or to save them from loss or damage, it is immaterial whether or not the fire was actually communicated thereto within the life of the policy, where the fire began in the building containing said property before the policy term expired.[12]

**§ 2793. Same subject: conclusion.**—In cases therefore, where the insurance is against loss arising from or occasioned by certain perils, the question might reasonably be held to depend largely upon the factor of proximate and remote cause; for if the ship be clearly injured within the life of the policy by a peril insured against, and the injury is of such a character that the loss resulting or rather consummating after the end of the risk is an inevitable consequence of such prior injury, such resulting loss will form an element in ascertaining the amount of damages, for it is an evidential fact as to the condition of the subject insured at the end of the risk and in the premises, and is of conclusive force.[13] Under a fire risk the loss

[11] See Perry v. Provident Life Ins. Co. 103 Mass. 242, s. c. 99 Mass. 162; Northrup v. Railway Pass. Assur. Co. 43 N. Y. 516, 518, 3 Am. Rep. 724.

[12] Rochester German Ins. Co. v. Peaslee-Gaulbert Co. 120 Ky. 752, 1 L.R.A.(N.S.) 364, 87 S. W. 1115, 89 S. W. 3.

As to removal of goods in case of threatened fire; damages and expenses incurred; duty of assured; how far assured must exert himself to save property, see §§ 2811 et seq. herein.

[13] "If certain consequences will inevitably result after the expiration of the period of the policy from the operations of the perils insured against during the period, they are surely proper subjects of indemnity;" 1 Phillips on Ins. (3d ed.) 684–86, sec. 1148. Mr. Parsons is of opinion that the insurers are liable in case of such injury during the period of the risk from a peril insured against, and a loss after the end of the risk, "where the ultimate loss was not only the effect of the injury so sustained, but an effect so direct, immediate, and inevitable that the injury must be deemed to be the proximate and only cause of the loss, . . . if insured property be injured by a peril insured against, the insurers are liable for the direct and immediate consequences whenever or wherever these may occur;" but he qualifies this by the words, "Possibly a distinction might be made in this respect between policies on time and those on a voyage:" 2 Parsons on Marine Ins. (ed. 1868) 65, 66. See Arnould on Ma-

is said to occur at the time of the fire, though the point involved here is not discussed.[14]

**§ 2794. Mortgage: unmarketableness by reason of liens, defects of title, etc.**—If a policy is issued on a mortgage against loss from its unmarketability, by reason of the possibility of mechanics' or municipal liens, excluding actual losses by reason of such liens, the loss only covers liens then existing and inchoate at the date of the policy.[15]

**§ 2794a. Mortgage clause: distinctions, validity and construction: generally.**—The mortgage clauses under consideration here have been variously denominated as the "mortgage clause" the "mortgagee clause," the "standard clause," the "standard mortgage clause," the "standard mortgagee clause," the "union clause" the "union mortgage clause," the "loss payable clause," and the "open mortgage clause."[16] And in a Kansas case a distinction is made, or at least qualifiedly made, between the "standard clause" and the "union clause," or "union mortgage clause."[17]

The taking out of a policy by the mortgagor or owner containing the mortgagee clause protecting the mortgagee against any act of neglect of said mortgagor or owner, is not against public policy and the mortgagee may enforce the contract as to his interest.[18]

A clause in a fire policy declaring that no act or neglect of the mortgagor shall defeat the insurance as to the interest of the mortgagee refers to acts or neglect in connection with the property, while the risk is subsisting, and which under the terms of the policy would invalidate the insurance, such as conduct increasing the hazard, and not the omission, after the fire has occurred, to comply with provisions designed to secure evidence as to the nature

rine Ins. (Perkins' ed. 1850) *754; 1 Arnould on Marine Insurance, *411, *451; 2 Id. (Maclachlan's ed. 1887) 372.

[14] Johnson v. Humboldt Ins. Co. 91 Ill. 92, 33 Am. Rep. 47.

[15] Wheeler v. Real Estate Title Ins. & Trust Co. 160 Pa. St. 408, 23 Ins. L. J. 475, 28 Atl. 849. See § 2822 herein.

[16] Gilman v. Commonwealth Ins. Co. of N. Y. 112 Me. 528, L.R.A. 1915C, 758, 92 Atl. 721, 45 Ins. L. J. 340, 342.—Haley, J.; Collinsville Savings Soc. v. Boston Ins. Co. 77 Conn. 676, 69 L.R.A. 924, 60 Atl. 647, 34 Ins. L. J. 1031, 1035.—Prentice, J.; Glens Falls Ins. Co. v. Porter, 44 Fla. 568, 33 So. 473, 32 Ins. L. J. 577; and cases throughout this and the next following sections.

[17] Stamey v. Royal Exchange Assur. Co. 96 Kan. 99, 150 Pac. 227, 46 Ins. L. J. 442 (*considered* more fully under § 2795 herein). See also Brecht v. Law, Union & Crown Ins. Co. 160 Fed. 399, 87 C. C. A. 35, 18 L.R.A.(N.S.) 197n, 37 Ins. L. J. 621; Collinsville Savings Soc. v. Boston Ins. Co. 77 Conn. 676, 69 L.R.A. 924, 60 Atl. 647, 34 Ins. L. J. 1031 (both cases are *considered* under sections next following).

[18] Kelsey v. Agricultural Ins. Co. 78 N. J. Eq. 437, 79 Atl. 539, 40 Ins. L. J. 1230.

and extent of the loss.[19] And under the standard or union mortgage clause, which expressly agrees that as to the interest of the mortgagee the insurance effected in his favor shall not be invalidated by any act or neglect of the owner or mortgagor of the insured property, the words "Acts or neglects of the mortgagor or owner" mean any act of omission or commission on his part, occurring subsequently to the execution of said clause, which would operate to forfeit his rights under the policy as said owner or mortgagor. Another point of importance which is asserted is this: that insurer's indemnity for such apparent unconditional guaranty to the mortgagee is its right of subrogation to said mortgagee's rights in the mortgage security, given by said mortgage clause.[20] So the consideration which supports the policy supports also a contract between insurer and the mortgagee under the mortgagee clause attached to it at the time of its execution, where the loss is payable to the mortgagee as his interest may appear and notice of any delinquency of assured is agreed to be given to the mortgagee within a specified time before any suspension or cancelation of the policy affecting his interests is made, as "delinquency" is interpreted as referring to the same kind of "act or default" as is referred to in the "union clause." And a recovery may be had by the mortgagee under said clause, where he has complied with its conditions, even though the mortgagor could not have enforced the policy because of his default.[1] And where it is agreed that the mortgagee shall notify assurer of any change of ownership or increase of hazard which should come to his knowledge, and pay for every such increase not permitted by the mortgagor's policy, and that insurer shall have the right to cancel the policy, there is a valid and binding consideration for an agreement that the interest of the mortgagee shall not be effected by any act or neglect of the mortgagor.[2]

[19] Southern Home Building & Loan Assoc. v. Home Ins. Co. 94 Ga. 168, 27 L.R.A. 844, 47 Am. St. Rep. 147, 21 S. E. 375.

On effect of mortgagor's failure to give notice or proof of loss on mortgagee's right to recover, see note in 14 L.R.A.(N.S.) 459.

[20] Glens Falls Ins. Co. v. Porter, 44 Fla. 568, 33 So. 473, 32 Ins. L. J. 577.

On right of insurer upon paying mortgagee under mortgage clause in policy issued to owner of equity of redemption to be subrogated to rights of mortgagee, see note in L.R.A. 1916A, 559.

[1] People's Savings Bank v. Retail Merchants' Mutual Fire Ins. Assoc. 146 Iowa, 536, 31 L.R.A.(N.S.) 455, 123 N. W. 198, 39 Ins. L. J. 76.

On effect of breach of policy of insurance by mortgagor on rights of mortgagee, see notes in 18 L.R.A (N.S.) 197; 25 L.R.A.(N.S.) 1226; and L.R.A.1915C, 758.

[2] Planters' Mutual Ins. Assoc. v. Southern Savings Fund & Loan Soc. 68 Ark. 8, 56 S. W. 443, 29 Ins. L. J. 611.

Under the Massachusetts mortgagee clause a reinsurer stands in the place of the original insurer in so far as the parties' rights under the contract in this respect are concerned.[3]

**§ 2794b. Mortgagor's and mortgagee's rights: generally.**—If the mortgage requires the mortgagor to insure for the mortgagee's benefit and the policy makes the loss payable to the mortgagee as his interest may appear, he is entitled to recover thereon in his own name to the extent of his interest.[4] and where the loss is so payable to the mortgagee he may, in case of loss, recover the whole amount thereof, in his own name, if the mortgage debt exceeds the loss.[5] And where the policy is payable to the mortgagee as his interest may appear, and that interest is reduced upon foreclosure and sale of the insured premises, by the transfer of two thirds of his interest by the mortgagee, who bids in the property for less than his debt, but the deed is not formally delivered before the loss occurs, the mortgagee may recover for the remaining one-third of the actual damage caused to his interest by the fire.[6] So a mortgagee corporation can also avail himself of an insurance contract made for its benefit, where the mortgage covenants that the mortgagor shall keep the property insured for the mortgagee's benefit and the policy makes the loss payable to said mortgagee as his interest may appear, and this applies even though the latter had no knowledge of the existence of the policy until after the fire, and it is immaterial which of the parties protected thereby is in possession of the policy, and an action thereunder cannot in such case be defeated by insurer by offering, several months after suit is brought, to pay the mortgage amount if the mortgagee will assign it to assurer where no offer to pay interest and costs of suit is made.[7]

Again, if the mortgagor agrees to keep the premises insured for the benefit of the mortgagee, but the policy is taken out by the mortgagor in his own name, an equitable lien attaches in favor of the mortgagee to the policy proceeds, where the policy is not assigned to the mortgagee, nor made payable to him. Nor in such case are said proceeds exempt on the ground that the property in-

[3] Flint v. Westchester Fire Ins. Co. 207 Mass. 337, 92 N. E. 646, 40 Ins. L. J. 506.

[4] Palmer Savings Bank v. Insurance Co. of North America, 166 Mass. 189, 32 L.R.A. 615, 44 N. E. 211.

[5] Peck v. Girard Fire & Marine Ins. Co. 16 Utah, 121, 67 Am. St. Rep. 600, 51 Pac. 255, 27 Ins. L. J. 265. See also Stamey v. Royal Exchange Assur. Co. 96 Kan. 99, 150 Pac. 227, 46 Ins. L. J. 242 (standard mortgagee clause considered under § 2795 herein.

[6] Uhlfelder v. Palatine Ins. Co. 97 N. Y. Supp. 499, 111 App. Div. 57.

[7] Union Institution for Savings v. Phoenix Ins. Co. 196 Mass. 230, 14 L.R.A.(N.S.) 459, 81 N. E. 994, 37 Ins. L. J. 43.

sured constitutes a homestead.[8] But if a donee of mortgaged personalty has procured insurance for his own benefit, the mortgagee is not entitled to the benefit thereof, merely because said donee has knowledge that the mortgagor had failed to keep his agreement to insure for the mortgagee's benefit.[9]

Under a Kansas decision where the mortgagee acquires the legal title to the real estate upon which he holds a mortgage, in view of numerous instances where merger would be unobjectionable to some parties and injurious to others, the general rule is, that, whether or not a merger results depends upon the intention of the mortgagee, actual or presumed. If no intention appears it will be presumed to be such as will best conserve his interests. If it appears wholly indifferent a merger will be presumed. "It has also been held that this intention need not be manifested or exercised at any particular time. The time when the merger takes place if at all, is unimportant unless it affects some intervening rights injuriously. The intent of the party interested need not be declared, or exist when the titles become united, but may be formed or declared when it best suits the interest of the owner thereof if no injury results to others thereby." Accordingly where the mortgagee was secured in part by an insurance policy and accepted a deed to the property in order to avoid foreclosure, and the two interests are kept separate, there is no merger of the mortgage in the legal title and the liability of insurer is in no wise affected thereby.[10]

If a policy is made payable to a mortgagee as his interest may appear and his interest is only to the extent of his lien secured by notes it constitutes an appropriation in advance of the policy proceeds to the satisfaction of said notes and neither party can without the consent of the other disregard such application of payment even though one of the notes was not due at the time the payment was made.[11]

A violation of the ordinary stipulation in a mortgage clause in a policy, that the mortgagee will notify the insurer of a change of title to the property, is held not a ground for forfeiture of the policy, but is merely a breach of contract for which an action for damages will lie if the insurer is injured.[12] And if a mortgagee fails to com-

[8] Chipman v. Carroll, 53 Kan. 163, 25 L.R.A. 305, 35 Pac. 1100.

On right of mortgagee to benefit of insurance taken in the name of mortgagor, see note in 25 L.R.A. 305.

[9] Shadgett v. Phillips & Crew Co. 131 Ala. 478, 56 L.R.A. 461, 31 So. 20.

[10] Fort Scott Building & Loan Assoc. v. Palatine Ins. Co. Ltd. 74 Kan. 272, 86 Pac. 142, 35 Ins. L. J. 919.

As to conveyance from mortgagor to mortgagee, see § 2263a herein.

[11] Bonham v. Johnson, 98 Ark. 459, 136 S. W. 191, 40 Ins. L. J. 1216.

[12] Pioneer Savings & Loan Co. v. Providence Washington Ins. Co. 17

ply with a policy requirement to give notice to insurer of a conveyance of the property his right to the insurance is not defeated in the absence of a stipulation voiding the policy for such failure.[13] A mortgagee to whom a policy is payable does not lose the right to collect the insurance by a transfer of the mortgage with a guaranty of its payment without assigning the policy, although the assignee of the mortgage may be a proper party plaintiff.[14]

If a policy is by indorsement made payable in case of loss to the "first mortgagee, as his interest may appear under present or any future mortgages on the insured property. Balance, if any" to the "second mortgagee as his interest may appear," and said indorsement is assented to by insurer's agent and the second mortgage was arranged for and made on the same day, although it did not take effect by delivery until a few days thereafter and both mortgages and the indorsement bore the same date in the absence of fraud or concealment the first and second mortgagees are intended by the indorsement and recovery and satisfaction will be had in the order of precedence, the second mortgagee being entitled to such balance as remains out of the insurance money in case of loss and payment of the amount due the first mortgagee.[15]

A mortgagor's rights are not aided by the "union mortgage clause" to the extent of enabling him to obtain the policy benefits in case of a forfeiture as to him.[16] But if a trustee of a deed of trust pending the redemption period after foreclosure sale, collects the proceeds of insurance on the property, he cannot refuse to turn it over to the mortgagor on the ground that his interest in the property has ceased.[17] If mortgaged property insured by the administrator is injured by fire, and, before payment of the insurance amount,

Wash. 175, 38 L.R.A. 397, 49 Pac. 231. See Magoun v. Firemen's Fund Ins. Co. 86 Minn. 486, 91 Am. St. Rep. 370, 91 N. W. 5, 31 Ins. L. J. 805.

When consent to mortgage of live stock is given it is immaterial that not indorsed on policy, see National Live Stock Ins. Co. v. Jackson, 160 Ky. 228, 169 S. W. 695.

Mortgage; alienation, change of interest or title, see §§ 2260 et seq. herein.

[13] Phenix Ins. Co. v. Omaha Loan & Trust Co. 41 Neb. 834, 25 L.R.A. 679, 60 N. W. 133. See note in 25 L.R.A. 681, on rights given by attachment of mortgage slip to insurance policy.

[14] Phenix Ins. Co. v. Omaha Loan & Trust Co. 41 Neb. 834, 25 L.R.A. 679, 60 N. W. 133. See §§ 2314 et seq. herein.

[15] Amory v. Reliance Ins. Co. 208 Mass. 398, 94 N. E. 677, 40 Ins. L. J. 1224.

[16] Badger v. Platts, 68 N. H. 222, 73 Am. St. Rep. 572, 44 Atl. 296.

[17] Rawson v. Bethesda Baptist Church, 221 Ill. 216, 6 L.R.A.(N.S.) 448, 77 N. E. 560.

On right to proceeds of insurance where loss occurs after foreclosure sale but during the period of redemption, see note in 6 L.R.A.(N.S.) 448.

he performs the covenant to repair contained in the deed of trust and restores the property out of money on which the mortgagees, to whom the policy is payable as their interest may appear, have no lien, said administrator is entitled to recover and not the mortgagees, for the reason that his security is fully restored by such repairs.[18]

**§ 2795. When mortgagee's interest not affected by mortgagor's acts.**—The mortgage clause making the mortgagee payee, and stipulating that the insurance should not be invalidated by the mortgagor's acts or neglect, constitutes an independent contract between said mortgagee and insurer, and in such case the subject matter of the insurance is the mortgagee's insurable interest, and not the real estate, and the risk will not be avoided by any acts of the mortgagor, whether done prior or subsequently to or at the time of the issue of the policy.[19]

So in New Jersey the standard mortgagee clause creates an independent contract of insurance for the mortgagee's separate benefit, ingrafted upon the main contract of insurance contained in the policy itself, which is rendered certain and understood by reference to the policy which makes it certain and complete.[20] So a mortgage

[18] Huey v. Ewell, 22 Tex. Civ. App. 638, 55 S. W. 606, 29 Ins. L. J. 377.

[19] Hanover Fire Ins. Co. v. Bohn, 48 Neb. 743, 58 Am. St. Rep. 719, 67 N. W. 774. See also Phenix Ins. Co. v. Omaha Loan & Trust Co. 41 Neb. 834, 25 L.R.A. 679n, 60 N. W. 133; Peoples' Savings' Bank v. Retail Merchants' Mutual Fire Ins. Assoc. 146 Iowa, 536, 31 L.R.A.(N.S.) 455, 123 N. W. 198, 39 Ins. L. J. 76; Gilman v. Commonwealth Ins. Co. of N. Y. 112 Me. 528, L.R.A.1915C, 758n, 92 Atl. 721; Smith v. Union Ins. Co. 25 R. I. 200, 55 Atl. 715, 32 Ins. L. J. 1000; Laurenzi v. Atlas Ins. Co. 131 Tenn. 644, 176 S. W. 1022; Firemans Ins. Co. v. Boland, 30 Ohio Civ. Ct. Rep. 811. *Examine* Brown City Savings Bk. v. Windsor, 198 Fed. 28, 117 C. C. A. 136, 41 Ins. L. J. 1869. See notes 18 L.R.A.(N.S.) 204, 135 Am. St. Rep. 749, 58 Am. St. Rep. 672.

On effect of breach of policy of insurance by mortgagor on rights of mortgagee, see notes in 18 L.R.A. (N.S.) 197; 25 L.R.A.(N.S.) 1226; and L.R.A.1915C, 758.

[20] Reed v. Firemens Ins. Co. 81 N. J. L. 523, 35 L.R.A.(N.S.) 343, 80 Atl. 462, 40 Ins. L. J. 1711. The court, per Voorhees, J., said: "The insistence of the defendant is that the mortgagee clause is not an independent contract, in the sense that none of the terms of the policy applies to the mortgagee, because it would then be unenforceable, because lacking certainty and completeness, because contrary to the intent manifested by the statute (P. L. 1892, p. 366; P. L. 1902, p. 407), providing for 'agreements or additions as may be indorsed thereon or added thereto and form a part of such contract or policy,' and because to construe this clause as a complete independent contract, without resort to the policy, is contrary to the words of the clause which refer to the policy and would do violence to them. It must be admitted that the mortgagee clause is not an independent contract in the sense that none of the terms of the policy applies to it. It is not in itself complete, but becomes so by reading the policy in connection with it, and the reading

clause declaring that the mortgagee's interest shall not be invalidated by any act or neglect of the mortgagor, or by any change in title or possession without the mortgagee's notice, makes a new contract between the insurer and mortgagee which is unaffected by the false statements of the mortgagor as to his title or ownership of the property of which the mortgagee is ignorant, whereby the insurance never became valid as to the mortgagor.[1] So where it is stipulated that no act or default of any person other than the mortgagee or his agents, or those claiming under him, shall affect the mortgagee's right to recover in case of loss, an independent insurance is created in favor of the mortgagee, who is not simply a conditional appointee as he would be under the "open mortgage clause," loss if any payable as interest may appear.[2] And where it is agreed by indorsement on the policy that the interest of the mortgagee shall not be affected by any act or neglect of the mortgagor, and the insurer has the right to cancel the policy, and the premium note has not ma-

of the two together does not clash with the notion that the mortgagee clause creates an independent contract between the company and the mortgagee. The policy furnishes the terms of the contract between the owner and the insurer. The mortgagee clause is the contract between the insurer and the mortgagee, quite separate from the policy, yet ingrafted upon it, and to be understood by reference to the policy which renders it certain and complete. The policy, therefore, may be looked at for the purpose of showing what the mortgagee contract refers to and establishes, which is quite different, however, from examining the policy for the purpose of defeating the ingrafted contract. The Court of Appeals of New York in Eddy v. London Assur. Corp. 143 N. Y. 311, 38 N. E. 397, 25 L.R.A. 686, referring to the mortgagee clause, says: 'The controlling idea was a separate insurance of the mortgagee, freed from the conditions attached to the insurance of the owner, and not to be impaired or weakened by any act or neglect of such owner. . . . By taking the insurance in the manner the mortgagee herein did, instead of taking out a separate policy, all the provisions in the policy which from their nature would properly apply to the case of an insurance of the mortgagee's interest would be regarded as forming part of the contract with him, while those provisions which antagonize or impair the force of the particular and specific provisions contained in the clause providing for the insurance of the mortgagee must be regarded as ineffective and inapplicable to the case of the mortgagee.' See also Smith v. Union Ins. Co. 25 R. I. 260, 55 Atl. 715, 105 Am. St. Rep. 882. The law which applied to the old form 'loss if any payable, etc., to the mortgagee,' inserted in the policy (Sun Ins. Co. v. Greenville Building & Loan Assoc. 58 N. J. L. 367, 33 Atl. 962; Milliken v. Woodward, 64 N. J. L. 444, 45 Atl. 796), is inapplicable to the standard mortgagee rider, and, although in the body of the present policy we find, as above noted, the former, yet it there refers in words to the attached mortgagee clause for the terms of the contract."

[1] Syndicate Ins. Co. v. Bohn, 65 Fed. 165, 12 C. C. A. 531, 27 U. S. App. 564, 27 L.R.A. 614.

[2] Magoun v. Firemens Fund Ins. Co. 86 Minn. 486, 91 Am. St. Rep. 370, 91 N. W. 5, 31 Ins. L. J. 805 (standard form).

tured at the time of the assignment, its nonpayment will not affect the mortgagee's rights.[3]

But under a Florida decision the following distinction is made: that while the standard or union mortgage clause does not create in the mortgagee's favor a contract wholly independent, separate, and distinct from that created by such a policy in favor of the mortgagor or owner, still it does give to the mortgagee such a separate and independent contractual status toward insurer as to enable him to recover the policy amount under circumstances and conditions which would preclude a recovery by the owner or mortgagor.[4]

The Maine standard form enacted in 1895, protects the mortgagee against the mortgagor's policy forfeiting or invalidating acts which would otherwise void the insurance as to the mortgagee by providing that: "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate; provided, that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risk not paid for by the insured; and whenever this company shall be liable to the mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself or with others to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested upon such payment. the said mortgage together with the note and debt thereby secured." And this applies where the loss is made payable to the mortgagee as his interest shall appear so that his right to recover is not affected by the cancelation of the policy by insurer at the mortgagor's request, but without notice to the mortgagee.[5] So under a like provision in the Massachusetts standard form of policy, the mortgagee's right to recover is not precluded by a sale of the property without insurer's consent, although such sale avoids the insurance except as to the mortgagee's interest;[6] nor is the mortgagee's recovery precluded by a subsequent conveyance of the equity of redemption by the mortgagor;[7] nor because of any conveyance or other act of the

[3] Planters' Mutual Ins. Co. v. Southern Savings' Fund & Loan Soc. 68 Ark. 8, 56 S. W. 443, 29 Ins. L. J. 611.

[4] Glens Falls Ins. Co. v. Porter, 44 Fla. 568, 33 So. 473, 32 Ins. L. J. 577.

[5] Gilman v. Commonwealth Ins. Co. 112 Me. 528, L.R.A.1915C, 758n, 92 Atl. 721, 45 Ins. L. J. 340; Rev. Stat. c. 49, sec. 4.

[6] Flint v. Westchester Fire Ins. Co. 207 Mass. 337, 93 N. E. 646, 40 Ins. L. J. 508.

[7] Union Institution for Savings v. Phoenix Ins. Co. 196 Mass. 230, 14 L.R.A.(N.S.) 459, 81 N. E. 994, 37

mortgagor made or done after the policy issued,[8] nor does a transfer by a part owner of the property affect the right to recover of either the mortgagee or his assignee.[9] So under a like provision in the South Dakota policy the mortgagee's rights are not affected by a sale of the premises by the owner.[10]

If a fire policy provides: "If, with consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described therein, the conditions hereinbefore contained shall apply in the manner expressed in such conditions and provisions of insurance relating to such interest as shall be written upon, attached, or appended thereto," such provision has the effect of preventing the conditions previously mentioned from applying to such interest, unless they are again written upon, attached or appended to the policy, as applicable to that interest, and the interest of a mortgagee is free from all such conditions not thus attached, so that a conveyance by the owner, without the consent of the insurer, does not affect the rights of the mortgagee.[11] So in Nebraska when a policy, to which is attached a clause making the loss, if any, payable to the mortgagee, as his interest may appear, provides, in the body thereof, that "if an interest shall exist in favor of a mortgagee, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto," and there is neither in the "loss payable clause," nor in any writing upon, attached to, or appended to the policy, any provision or condition carrying the conditions of the policy into such clause, or rendering them in any manner applicable, the mortgagee is, in case of loss, entitled to recover to the extent of his interest without regard to acts or omissions of the owner which might, as between the insurer and such owner, defeat a recovery, because, in order to render the general conditions of the policy applicable to the inter-

Ins. L. J. 43 (standard policy clause Rev. L. c. 116, sec. 60).

[8] Palmer Savings Bank v. Insurance Co. of North America, 166 Mass. 189, 32 L.R.A. 615, 55 Am. St. Rep. 387, 44 N. E. 211.

[9] Whiting v. Burkhardt, 178 Mass. 535, 52 L.R.A. 788, 60 N. E. 1, 30 Ins. L. J. 666.

Mortgage; alienation, change of interest or title, see §§ 2260 et seq. herein.

[10] Edge v. St. Paul Fire & Marine Ins. Co. 20 S. Dak. 190, 105 N. W. 281.

[11] Welch v. British-American Assur. Co. 148 Cal. 223, 113 Am. St. Rep. 223, 82 Pac. 964, 7 Am. & Eng. Ann. Cas. 396. See also Edge v. St. Paul Fire & Marine Ins. Co. 20 S. Dak. 190, 105 N. W. 281. See Queen Ins. Co. v. Dearborn Savings Loan & Building Assoc. 175 Ill. 115, 51 N. E. 717, aff'g 75 Ill. App. 371 (New York standard clause).

est of a mortgagee there must be written upon, attached, or appended to the policy, relating to the interest of the mortgagee, some provisions or conditions expressing in what manner the conditions of the policy shall be so applicable.[12] So in Washington when the loss is made payable to the mortgagee by a policy on mortgaged property which provides that "the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended thereto," and no such provisions or conditions are written upon, attached, or appended, the insurance will not be invalidated by a violation of provisions applicable to the mortgagor.[13] And the unpaid balance of the mortgage lien on the property may be recovered from insurer, even though the vendee and mortgagor burned the property, where the value of mortgaged personalty exceeds the amount remaining unpaid upon the mortgage, where the policy is payable to the mortgagee as his interest may appear, and the policy also contains the standard mortgagee clause. In the case so deciding a distinction is made, or at least qualifiedly made by the court, between said standard clause and a clause which provides that the insurance shall not be avoided by any act or neglect of the owner which constitutes what is known as the "union clause." [14] And policies with the loss pay-

[12] Oakland Home Ins. Co. v. Bank of Commerce, 47 Neb. 717, 36 L.R.A. 673, 58 Am. St. Rep. 663, 66 N. W. 646.

[13] Boyd v. Thuringia Ins. Co. 25 Wash. 447, 56 L.R.A. 165, 65 Pac. 785.

[14] Stamey v. Royal Exchange Assur. Co. 96 Kan. 99, 150 Pac. 227, 46 Ins. L. J. 442. The court said: "Attached to and made a part of the policy was the following clause:—

"'It is understood that the two hacks insured under the first item are being sold to the assured under a contract issued by the United States Carriage Company, and loss, if any, is first payable to the United States Carriage Company as their interest may appear.'

"It is insisted that this is merely the standard clause under which the mortgagee became a mere appointee to receive the loss, which would otherwise have been payable to the assured. Counsel is correct in his contention that Dodge v. Hamburg-Bremen Fire Ins. Co. 4 Kan. App. 415, 46 Pac. 25, was based upon the union, and not upon the standard clause, and that the case of Bank of Concordia v. German Ins. Co. 6 Kan. App. 219, 49 Pac. 688, was based upon the standard clause, and was decided in accordance with counsel's theory, and also that Insurance Co. v. Coverdale, 48 Kan. 446, 29 Pac. 682, and Insurance Co. v. Boardman, 58 Kan. 339, 49 Pac. 92, involved the union, and not the standard, clause.

"It is variously agreed that, as found by the trial court, no conditions were attached to the mortgage clause in this case, that the entire policy was attached thereto, and that by the language used the clause became a part of the policy itself, all of which should be considered in connection with such clause. From the abstract it appears that the policy contained this provision:—

"'If, with the consent of this com-

able to the mortgagee as his interest may appear and which contain clauses of this character are to be construed so as to effectuate the parties' interest, and so constitute two separate contracts of indemnity which relate to the same subject matter but cover distinct interests therein, they effect a new and independent insurance, which protects the mortgagee as stipulated, and cannot be destroyed or impaired by the mortgagor's acts or by those of any person other than the mortgagee or some one authorized to act for him and in his behalf.[15]

Again, where a policy is payable to the mortgagee as his interest may appear, under a mortgage clause providing for notice to the mortgagee of any delinquency of assured before suspension or can-

pany, an interest under this policy shall exist in favor of a mortgagee, or of any person or corporation having an interest in the subject of insurance other than the interest of the assured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.'

"It seems clear that an interest under the policy existed in favor of the mortgagee with the consent of the company, and also that the mortgagee had an interest in the subject of insurance other than that of Stamey, who was the insured named in the policy. The clause respecting this company was the standard clause, and according to many authorities of itself merely made the company the appointee to receive the loss on its property otherwise payable to Stamey, and which, of course, could not be claimed by the company unless Stamey could otherwise claim it. But, not content with leaving this mortgage clause to govern, the insurance company inserted in its policy the provision that 'the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto,' and no 'provisions or conditions of insurance relating to such interest' were ever written upon, attached, or appended to the policy, except the mere mortgage clause itself, which was by its terms made a part of the policy. Hence there were no conditions so far as the carriage company was concerned, for the insurer contracted without conditions to pay the loss to such company. Had the policy omitted all reference to the mortgage clause, and simply attached it to the policy, then the position of counsel that a mere appointment and not a contract existed would be correct. But mortgagees seldom procure or have opportunity to examine policies issued to the owners, and as contracts of insurance prepared and solicited by the insurer are to be construed strongly against such insurer, it must be held that, in view of the terms of the policy, the mortgage clause, and the reference thereto in the policy, the carriage company had an independent contract of insurance and is entitled to recover, and so far as that company is concerned the destruction of the property by the insured did not relieve the insurer from liability."

[15] Queen Ins. Co. v. Dearborn Savings, Loan & Bldg. Assoc. 75 Ill. App. 371, aff'd 175 Ill. 115, 51 N. E. 717 (New York Standard clause); Is independent contract, see Edge v. St. Paul Fire & Marine Ins. Co. 20 S. Dak. 190, 105 N. W. 281.

celation of the policy affecting his interests, the word "delinquency" refers to the same kind of "act or default" as is referred to in the "union clause," so that any act or neglect of the mortgagor or owner does not invalidate the insurance as to the mortgagee's interest; and this applies to preclude assured from urging as a defense against the mortgagee any breach of condition or misrepresentation contemporaneous with or subsequent to the issue of the policy which it might have urged against the mortgagor, no knowledge of such breach being had by said mortgagee.[16]

**§ 2795a. Same subject: instances.**—Invalid insurance taken by the owner of property in violation of a policy cannot be reckoned in determining the recovery of a mortgagee, where the policy provides that his interest shall not be invalidated by any act of the owner, although it provides generally that the insurer shall be liable only for its proportion of the loss according to the whole amount of insurance on the property, whether valid or not.[17] So under a policy on mortgaged property which provides that loss, if any, is payable to the mortgagee, and which is delivered by the insurer to the mortgagee, he is the party insured, so that the question of forfeiture will not be determined by provisions relating to acts of the mortgagor.[18] So the enforcement of a mortgage clause attached to an insurance policy, under a statute providing that the insurance of the mortgage interest shall not be invalidated by any act or neglect of the owner of the property will not be prevented by the fact that the policy was invalid because the interest of the owner was not correctly described.[19] And a fire policy in the standard form, which is void as to the insured owner, because of his breach of the warranty that his interest is not other than unconditional and sole ownership, may nevertheless be valid as to a mortgagee, when the mortgagee clause in the usual form is attached to the policy.[20] And the fact that mortgagors who secured by misrepresenting their title a policy of insurance which contained a mortgage clause were made parties to a suit to recover on the policy when the contract was invalid so far as they were concerned does

[16] Peoples Savings Bank v. Retail Merchants Mutual Fire Ins. Co. 146 Iowa, 536, 31 L.R.A.(N.S.) 455, 123 N. W. 198, 39 Ins. L. J. 76. *Examine* Christensen v. Fidelity Ins. Co. 117 Iowa, 77, 94 Am. St. Rep. 286, 90 N. W. 495.

[17] Eddy v. London Assurance Corp. 143 N. Y. 311, 25 L.R.A. 686, 38 N. E. 307. See Laurenzi v. Atlas Ins. Co. 131 Tenn. 644, 176 S. W. 1022.

[18] Boyd v. Thuringia Ins. Co. 25 Wash. 447, 55 L.R.A. 165, 65 Pac. 785.

[19] Bacot v. Phenix Ins. Co. 96 Miss. 223, 25 L.R.A.(N.S.) 1226, 50 So. 729.

[20] Reed v. Firemen's Ins. Co. 81 N. J. Law, 523, 35 L.R.A.(N.S.) 343, 80 Atl. 462.

not prevent a recovery in favor of the mortgagees, since they can be eliminated from the case.[1] Again, an appropriation by the owner of insured property, which is destroyed, of the proceeds of the sale of the *debris,* after total loss, to his own use, would be an act of the owner, but such act would not invalidate the insurance of the mortgagee, or cast upon the mortgagee the burden of proving the amount realized from such sale.[2] Nor can the rights of a mortgagee in a policy payable to him "as his mortgage interest may appear" be defeated by an accord and satisfaction between the insurer and the owner of the premises, who procured the policy in his own name.[3] And a mortgagee, in whose favor a loss is made payable as his interest may appear, is not affected by additional insurance procured upon the property without his knowledge or consent, though there is a rider attached to the policy to the effect that, if other insurance shall exist on the property, the company shall be liable only for such proportion of the loss sustained as the amount insured shall bear to the whole insurance on the property insured, whether the other insurance applies in the same manner or not. The provisions respecting the other insurance affect the interest of the insured only, and not that of the mortgagee, unless additional insurance is obtained for his benefit and with his knowledge.[4] If the policy is payable to the mortgagee his acts, in effecting a new insurance and attempting, without authority or notice to the mortgagor, to cancel the policy, do not affect the mortgagor's right to recover.[5]

**§ 2795b. When mortgagee's interest affected by mortgagor's acts: when mortgagee not insured party, but appointee.**—In Maine the form of the standard policy was prescribed by the legislature in 1895 and it materially affected the rights or interests of the mortgagee, inasmuch as prior thereto where the policy was by indorsement thereon made payable to the mortgagee as his interest might appear, then neither his interest was insured nor was the policy thereby assigned to him, but said indorsement was merely a contingent order or a stipulation assented to by insurer for payment of

[1] Bacot v. Phenix Ins. Co. 96 Miss. 223, 25 L.R.A.(N.S.) 1226, 50 So. 729.

[2] Reed v. Firemen's Ins. Co. 81 N. J. Law, 523, 35 L.R.A.(N.S.) 343, 80 Atl. 462.

[3] Hathaway v. Orient Ins. Co. 134 N. Y. 409, 17 L.R.A. 514, 32 N. E. 40.

On effect of settlement between insurer and mortgagor upon rights of mortgagee to whom loss is made payable as his interest may appear, see note in 19 L.R.A. 321.

[4] Hardy v. Lancashire Ins. Co. 166 Mass. 210, 33 L.R.A. 241, 55 Am. St. Rep. 395, 44 N. E. 209.

On procuring of insurance by mortgagee as violation of provision in policy of mortgagor against other or additional insurance, see note in L.R.A.1917A, 607.

[5] Morrow v. Lancashire Ins. Co. 26 Ont. App. 173.

the loss to the mortgagee to the extent of his interest, but the interest of the mortgagor and not of the mortgagee was insured, and the mortgagee was not protected against acts of the mortgagor forfeiting or invalidating the policy under its terms.[6] This rule or principle has been applied and held to govern in other cases, where the loss is payable to the mortgagee, as his interest may appear and also in cases under the standard mortgage clause, deciding that the mortgagee is merely an appointee under such contingent order to receive said policy proceeds, and that he is unprotected, as above stated, against the mortgagor's policy invalidating or forfeiting acts.[7] So the fact that a loss is payable to the mortgagee of insured premises does not increase, lessen, or otherwise change the burden assumed by the insurance company. The same defenses may be made against the mortgagee, who brings an action on the policy, as could have been made against the insured.[8] And if insurance is payable to a mortgagee, as his interest may appear, he is not entitled to recover if the assured is not, so that recovery for his benefit is precluded if the premises are burned by insured for the purpose of realizing upon the insurance.[9] So where the cause of action has been lost to the insurer through forfeiture of the

[6] Gilman v. Commonwealth Ins. Co. of N. Y. 112 Me. 528, L.R.A.1915C, 758n, 92 Atl. 721, 45 Ins. L. J. 340, Rev. Stat. c. 49, sec. 4; Biddleford Savings Bank v. Dwelling House Ins. Co. 81 Me. 566, 570, 18 Atl. 298; Brunswick Savings Institution v. Commercial Union Ins. Co. 68 Me. 313, 28 Am. Rep. 56.

[7] *United States.*—Brecht v. Law, Union & Crown Ins. Co. 160 Fed. 399, 87 C. C. A. 35, 18 L.R.A.(N.S.) 197n, 37 Ins. L. J. 621 (change of interest, title or possession; condition was, however, standard mortgage clause) *approving* and *following* Delaware Ins. Co. v. Greer, 120 Fed. 916, 57 C. C. A. 188, 61 L.R.A. 137.

*Georgia.*—Hartford Fire Ins. Co. v. Liddell Co. 130 Ga. 8, 14 L.R.A. (N.S.) 168, 124 Am. St. Rep. 157, 60 S. E. 104 (payable to mortgagee as his interest may appear, held not an assent to subsequent incumbrance).

*Illinois.*—Continental Ins. Co. v. Halman, 92 Ill. 145, 34 Am. Rep. 122.

*Maryland.*—Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 30 L.R.A. 633, 61 Am. St. Rep. 457, 33 Atl. 429 (policy indorsed payable to mortgagees as their interest may appear).

*Massachusetts.*—Young v. Eagle Fire Ins. Co. 14 Gray (80 Mass.) 150, 74 Am. Dec. 673; Hale v. Mechanics Mutual Fire Ins. Co. 6 Gray (72 Mass.) 169, 66 Am. Dec. 470n.

*New York.*—Perry v. Lorillard Fire Ins. Co. 61 N. Y. 214, 19 Am. Rep. 272.

*Tennessee.*—Hocking v. Virginia Fire & Marine Ins. Co. 99 Tenn. 729, 39 L.R.A. 148, 63 Am. St. Rep. 862, 42 S. W. 451 (as his interest may appear; no recovery by mortgagee where mortgagor burned property). Compare Laurenzi v. Atlas Ins. Co. 131 Tenn. 644, 176 S. W. 1022.

*Wisconsin.*—Meiswinkel v. St. Paul Fire & Marine Ins. Co. 75 Wis. 147, 6 L.R.A. 200, 43 N. W. 669 (policy indorsed loss payable to mortgagees); Gillett v. Liverpool & London & Globe Ins. Co. 73 Wis. 203, 9 Am. St. Rep. 784, 41 N. W. 78.

[8] German Ins. Co. v. Hayden, 21 Colo. 127, 52 Am. St. Rep. 206, 40 Pac. 453.

[9] Hocking v. Virginia Fire & Ma-

policy, a mortgagee, for whose benefit the insurance was procured, has no greater right than the insured.[10]

If a policy is void, and insurer, without knowledge thereof, attaches a mortgage clause to the policy, without consideration at the instance of the mortgagee, who is also ignorant of the fact that the policy is void, and who because of the mortgagee clause neglects to get other insurance, the company is not thereby estopped to deny the validity of the policy.[11] Again, sending a policy to the assured on his promise to remit the premium does not estop the insurer from denying its validity for nonpayment of premium, as against a mortgagee to whom "loss, if any, is payable," although he received the policy from the assured without notice that the premium was unpaid.[12]

Under an Ohio decision a mortgage clause attached to an insurance policy is not a new and separate contract between the insured and the mortgagee. Its purpose is to designate or appoint a payee of the amount of the loss according to the interest of the mortgagee in the insurance which he may make appear, and it modifies the principal contract only to the extent that a modification or qualification is therein expressed.[13]

And where the code provides that insurance effected by the mortgagor on his own name, loss payable to the mortgagee, the insurance is deemed to be upon the mortgagor's interest, the stipulation for payment to the mortgagee operates only as a provisional assignment of the contingent proceeds of the contract and does not substitute the mortgagee for the mortgagor as the insured party. So that the mortgagee's interest under the policy only extends to a security for his debt and such interest ceases when the debt is extinguished. Accordingly a foreclosure of the mortgaged premises and the purchase thereof by the mortgagee fully extinguishes the debt and dissolves the relation of debtor and creditor, or of mortgagor and mortgagee; and in such case where the insured building burns before the period of redemption expires, the fact that loss has been paid to a mortgagor during the period of redemption, does not render the insurance company liable to the

rine Ins. Co. 99 Tenn. 729, 39 L.R.A. 148, 63 Am. St. Rep. 862, 42 S. W. 451.

[10] Woodard v. German American Ins. Co. 128 Wis. 1, 116 Am. St. Rep. 17, 106 N. W. 681.

[11] Baldwin v. German Ins. Co. 113 Iowa, 314, 86 Am. St. Rep. 375, 85 N. W. 26.

[12] Union Building Assoc. v. Rockford Ins. Co. 83 Iowa, 647, 14 L.R.A. 248, 49 N. W. 1032.

[13] Erie Brewing Co. v. Ohio Farmers' Ins. Co. 81 Ohio, 1, 20 L.R.A. (N.S.) 740n, 135 Am. St. Rep. 735, 85 N. E. 1065.

mortgagee, where his interest in the policy has ceased with the extinguishment of the mortgage indebtedness.[14]

Under a Federal decision it is held that the clause, that "the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto," did not protect the mortgagee as there was no special agreement modifying or waiving the conditions of the policy, and insurer had thereby simply consented to the appointment of a third person to receive payment of any loss sustained by the person to whom the policy was issued, and all its conditions applied, and that if insurer had intended to protect the mortgagee's interest regardless of breaches of conditions by the mortgagor, it could have done so by "the use of the 'union mortgage clause' " and therefore such appointee was subject to the risk of all acts and omissions of the person to whom the policy was issued.[15] Under a Connecticut

[14] Reynolds v. London & Lancashire Fire Ins. Co. 128 Cal. 16, 79 Am. St. Rep. 17, 60 Pac. 467, 29 Ins. L. J. 330; Cal. Civ. Code, sec. 2541.

[15] Brecht v. Law Union & Crown Ins. Co. 160 Fed. 399, 87 C. C. A. 35, 18 L.R.A.(N.S.) 197n, 37 Ins. L. J. 621 (change of interest, title, or possession). The court, however, per De Haven, D. J., says: "The contention of the plaintiff in error, broadly stated, is that, by the terms of this provision, the conditions contained in the policy against alienation and change of possession do not affect his right to recover, because there was not written upon or attached to the policies any statement or writing showing the manner or extent to which such conditions should apply to the interest which he had in the policies as the person to whom the loss thereunder is made payable. This contention is sustained by a number of decided cases, among which are the following: Oakland Home Ins. Co. v. Bank of Commerce, 47 Neb. 717, 36 L.R.A. 673, 66 N. W. 646; Queen's Ins. Co. v. Dearborn Savings, Loan & Building Assoc. 175 Ill. 115, 51 N. E. 717; Christensen v. Fidelity Ins. Co. 117 Iowa, 77, 90 N. W. 495; Boyd v. Thuringia Ins. Co. 25 Wash. 447, 453, 55 L.R.A. 165, 65 Pac. 785; Edge v. St. Paul Fire & Marine Ins. Co. 20 S. Dak. 190, 105 N. W. 281; Welch v. British & American Assurance Co. 148 Cal. 223, 82 Pac. 964. These cases all hold that a stipulation in a policy like that above quoted is to be construed as an agreement upon the part of the insurance company issuing it that the conditions of the policy to which the stipulation refers shall not apply to the interest vested in a mortgagee by a memorandum clause, making the loss, if any, payable to him as his interest may appear, unless the manner in which such conditions are to be applied are expressly stated in some writing indorsed upon or attached to the policy. The contrary was however held by the circuit court of appeals for the eighth circuit in Delaware Ins. Co. v. Greer, 120 Fed. 916, 57 C. C. A. 188, 61 L.R.A. 137; and by Judge Wolverton in Vancouver National Bank v. Law, Union & Crown Ins. Co. (C. C.) 153 Fed. 440. We think the cases last cited announce the better rule in relation to the construction of insurance policies having provision like those sued on in this action. The contract of insurance here was between the St. Johns Lumber Company, as owner of the property insured, and the defendant insurance

decision wherein an exactly like clause was before the court it was decided that the mortgagor or owner had full power in the matter of adjustment, whether by way of agreement or arbitration, and that the mortgagee, to whom the policy was payable as his interest

company, and the legal effect of the slips attached to the policies, making the loss thereunder payable to the plaintiff in error, was to constitute him the appointee of the St. Johns Lumber Company, to receive payment of whatever sums might become due, under the policies, on account of losses sustained by that company by reason of the destruction of its property by fire. . It may be conceded, as claimed by the plaintiff in error, that the slips were attached for his benefit as mortgagee of the insured property, still it is well settled that, under such form of memorandum clause, the person named as payee therein is only entitled to recover as the appointee of the insured, and, when the policy has become void as to the person effecting the insurance, it cannot be enforced by his appointee. This was so held in Brunswick Savings' Institution v. Commercial Union Ins. Co. 68 Me. 313, 28 Am. Rep. 56, the court saying:

"'This clause in the policy "payable, in case of loss, to the Brunswick Savings' Institution to the amount of the mortgage held by them" is not an insurance of the plaintiff's interest in the property, nor an assignment of the policy to the plaintiffs. It is merely a contingent order or stipulation, assented to by the defendant, for the payment of the loss of the assured, if any, to the plaintiffs. It gives the plaintiffs the same right to recover that the assured would have if no such clause had been inserted in the policy. Any violation of the conditions and stipulations of the policy which would defeat the right of the assured to recover upon it will defeat the right of the plaintiffs.'

"The rule thus stated is fully sustained by the following cases: Fogg v. Middlesex Mutual Fire Ins. Co. 10 Cush. (64 Mass.) 337; Martin v. Franklin Fire Ins. Co. 38 N. J. Law, 140, 20 Am. Rep. 372; Keith v. Royal Ins. Co. 117 Wis. 531, 94 N. W. 295; Wunderlich v. Palatine Ins. Co. 104 Wis. 382, 395, 80 N. W. 467; Grosvenor v. Atlantic Fire Ins. Co. 17 N. Y. 391; Loring v. Manufacturers' Ins. Co. 8 Gray (74 Mass.) 28; Bates v. Equitable Ins. Co. 10 Wall. (77 U. S.) 33, 19 L. ed. 882; Bidwell v. Northwestern Ins. Co. 19 N. Y. 179, 180. . . .

"When the policies sued on were issued, it was not unusual for insurance companies to insure the interest of mortgagees by attaching to their policies slips containing what is known as the 'Union Mortgage Clause,' whereby the insurance company agreed to pay to the mortgagee the amount to become due under the policy as his interest might appear, regardless of subsequent breaches of certain conditions of the policy by the mortgagor. The following cases arose under policies containing such a clause: Magoun v. Firemen's Fund Ins. Co. 86 Minn. 486, 91 Am. St. Rep. 370, 91 N. W. 5; National Bank v. Union Ins. Co. 88 Cal. 497, 22 Am. St. Rep. 324, 26 Pac. 509; Hastings v. Westchester Ins. Co. 73 N. Y. 141, 144; Syndicate Ins. Co. v. Bohn, 65 Fed. 165, 12 C. C. A. 531, 27 L.R.A. 614. Now, if it had been the intention of the defendant to insure the plaintiff in error absolutely and without reference to any breach of the conditions of the policies by the St. Johns Lumber Company, such insurance could have been effected by the use of the 'Union Mortgage Clause' in defining the rights of the plaintiff in error under the policies; but, instead of doing this, the parties adopted a form merely designating him as the person to whom the loss, if any,

might appear, was not entitled to be a party thereto and had no standing to attack its acceptance in the absence of bad faith.[16]

should be payable, a form which under well-settled rules subjects the appointee to the risk of all acts and omissions of the person to whom the policy was issued."

[16] Collinsville Savings' Soc. v. Boston Ins. Co. 77 Conn. 676, 69 L.R.A. 924, 60 Atl. 647, 34 Ins. L. J. 1031. The court, per Prentice, J., said: "The indorsement above recited, designating the payee of any loss, which, for the purposes of distinction, has been called the 'open mortgage clause,' did not bring the plaintiff and defendant into contractual relations with each other, either directly or through an assignment of the policy; neither did the plaintiff thereby become a person or corporation whose property or property interests were insured under the policy. The contract for indemnity remained one exclusively between the defendant and the property owner. The plaintiff was only a conditional appointee of the latter. As such appointee, it was entitled to receive so much of any sum that might become due under the policy as did not exceed its interest as mortgagee, and nothing more. Such is the accepted rule in this state, and, with few possible exceptions, elsewhere: Woodbury Savings Bank & Building Assoc. v. Charter Oak Ins. Co. 29 Conn. 374; Meriden Savings Bank v. Home Ins. Co. 50 Conn. 396; Franklin Savings Inst. v. Central Mutual Fire Ins. Co. 119 Mass. 240; Baldwin v. Phœnix Ins. Co. 60 N. H. 164; Biddeford Savings Bank v. Home Ins. Co. 81 Me. 566, 18 Atl. 298; Magoun v. Firemen's Fund Ins. Co. 86 Minn. 486, 91 Am. St. Rep. 370, 91 N. W. 51; Hartford Fire Ins. Co. v. Olcott, 97 Ill. 439; Williamson v. Michigan Fire & Marine Ins. Co. 86 Wis. 393, 39 Am. St. Rep. 906, 57 N. W. 46; Van Buren v. St. Joseph County Village Fire Ins. Co. 28 Mich. 398; Martin v. Franklin Fire Ins. Co. 38 N. J. Law. 140, 146, 20 Am. Rep. 372; Grosvenor v. Atlantic Fire Ins. Co. 17 N. Y. 391; Syndicate Ins. Co. v. Bohn, 65 Fed. 165, 12 C. C. A. 531. It is universally held that a policy so indorsed may become forfeited, and the mortgagee deprived of all protection thereunder, by any act or default of the property owner before loss: Moore v. Hanover Fire Ins. Co. 141 N. Y. 219, 36 N. E. 191; Baldwin v. Phœnix Ins. Co. 60 N. H. 164.

"There is another stipulation appearing in or appended to policies issued to property owners, and designed to protect the interest of mortgagees, which it is important to notice. This has been variously denominated the 'mortgagee clause' and the 'union mortgage clause.' It is embodied in the standard policies in some states, and is frequently used as a rider upon policies in other states. It embraces the provision, in substance, that no act or default of any person other than such mortgagee or his agent, or those claiming under him, shall affect the mortgagee's right of recovery. It has frequently been held that the effect of this clause, whenever it is made a part of or indorsed upon a policy, is to bring the insurer and mortgagee into relations of privity, to convert the mortgagee into a party to the contract of insurance, to give to the mortgagee separate and distinct protection to his interest, to create in him an interest under the policy distinct from that of the property owner, and to, in fact, make him an assured: Hastings v. Westchester Fire Ins. Co. 73 N. Y. 141; Magoun v. Firemen's Fund Ins. Co. 86 Minn. 486, 91 Am. St. Rep. 370, 91 N. W. 5; Hartford Fire Ins. Co. v. Olcott, 97 Ill. 439; Phœnix Fire Ins. Co. v. Omaha Loan & Trust Co. 41 Neb. 834, 25 L.R.A. 679n, 60 N. W. 133; Ormsby v. Phenix Ins. Co. 5 S. Dak. 72, 58 N. W. 301; Syndicate Ins. Co. v. Bohn, 65 Fed.

**§ 2796. Overheating without combustion.**—If fire is used for culinary and heating purposes, or for the purpose of generating power, the fire being confined within the limits of certain agencies for producing heat, or if it is used by chemists, artisans, and manufacturers as a chemical agent or as an instrument of art or fabrication, or for any of the other numerous purposes of like character,

165, 12 C. C. A. 531; Clement on Ins. 33; Elliott on Ins. sec. 341. This court has never gone to the full length of these decisions, nor need we do so now. . . .

"It is quite clear that the plain and explicit provision of the 'union mortgage clause,' to the effect that the mortgagee's right of recovery under the policy, as the payee thereof, shall not be affected by the act or neglect of any person other than the mortgagee, his agent, or those claiming under him, must suffice to establish for a mortgagee under such conditions a status with respect to the insurance which is not only independent of, but also superior to, that of the property owner. The former's rights are thus expressly set free from the operation of those acts and neglects of the latter which would destroy the latter's insurance or limit the extent of his recovery. The rights of the mortgagee become not merely those of a substitute for the owner. He acquires rights of his own which are subject to no man's control, and which gives him independent and distinct protection.

"It requires no argument to demonstrate that under such circumstances the, mortgagee's protection extends, as we have above assumed it to do, to the consequences of all the acts and neglects of the property owner both before and after loss, and that it therefore precludes a submission to appraisers which should be binding upon the mortgagee without his concurrence or ratification. . . .

"It is easy to understand how a mortgagee, having acquired the status which the 'union mortgage clause' gives one, whatever that status, technically regarded, may be, might be fairly entitled to be comprehended within the descriptive term 'the insured,' and, if not, that the express language of that clause so defines his rights and limits the rights and capacity of the property owner that the right to participate in any adjustment of the loss is impliedly accorded him. On the other hand, it is not easy to discover upon what theory it can be reasonably claimed that a person who has not come into contractual relations with the insurer, who has obtained no insurance protection, and who is only an appointee of the owner as respects whatever may become due under the contract of insurance, to which he is a stranger, acquires the right, even by indirection, to assume the title of 'the insured.' If we look for other provisions which may serve, by way of implication or otherwise, to give him a standing in the adjustment of a loss, we find only that the word 'insured,' whenever used in the policy, should be construed to include the legal representatives of the insured, and nothing more. It appears, therefore, that the right to participate in an adjustment of a loss under this policy and indorsement has by the parties to the contract been limited to the insurer, the property owner, and his legal representatives." The court also reviews the following cases and states that "most of them have no pertinence whatever to the proposition in support of which they are so often cited, and the balance are not of such a character as to strongly commend them as authorities in this jurisdiction at least." *Considering* Hathaway v. Orient Ins. Co. 134 N. Y. 409, 17 L.R.A. 514, 32 N. E. 40;

and if in such cases it is used or applied by design, and a loss occurs in consequence of overheating or by unskillfulness or negligence of the operator, and his mismanagement of heat as an agent or instrument of manufacture or other useful purpose, this is not a loss within a fire policy. To this extent the rule is law.[17]

Whether this rule may be extended beyond this point is a question. There is authority for the proposition that a fire policy does not cover damage without combustion by overheating; that there must in such case be an actual ignition or burning; that the fire must operate upon the subject insured, as distinguished from a loss occasioned by the action of heat within the limits of some one or more of the usual and proper agencies for producing heat. This extension of the rule would certainly be reasonable and in accord with the authorities. The qualification, or rather explanation, is added that the identical property insured need not be ignited or consumed, for if there is ignition of part of the insured property or of other nearby property, or of the building or some part thereof, and an injury, of which fire is clearly the proximate cause, is sustained by the remainder of the identical property insured, or by the whole or some part thereof, this would certainly be a loss by fire, even though there is no actual ignition of the property so damaged, and we believe that with such qualification the above rule is the true one.[18] So in case of a policy against fire on a steam ves-

Wilson v. Hakes, 36 Ill. App. 539, 547; Harrington v. Fitchburg Ins. Co. 124 Mass. 126; Hall v. Philadelphia Ins. Co. 64 N. H. 405, 13 Atl. 648; Brown v. Hartford Fire Ins. Co. 5 R. I. 394, 398; Bergman v. Commercial Assur. Co. 92 Ky. 494, 15 L.R.A. 270, 18 S. W. 122.

[17] Scripture v. Lowell Mutual Fire Ins. Co. 10 Cush. (64 Mass.) 356, 57 Am. Dec. 111, per Cushing, J., an exhaustive discussion of Austin v. Drewe, 4 Camp. 361, Holt 126, 6 Taunt. 436, 2 Marsh. 130, 16 R. R. 647; St. John v. American Mutual Fire Ins. Co. 11 N. Y. 516, per Denio, J.; Beaumont on Ins. 37.

If fire is employed as an agent, either for the ordinary purposes of heating the insured building for the purposes of manufacture, or as an instrument of art, the insurer is not liable for the consequences thereof, so long as the fire itself is confined within the limits of the agencies employed as from the effects of smoke or heat evolved thereby, or escaping therefrom from any cause, whether intentional or accidental. Cannon v. Phœnix Ins. Co. 110 Ga. 563, 78 Am. St. Rep. 124, 35 S. E. 775, 29 Ins. L. J. 1023.

[18] *United States.*—Waters v. Louisville Ins. Co. 1 McLean (U. S. C. C.) 275, Fed. Cas. No. 17,266.

*Louisiana.*—Millaudon v. New Orleans Ins. Co. 4 La. Ann. 15, 50 Am. Dec. 550.

*Massachusetts.*—Sohier v. Norwich Fire Ins. Co. 11 Allen (93 Mass.) 336.

*New York.*—Brown v. Kings County Fire Ins. Co. 31 How. Pr. (N. Y.) 508; Babcock v. Montgomery County Mutual Ins. Co. 16 Barb. (N. Y.) 637, per Pratt, J.

*England.*—See Everett v. London Assur. Co. 19 C. B. N. S. 126, per Byles, J.; Austin v. Drewe, 6 Taunt. 436, 2 Marsh. 130, 4 Camp. 360,

sel, her hull, machinery, etc., the court says: "Of necessity fire was to be maintained in the furnace, and in contact with the boiler as means to generate motive power by which the vessel could be propelled. The burning or warping of the bars of the grate in the furnace, though produced by the action of fire, could hardly be supposed to be within the scope of the risk insured against, however, general the terms of the policy. And if that be true of the furnace, it is difficult to perceive why it is not equally true of such parts of the boiler as are brought in contact with the fire in the furnace or the heat evolved therefrom. The fire, while in the furnace, was in its proper place and where it was intended to be, and it was placed there to act upon the boiler, which in course of time would be burned out or warped, as the grate in the furnace would be, by the continued action of the fire therein, and if such results of the action of fire upon these materials while in ordinary use are not within the risk, it would be difficult to say upon what degree of heat or under what conditions the liability under the policy would attach for injury caused by the action of fire while confined to the furnace and producing no external ignition. If a person has his house insured against all loss or damage by fire, and he should make a fire in his grate or fireplace of such intense heat as to crack his chimney or to warp or crack his mantelpieces, it could hardly be contended that he could hold the insurance company liable for such damage, though the damage was unintentionally allowed to be produced by the action of fire. In such case the fire would not have extended beyond the proper limits within which it was intended to burn, but the heat emitted therefrom would have produced effects not intended by the insured. No doubt there are many instances where the insurer has been held liable for injury done to buildings and furniture by heat or smoke without actual ignition, where the heat or smoke has proceeded from fire outside of and beyond the limits of the place where it was intended by the contract of insurance to burn. But that is a different question." In this case it was sought to recover damage to the interior of the boiler occasioned by the overheating of the boiler from the furnace fires, owing to absence of water in the boiler, and not as the result of fire outside the furnace.[19]

Holt, 126, 16 R. R. 647, per Gibbs, C. J.

"Fire" defined; spontaneous combustion. See Sun Insurance Office v. Western Woolen Mill Co. 72 Kan. 41, 82 Pac. 513; Ellis on Fire Ins. 273; Steph. N. P. 1079; 11 Petersd. Abr. 18.

On loss caused by excessive heat, smoke or soot from heating apparatus without actual ignition, see note in 25 L.R.A.(N.S.) 501.

[19] American Towing Co. v. German Fire Ins. Co. 74 Md. 25, 21 Atl. 353, per Alvry, J.

Insurance, however, against all direct loss and damage by fire includes loss by smoke, soot, and excessive heat due to a fire kindled with unusually inflammable materials in the furnace designed to heat the building, although the fire does not escape from the furnace, and is not communicated to the property injured.[20]

The rule above given does not confine the loss to actual burning or consuming, but all losses are covered which are proximately or immediately caused by the fire or combustion; as in case of loss by water to extinguish the fire.[1] But a loss by lightning unaccompanied by combustion is not a loss by fire.[2] And where a boiler exploded from excessive heat, this was held not a loss within the policy.[3] And where wool was insured against all direct loss or

[20] O'Connor v. Queen Ins. Co. 140 Wis. 388, 25 L.R.A.(N.S.) 501, 133 Am. St. Rep. 1081, 122 N. W. 1038.

[1] Geisek v. Crescent Mutual Ins. Co. 19 La. Ann. 297; City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258; Babcock v. Montgomery County Mutual Ins. Co. 6 Barb. (N. Y.) 637.

[2] Kenniston v. Merrimac County Mutual Ins. Co. 14 N. H. 341, 40 Am. Dec. 193. See Babcock v. Montgomery County Mutual Ins. Co. 6 Barb. (N. Y.) 637.

[3] Millaudon v. New Orleans Ins. Co. 4 La. Ann. 15, 50 Am. Dec. 550; Scripture v. Lowell Mutual Fire Ins. Co. 10 Cush. (64 Mass.) 356, for an exhaustive discussion of Austin v. Drewe, 4 Camp. 360, Holt, N. P. 126, 6 Taunt. 436, 2 Marsh. 130, 16 R. R. 647.

*Opinions of Text-Writers in the Above.*—Mr. Wood says: "Where fire is employed as an agent either for the ordinary purposes of heating the building, for the purposes of manufacture, or as an instrument of art, the insurer is not liable for the consequences thereof so long as the fire itself is confined within the limits of the agencies employed; as from the effects of smoke or heat evolved thereby or escaping therefrom from any cause, whether intentional or accidental. In order to bring such consequences within the risk there must be actual ignition outside of the agencies employed, not purposely caused by assured, and these as a consequence of such ignition dehors the agencies:" 1 Wood on Fire Ins. (2d ed. 236) sec. 103, *citing:*

*Louisiana.*—Geisek v. Crescent Mutual Ins. Co. 19 La. Ann. 297; Millaudon v. New Orleans Ins. Co. 4 La. Ann. 15, 50 Am. Dec. 550.

*New Hampshire.*—Kenniston v. Merrimac County Mutual Ins. Co. 14 N. H. 341, 40 Am. Dec. 193.

*Ohio.*—Perrin v. Protection Ins. Co. 11 Ohio, 147, 38 Am. Dec. 728.

*New York.*—Grim v. Phœnix Ins. Co. 13 Johns. (N. Y.) 451; Babcock v. Montgomery County Mutual Ins. Co. 6 Barb. (N. Y.) 637.

*England.*—Austin v. Drew, 4 Camp. 360, 361, Holt, N. P. 126, 6 Taunt. 436, 2 Marsh. 130, 16 R. R. 647; Jameson v. Royal Ins. Co. 7 Ir. L. R. 126. The case of Austin v. Drewe, 4 Camp. 637, 2 Marsh. 130, 6 Taunt. 436, Holt, N. P. 126, 16 R. R. 647, is mainly relied on by Mr. Wood, but Mr. May does not give such a construction to that case; in fact, he does not deduce therefrom any rule which would extend beyond that noted at the beginning of this section: 2 May on Ins. (3d ed.) sec. 402; and he *cites* the case of Austin v. Drewe as reported in 6 Taunt. 436, and note thereto; 1 Benn. F. I. Cas. 104; Case v. Hartford Fire Ins. Co. 13 Ill. 676, per Trumbull, J.; Balestracci v. Fireman's Ins. Co. 34 La. Ann. 844; Sohier v. Norwich Fire Ins. Co. 11 Allen (93 Mass.) 336;

damage by fire, and a flood submerged the wool for over a week and it became very much heated and the fiber of the wool was destroyed, but it did not appear from the evidence that at any time the heat produced a flame or glow, it was held not to be a "fire" within the meaning of that word.[4]

**§ 2797. Perils of the seas and rivers: dangers of navigation.**—Perils of the sea include accident or misfortunes of which sea damage is the proximate or efficient cause; that is, those losses occasioned by extraordinary circumstances such as stress of weather, winds, tempests, storm and waves, rocks, sands, shoals, foundering or sinking at sea, striking against a sunken rock, stranding, shipwreck, etc., but does not cover loss arising from ordinary circumstances of the voyage or from sea damage, or from wear and tear which without any extraordinary circumstances is to be expected. It is not confined to damage caused only by the sea, but covers damage of a character to which a marine adventure is subject, or perils which sustain to such adventures a special or peculiar relation.[5] "Perils of the sea are from storms and waves, rocks, shoals, and rapids, other obstacles though of human origin, changes of climate, the confinement necessary at sea, animals peculiar to the sea, and all other dangers peculiar to the sea."[6] So it is declared that perils of the sea are all perils, losses, and misfortunes of a marine character, or of a character incident to a ship

Brown v. Kings County Fire Ins. Co. 31 How. Pr. (N. Y.) 508. Mr. Ostrander has merely adopted Mr. Wood's rule: Ostrander on Fire Ins. (ed. 1892) 367, sec. 165. Mr. Phillips says: "If fire is the efficient cause, and if the loss is its direct effect, the underwriters are liable:" 1 Phillips on Ins. (3d ed.) 624, 625, sec. 1097. And Mr. Marshall's opinion is that there must be actual ignition: 2 Marshall on Ins. (3d ed.) 790, noted more fully in next section.

[4] Western Woolen Mills Co. v. Northern Assur. Co. 139 Fed. 697, 72 C. C. A. 1, certiorari denied (mem.) 199 U. S. 608, 50 L. ed. 331, 26 Sup. Ct. 750.

[5] Coles v. Marine Ins. Co. 3 Wash. (U. S. C. C.) 159, Fed. Cas. No. 2,988; Bullard v. Roger Williams Ins. Co. 1 Curt. (U. S. C. C.) 148, Fed. Cas. No. 2,122, per Curtis, J.; Hazard v. New England Marine Ins. Co. 1 Sum. (U. S. C. C.) 218, Fed. Cas. No. 6,282, rev'd 8 Pet. (33 U. S.) 557, 8 L. ed. 1043; The Gulnare, 42 Fed. 861; The Mangalore, 23 Fed. 462, 9 Saw. (U. S. C. C.) 17; The Schooner Reeside, 2 Sum. (U. S. C. C.) 567, 571, Fed. Cas. No. 11,657; Potter v. Suffolk Ins. Co. 2 Sum. (U. S. C. C.) 197, Fed. Cas. No. 11,339; Miller v. California Ins. Co. 76 Cal. 145, 9 Am. St. Rep. 184, 18 Pac. 155; Thames & Mersey Marine Ins. Co. v. Hamilton, 12 App. C. 484, 56 L. J. Q. B. 626, 17 Q. B. D. 195, 57 L. T. 695, 36 W. R. 337, 6 Asp. M. C. 200; Fletcher v. Inglis, 2 Barn. & Ald. 315, 20 R. R. 448; Rohl v. Parr, 1 Esp. 445, 5 R. R. 741. But see §§ 2816, 2817, on stranding.

[6] Deering's Annot. Civ. Code Cal. sec. 2197; Abbott on Shipping (6th ed.) 384n; Miller v. California Ins. Co. 76 Cal. 145, 9 Am. St. Rep. 184, 18 Pac. 155. See note 41 Am. Dec. 287–90, as to what is included in perils of the seas.

as such.[7] It is also asserted that "perils of the sea," are extraordinary occurrences only, a loss by ordinary occurrences not being insured against.[8] The marine insurance act 1906, of England, provides: "The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include ordinary actions of the wind and waves."[9] And when a peril of the sea is the direct and proximate cause of the loss, the underwriter is liable, although the servants of the assured did not use due care to avoid the peril.[10]

[7] Miller v. California Ins. Co. 76 Cal. 145, 9 Am. St. Rep. 184, 18 Pac. 155.

[8] Hazard v. New England Marine Ins. Co. 8 Pet. (33 U. S.) 557, 8 L. ed. 1043, *cited* in The Miletus, 5 Blatchf. (U. S. C. C.) 335, 336, Fed. Cas. No. 9,545; Franklin Ins. Co. v. Humphrey, 65 Ind. 549, 557, 32 Am. Rep. 78; Starbuck v. Phenix Ins. Co. 45 N. Y. Supp. 995, 19 App. Div. 139, 142; Washington Mutual Ins. Co. v. Reed, 20 Ohio, 200, 210.

[9] Marine insurance act 1906 (6 Edw. VII. c. 41) Sched. I. r. 7 (rules for construction); Butterworth's Twentieth Century Stats. (1900–1909) pp. 425–427; 15 Chitty's Stats. (1902–1907) pp. 907, 908.

[10] General Mutual Ins. Co. v. Sherwood, 14 How. (55 U. S. 351, 14 L. ed. 452, *cited* in:

*United States.*—Liverpool & Great Western Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 438, 32 L. ed. 788, 791, 9 Sup. Ct. 469; Orient Mutual Ins. Co. v. Adams, 123 U. S. 67, 73, 31 L. ed. 63, 66, 8 Sup. Ct. 68, 44 Leg. Int. 504; Phœnix Ins. Co. v. Erie & Western Transportation Co. 117 U. S. 312, 323, 29 L. ed. 873, 879, 6 Sup. Ct. 1176; The Potomac (The Potomac v. Cannon) 105 U. S. 630, 636, 26 L. ed. 1194, 1196; Howard Fire Ins. Co. v. Norwich & New York Transportation Co. 12 Wall. (79 U. S.) 194, 199, 20 L. ed. 378, 379; The Portsmouth (The Portsmouth v. Salt Co.) 9 Wall. (76 U. S.) 682, 684, 19 L. ed. 754, 755; Lawrence v. Minturn, 17 How. (58 U. S.) 100, 111, 15 L. ed. 58, 63; Morgan v. United States, 5 Ct. Cl. 191; The America, 16 Month. L. Rep. 269, Fed. Cas. No. 288; Nome Beach Lighterage & Transportation Co. v. Munich Assur. Co. 123 Fed. 20, 826; Pennsylvania Ry. Co. v. Manheim Ins. Co. 56 Fed. 303; Earnmoor Steamship Co. v. Union Ins. Co. 44 Fed. 374, 376; Northwestern Transportation Co. v. Boston Marine Ins. Co. 41 Fed. 793, 797; The Ontario, 37 Fed. 220, 225; The Titania, 19 Fed. 101, 104; The Hadji, 16 Fed. 861, 865; Dole v. New England Mutual Marine Ins. Co. 2 Cliff. 394, 434, Fed. Cas. No. 3,966.

*Kentucky.*—Louisville Ins. Co. v. Monarch, 99 Ky. 578, 593, 36 S. W. 563.

*Maine.*—Hutchins v. Ford, 82 Me. 363, 371, 19 Atl. 832; Dyer v. Piscataqua Fire & Marine Ins. Co. 53 Me. 118, 121.

*Massachusetts.*—Lyon Gas & Electric Co. v. Meriden Fire Ins. Co. 158 Mass. 570, 576, 20 L.R.A. 297, 304, 35 Am. St. Rep. 540, 33 N. E. 690.

*Mississippi.*—Crescent Ins. Co. v. Vicksburg, Y. & S. River Packet Co. 69 Miss. 208, 210, 30 Am. St. Rep. 537, 13 So. 254.

*New Hampshire.*—Gove v. Farmers' Mutual Fire Ins. Co. 48 N. H. 41, 43, 2 Am. Rep. 168, 97 Am. Dec. 572.

*Ohio.*—Daniels v. Ballantine, 23 Ohio St. 532, 539, 13 Am. Rep. 264.

The seasons of the year with probability of storms, the character of the goods, storage, and weather likely to be encountered, are all to be considered. The Erskine M. Phelps (U.

In all marine policies a distinction should be observed between those injuries, losses, and damages which arise from or are occasioned by mere wear and tear which is to be expected, and those which arise from some extraordinary cause. A loss which may not be covered by the policy in the former case may, even though of the same character, render the insurers liable in the latter case. It is certainly true that no liability rests upon the insurer for any deterioration in the ship, her rigging, furniture, and apparel, arising from what is to be reasonably expected from the service in which she is employed.[11] The general rule under the authorities is that above stated, and it may also be generally stated, to make the insurer liable, the injury must have been occasioned by a disaster or injury that would injure a seaworthy vessel.[12] Dangers

S. D. C.) 231 Fed. 767 (case, however, of action for damage to goods).

[11] "The loss of an anchor," says Valin, "by the fretting of a cable against the rocks, which have broken and cut it, is not a damage arrived by a peril of the sea. It is a natural consequence of the service of things destined to the use of the vessel. In the same way no demand can be made on the insurers for what the vessel has lost of value by additional service, or for rigging or sails worn; so the ship being at anchor, if the cables are worn, parted, or are cut by the effect only of currents or the vessel's swinging. It would be different if the violence of the winds or waves obliged them to cut the cables or caused them to part; and so if the wind carried away a sail, or a yard, or a spar:" Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 9, pp. 312, 313. This rule is, however, not considered quite satisfactory by Marshall, who makes the test that of the ordinary employment of the ship under the rule governing average contributions: 2 Marshall on Ins. (ed. 1810) *492, *493. Mr. Arnould states substantially the same rule as Emerigon, but he also distinguishes between ordinary and extraordinary causes of damage, or those occasioned by the direct and violent operations of one of the perils insured against, and says that "whenever the loss can, upon a fair review of all the circumstances, be imputed to the ordinary wear and tear of the voyage, the underwriter is exempt from liability:" 2 Arnould on Marine Ins. (Perkins' ed. 1850) *756 et seq. *758; Id. (Maclachlan's ed. 1887) 720 et seq.; *citing* Benecke on the Principles of Indemnities, 451, 456; Stevens on Average (8th ed.) 160, 166, 168; Covington v. Roberts, 2 Bos. & P. (N. R.) 378, 9 R. R. 669; Fawcus v. Sarsfield, 6 El. & B. 192, 199, 25 L. J. K. B. 249, 2 Jur. (N. S.) 665, as *cited* by Blackburn, J., in Dugeon v. Pembroke, L. R. 9 Q. B. 581, 1 Q. B. D. 96, 2 App. Cas. 284, 43 L. J. Q. B. 220, 46 L. J. Q. B. 409, 31 L. T. 31, 36 L. T. 382, 22 W. R. 919, 25 W. R. 499, 3 Asp. M. C. 393. See also 2 Arnould on Marine Ins. (9th ed. Hart & Simey) secs. 775 et seq. pp. 968 et seq.

Perils of the seas covers only losses really caused by sea damage or the violence of the elements, etc. The words do not embrace all losses happening on the seas under the general words "all other perils" etc. Murray v. Novia Scotia Marine Ins. Co. 1 R. & C. (Nov. Sc.) 24.

[12] Flemming v. Marine Ins. Co. 4 Whart. (Pa.) 59, 33 Am. Dec. 33n; Pandorf v. Hamilton, 16 Q. B. D. 629, 17 Q. B. D. 674, 55 L. J. Q. B. 546, 55 L. T. 499, 35 W. R. 70, 6 Asp. M. C. 44, per Lopes, L. J.

of navigation mean those perils that are incident to it in a lawful course of it, but not those that arise from pursuing an unlawful course therein.[13] The mere fact, shown by the assured, that the goods after arrival were found damaged by sea water is not evidence of a loss by perils of the sea.[14] If goods shipped in good order and condition are damaged by sea water, it is for the ship to show that the damage was occasioned by a "peril of the sea." [15] So where a cargo of kainit is put on board a ship in good order and is put off damaged, the ship must show the loss to have resulted from "a peril of the sea" if she would escape liability.[16]

Where the owner has protected itself by insurance against perils of the seas, barratry, and all other perils, losses, etc., it may lawfully stipulate in the charter party that the charterer shall not be liable for any loss by anything not included in and covered by the insurance policies in force, and it may also provide that if the vessel is lost through any cause that will permit the underwriters to make a successful defense against paying the face of the policies, the party to whom the vessel is chartered shall be responsible, and where the vessel was lost through a peril of the sea there is a loss irrespective of the question of negligence of the master and crew, against which the owner was insured, and there is a loss by the peril of the sea where the chartered vessel is wrecked by striking and stranding upon the bank of a creek in tidal waters.[17]

§ 2798. **Same subject: what losses are covered.**—A loss to cargo may be attributed to a peril of the sea if there are no circumstances from which to infer an improper stowage, and the voyage is a very stormy one.[18] Damage to goods in the hold, caused by sea water, shipped during extraordinary stress of weather is loss by perils of the sea.[19] A jettison occasioned by peril of the sea is a loss by peril of the sea.[20] Injury to a cargo of a flatboat by her springing a leak, caused by a heavy swell raised by the boats passing each other, is a loss by a peril of the sea, even though the steamboat was one of ordinary size and the swell only an ordinary one

[13] Atwood v. Reliance Transportation Co. 9 Watts (Pa.) 87, 34 Am. Dec. 503.

[14] Flemming v. Marine Ins. Co. 3 Watts & S. (Pa.) 144, 38 Am. Dec. 747.

[15] The Lydian Monarch, 23 Fed. 298.

[16] Tygert Co. v. The Charles I. Sinnickson, 24 Fed. 304.

[17] American-Hawaiian Steamship Co. v. Bennett & Goodall, 207 Fed. 510, 125 C. C. A. 172, 42 Ins. L. J. 1783, relying upon Liverpool & Great Western Steamship Co. v. Phenix Ins. Co. 129 U. S. 397, 428, 32 L. ed. 788, 9 Sup. Ct. 46, as to a policy against perils of the sea covering loss by stranding, etc.

[18] The Fern Holme, 24 Fed. 502.

[19] Baker v. Manufacturers' Ins. Co. 12 Gray (78 Mass.) 603.

[20] Lawrence v. Minturn, 17 How. (58 U. S.) 100, 15 L. ed. 58.

for such steamboats.[1] If mules prudently stationed on board are injured by an escape of steam without fault of the officers of a steamboat, it is a peril of the river.[2] So where cattle are put upon a lighter to be landed according to the usual way, owing to an insufficiency of water on the bar, and are secured as customary in such cases, but becoming violent they break away and a number are thrown overboard and drowned, it is held a loss by a peril of the sea.[3] And if the charter-party provides that in case of the breaking down of machinery, whereby the ship is delayed over twenty-four running hours, the hire shall cease until she is again able to prosecute the voyage, and the policy was on freight chartered against loss by perils of the sea, etc., and within the term of the risk the thrust shaft parted, whereby the vessel was delayed for twenty-eight days, the perils of the seas are the immediate cause whereby the clause in the charter-party is put in operation, and insurers are liable.[4] So where by the breaking of a mast-coat in a storm the hold is flooded, this is a peril of the sea, although the exercise of proper skill and diligence should lead to the discovery of rust on a cargo of iron, and secure repairs within a reasonable time.[5] And where a cargo is damaged by a peril of the sea, and not by neglect of the ship, the libel was dismissed.[6]

If the navigation is partly by fresh and partly by salt water, and it is necessary to transship the goods, that being contemplated, it is a loss by the perils of navigation if damage of any kind by water is sustained, even wetting caused by rains, the goods being on the wharf in course of transshipment. In such case damage from water in consequence of improper storage, unless such improper storage is occasioned or acquiesced in by the insured or his agent, is damage from the perils of navigation.[7] And where a vessel is insured against perils of the lake excepting certain excluded causes, if it is lost, from perils not arising from one of the excluded causes, the company is liable.[8]

[1] Washington Mutual Ins. Co. v. Reed, 20 Ohio, 200.

[2] Union Ins. Co. v. Groom, 4 Bush (67 Ky.) 289. See next section.

[3] Anthony v. Ætna Ins. Co. 1 Abb. (U. S. C. C.) 343, Fed. Cas. No. 486, *citing* The Reeside, 2 Sum. (U. S. C. C.) 567, Fed. Cas. No. 11,657; Garrison v. Memphis Ins. Co. 19 How. (60 U. S.) 312, 15 L. ed. 656; Potter v. Suffolk Ins. Co. 2 Sum. (U. S. C. C.) 197, Fed. Cas. No. 11,339; Garrigues v. Coxe, 1 Binn. (Pa.) 592, 2 Am. Dec. 493.

[4] The Bedouin, 1 L. R. Q. B. D. 1, 63 L. J. Adm. 30 (1894) P. 1, 6 R. 693, 69 L. T. 782, 42 W. R. 292, 7 Asp. M. C. 391; The Alps, 1 L. R. Q. B. D. 109, 62 L. J. Adm. 59, (1893) P. 109, 68 L. T. 624, 41 W. R. 527, 7 Asp. M. C. 337.

[5] The Ninth, 36 Fed. 86, 13 Sawy. 368.

[6] Fowler v. The Bertram L. Townsend, 35 Fed. 797.

[7] Underwriters' Agency v. Sutherlin, 55 Ga. 266.

[8] Union Ins. Co. v. Smith, 124 U.

If a vessel arrives in bad condition, having open seams and butts in her deck and top sides, and an opening in her bow port, and she was seaworthy and in good condition when leaving port for her voyage, and was subject on the voyage to a severe storm of several days by which she was greatly impeded, making only twelve miles a day, all of which appears by a preponderance of evidence, the damage to her cargo will be held to have been caused by the weather, even though several inspectors testify upon examination after arrival that she must have been in bad condition when she sailed.[9] Injury to cotton which is wet by being thrown from the deck into the river by the sudden careening of a steamboat is a peril of the sea within the meaning of a policy of marine insurance, notwithstanding the careening of the boat may have resulted from the negligence or unskillfulness of those engaged in unloading her. To relieve from liability because of acts of the master and crew there must be want of good faith and honesty of purpose.[10] The injury that vessels lying in the harbors may sustain by lying badly on the ground, taking the ground by the ebbing of the tide, is not attributable to any inherent weakness or defects, or mere wear and tear, but to some extraordinary cause; as by striking their bottoms against some hard substance, or malposition or overlaying the dock.[11]

A loss by shipwreck, whether the vessel has become a mere mass of floating material without form as a ship, or has become so far shattered as to be irreparably damaged and no longer capable of navigation, except at a cost in excess of her worth when repaired, or has become greatly injured and shattered, but may be repaired at a sum less than the value, is also a peril of the sea.[12] And a loss

S. 405, 31 L. ed. 497, 8 Sup. Ct. 534.

[9] The Piskataqua, 35 Fed. 622.

[10] Crescent Ins. Co. v. Vicksburg, Yazoo & Southern R. Packet Co. 69 Miss. 208, 30 Am. St. Rep. 537, 13 So. 254.

[11] Potter v. Suffolk Ins. Co. 2 Sum. (U. S. C. C.) 197, Fed. Cas. No. 11,-339; Hagar v. New England Mutual Marine Ins. Co. 59 Me. 460; Petre v. Phœnix Ins. Co. 132 N. Y. 137, 30 N. E. 380, 43 N. Y. St. Rep. 479, 45 Alb. L. J. 419, 21 Ins. L. J. 551; Kingsford v. Marshall, 8 Bing. 458, 1 M. & Scott. 657, 1 L. J. C. P. 135, 34 R. R. 756.

[12] 2 Arnould on Marine Ins. (ed. 1850) *795, sec. 296; 2 Id. (Maclachlan's ed. 1887) 747; 2 Marshall on Ins. (ed. 1810) *488; Id. (9th ed. Hart & Simey) sec. 815, p. 1021. See chapter on total and constructive total loss and abandonment herein. Emerigon says that there are two sorts of shipwreck (naufrage): 1. When the vessel is totally submerged; 2. When being stranded on shore the sea fills up her interior but she does not absolutely disappear. He also says the Ordonnance distinguishes between shipwreck (naufrage) and bris; that bris is absolute or partial —the first, when the vessel strikes a rock or other object the vessel is broken up and ceases to exist as such; the second, "when the vessel lets in water by being violently thrown

by collision or stranding, or by the unexpected striking and stranding of a vessel in tidal waters, as in case of a lighter being towed in such waters is a loss by a peril of the sea.[13] So gulf waters where the tide ebbs and flows are within the meaning of the word "seas" or "sea." And insurance will not be strictly confined to inland waters under a policy on a tug covering inland coast waters of the United States, but will include a wreck on a shoal off Charleston harbor.[14] Again, if a river steamboat runs upon a bar, and being taken off she is leaking badly, her seams having opened, and she is breached upon another bar to prevent her sinking, and is there destroyed by the river rising, this is a loss by a peril of the river.[15] In an Indiana case the defendant issued a policy to plaintiff "against loss or damage by fire . . . on his wharf-boat, tackle, and apparel lying at the wharf at the city of Evansville, Indiana, . . . and to receive, discharge, and store freight hazardous, extra-hazardous, and especially hazardous," providing "that the loss, if any, shall be adjudged according to the conditions herein contained and those hereto attached." The conditions were as follows: "Touching the adventures and perils which the said insurance company is contended to bear and take upon itself in this voyage, they are of the seas, lakes, rivers, canals, fires, jettisons, rovers and assailing thieves." It was held that the company was liable for the destruction of the boat by floating ice.[16] So where a lost kedge so fouled the anchor as to wrap it around the chain and cause the anchor to lose its hold, and the ship having been anchored a number of days suddenly in the night begins dragging, this is an accident due to sea peril.[17] And where in the absence of evidence of latent defects in a new propeller of an ocean steamship

against a foreign body. If this opening to the water occasions neither shipwreck nor stranding, it is simple average; but if this partial bris is accompanied by shipwreck or stranding, it is then a total loss (sinistre majeur)." Meredith, however, says the Ordonnance does not explain the distinction between bris and shipwreck, and that the text (Emerigon's) makes it no clearer; that "bris, literally rendered, is a breaking. 'Se brisco' is to be broken, in being thrown violently against any object. This term has no correlative in English law or custom, unless it be when it is said a vessel has struck:" Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 12, pp. 317, 318 and note.

[13] American-Hawaiian Steamship Co. v. Bennett & Goodale Co. 207 Fed. 510, 125 C. C. A. 172, 42 Ins. L. J. 1783.

[13a] Mannheim Ins. Co. v. Clarke & Co. — Tex. Civ. App. —, 157 S. W. 291, 42 Ins. L. J. 1177.

[14] St. Paul Fire & Marine Ins. Co. v. Knickerbocker Steam Engine Co. 93 Fed. 93, 35 C. C. A. 226.

[15] The Natchez, 42 Fed. 169.

[16] Franklin Ins. Co. of Indianapolis v. Humphrey, 65 Ind. 549, 32 Am. Rep. 78.

[17] The Carl Frederick, 33 Fed. 589.

said propeller blades are broken on a voyage it constitutes a loss by a peril of the sea.[18]

§ 2799. **Same subject: what losses are not covered.**—The fact that the goods insured were damaged by sea water when delivered is not of itself evidence of loss by perils of the sea.[19] Where the vessel encounters storms of only ordinary severity, the vessel not appearing to have been strained or injured, it is not proof that a loss of the cargo was caused by a peril of the sea.[20] And the encountering of heavy seas and rolling heavily is not a peril of the sea.[1] So damage to insured goods by sea water is not a "peril of the sea" if occasioned by bad stowage, want of pumping, or defectiveness of the vessel;[2] nor is a loss by embezzlement of specie.[3] And in order to recover under a marine policy covering partial loss if it amounts to fifty per cent of the property covered, such loss must be shown to have resulted from a peril of the sea, and cannot be created by a forced sale;[4] nor by the sale of cargo at a port of necessity or distress to obtain money for the vessel, the sale being necessitated by the damaged condition of the goods,[5] and this is true even though the damage to the ship is caused by a sea peril, the repairs being such as the ship-owner, a common carrier, is bound to make;[6] nor loss by the ship's springing a leak owing to her being eaten or damaged by worms, which in certain waters ordinarily assail and enter the bottom of vessels, and which is not an extraordinary occurrence or peril;[7] nor a loss by rats, where the ship is detained in a port at which she touches by sick-

[18] New York & P. R. Steamship Co. v. Ætna Ins. Co. 204 Fed. 255, 122 C. C. A. 523, Aff'g 192 Fed. 212.

[19] Flemming v. Marine Ins. Co. 3 Watts & S. (Pa.) 144, 38 Am. Dec. 747.

[20] The Mangalore, 23 Fed. 462, 9 Saw. (U. S. C. C.) 17.

[1] The Gulnare, 42 Fed. 861.

[2] Flemming v. Marine Ins. Co. 3 Watts & S. (Pa.) 144, 38 Am. Dec. 747.

[3] Hicks v. Fitzsimmons, 1 Wash. (U. S. C. C.) 279, Fed. Cas. No. 6,-460.

[4] Standard Marine Ins. Co. v. Nome Beach Lighterage & Transportation Co. 133 Fed. 636, 67 C. C. A. 602, 1 L.R.A.(N.S.) 1095.

[5] General Mutual Ins. Co. v. Sherwood, 14 How. (55 U. S.) 351, 14 L. ed. 452; Dyer v. Piscataqua Fire & Marine Ins. Co. 53 Me. 118; Ruckman v. Louisville Underwriters' Ins. Co. 5 Duer (N. Y.) 342; Sarquy v. Hobson, 2 Barn. & C. 7, 4 Bing. 131, 12 Moore, 474, 3 Dowl. & R. 192, 1 Y. & J. 347, 1 L. J. (O. S.) K. B. 222, 26 R. R. 251; Powell v. Gudgeon, 5 Maule & S. 431, 17 R. R. 385; Nesbitt v. Lushington, 4 Term Rep. 783, 2 R. R. 519.

[6] Dyer v. Piscataqua Fire & Marine Ins. Co. 53 Me. 118, and see cases in last note.

[7] Rohl v. Parr, 1 Esp. 445, 5 R. R. 741; Hazard v. New England Marine Ins. Co. 8 Pet. (33 U. S.) 557, 8 L. ed. 1043 (*cited* in The Giles Loring, 48 Fed. 460); 1 Sum. (U. S. C. C.) 218, Fed. Cas. No. 6,282; Martin v. Salem Marine Ins. Co. 2 Mass. 420.

ness of the crew,[8] losses by rats and worms not being generally considered as within ordinary wear and tear; nor ordinary wear and tear which is expected where the sole cause of the damage is the insufficiency of the ship to bear the ordinary stress of the voyage;[9] nor under the California code,[10] nor is explosion of dynamite on another vessel lying at a pier, where the damage is entirely caused by shock or concussion and not by any waves or swell of the water nor by any falling debris a "peril of the harbor;[11] nor, under the law of marine insurance generally, is a loss caused by the explosion of a boiler and the vessel's becoming thereby unmanageable and sinking a peril of the sea;[12] nor bursting of a boiler, either as understood in the law of marine insurance, or as defined by the Civil Code of California;[13] nor bilging and other damage where the vessel was hove down on the beach within the tideway to be repaired.[14] And damages to a cargo of lime, caused by a shrinking of barrel staves and slacking up of the cooperage, allowing the contents to sift out, and leaving the barrels so tender that they could not easily be hoisted without danger of falling to pieces, is not caused by peril of the sea, if the protracted length of the voyage, due to rough weather, was the proximate cause of the condition of the cargo.[15]

Where opium was placed in a wooden hulk moored in a river and used as a store, and said opium was insured under a time policy against marine risks and shortly after the insurance was effected the hulk sprang a leak and the opium was damaged by percolating water, the rotten condition of the hulk being the cause of the leak, it was held that recovery was precluded as the damage was not due to a sea peril either proximately or remotely

[8] Aymar v. Astor, 6 Cow. (N. Y.) 266; Hunter v. Potts, 4 Camp. 203, 16 R. R. 776. See Laverony v. Drury, 8 Exch. 166, 22 L. J. Ex. 2, 16 Jur. 1024, 1 W. R. 55, 91 R. R. 415.

[9] Coles v. Marine Ins. Co. 3 Wash. (U. S. C. C.) 159; Fed. Cas. No. 2,988; Magnus v. Buttemer, 11 Com. B. 876, 21 L. J. Com. P. 119, 16 Jur. 480, 87 R. R. 785; Taylor v. Curtis, 6 Taunt. 608, 2 Marsh. 309, Holt, 192, 4 Camp. 337, 16 R. R. 686, 14 Eng. Rul. Cas. 363; Stevens on Average (8th ed.) 161, 167, 168; Benecke on the Principles of Indemnities, 456.

[10] See § 2797 (at note 6 herein.)

[11] Listers Agricultural Chemical Works v. Home Ins. Co. (U. S. D. C.) 202 Fed. 1011, 42 Ins. L. J. 862.

[12] Miller v. California Ins. Co. 76 Cal. 145, 9 Am. St. Rep. 184, 18 Pac. 155; Thames & Mersey Marine Ins. Co. v. Hamilton, L. R. 12 App. C. 484, 12 L. J. Q. B. 626, 57 L. T. 695, 36 W. R. 337, 6 Asp. M. C. 200. See West India Co. v. Home & Colonial Ins. Co. 6 Q. B. D. 51. But see preceding chapter.

[13] Miller v. California Ins. Co. 76 Cal. 145, 9 Am. St. Rep. 184, 18 Pac. 155.

[14] Thompson v. Whitmore, 3 Taunt. 227, 12 R. R. 642.

[15] Perry v. Cobb, 88 Me. 435, 49 L.R.A. 389, 34 Atl. 278.

even though sea water damaged the goods and was the proximate cause of the loss. Lord Mersey said: "There is ample authority for so holding but it is sufficient to cite the judgment of Lord Herschell,[16] where he says: 'I think it is clear that the term "perils of the sea" does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril "of" the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear.' "[17]

**§ 2800. Personal injuries to employees: against liability or for losses paid.**—(a) *Preliminary statement.*—In the consideration of the questions involved and decided under employers' liability insurance or indemnity contracts, there are certain general principles which govern in cases where the indemnity for loss or damage consequent upon injuries fatal or nonfatal suffered by employees and also in cases where they are suffered by persons other than employees, and where these principles are so applicable to both classes of policies they have been discussed under this section wherever necessary to avoid repetition by a separate consideration of the same points under the section covering injuries to persons other than employees.[18]

(b) *General propositions.*—Employees' liability policies are held to be contracts of indemnity only; and also those of insurance.[19] But the indemnity contemplated is for the benefit of insured only and does not extend to any third person not a party to the contract who may suffer bodily injuries through negligence of assured, especially so where it is stipulated that no action shall lie against insurer unless it shall be brought by assured and then only for loss and/or expense actually sustained and paid in money by assured after actual trial of the issue.[20]

These contracts are not void as against public policy for the employer's means of meeting its liability is increased and not lessened thereby.[1] And a policy is held not invalid as against public

[16] Wilson, Sons & Co. v. Xantha (cargo owners), 56 L. J. P. at p. 119, 12 App. Cas. at p. 510.

[17] Sassoon & Co. v. Western Assur. Co. 81 L. J. P. C. 231, [1912] A. C. 561, 106 L. T. 929, 12 Asp. M. C. 206, 17 Com. Cas. 274.

[18] See § 2803 herein.

[19] See §§ 27a et seq., 206c, 337e herein.

[20] Van Reen v. Ætna Life Ins. Co. (U. S. D. C.) 209 Fed. 691, 43 Ins. L. J. 525. See § 3658b herein.

[1] Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co. 220 Mo. 327, 119 S. W. 576.

policy which indemnifies a taxicab company against loss consequent upon the violation by its employees of a city ordinance.[2]

Parties have also a right to insert provisions in these policies which define and make clear the limitations upon their liability and the obligations of each party thereto,[3] in case of ambiguity the rule of construction against assured will govern these indemnity or insurance contracts as the law does not favor forfeitures.[4] Such construction should also be given as to render effective all the various provisions of the contract.[5] Again, the various provisions of such policies, such as limitation of the amount recoverable for each person injured and in gross in case several persons sustain injury; the duty of assured as to notice of claims; the right of insurer to defend such claims or to pay or settle; the duty of assured with relation to settlements, its right to supply surgical or medical aid, its obligation to render all reasonable aid and assistance with reference to settlements, etc., are all stipulations intended to apportion responsibility between insurer and assured, instead of relieving the latter from all responsibility, and should operate also as a measure of limitation of the liability of the former.[6] The rules of construction have, however, been applied to policies of this character with reference to those matters of substance upon which liability depends and which operate upon persons prior to the loss, and those matters or formal requisites whereby it is intended to make available previously vested rights, so that provisions in the former case should be fairly construed and in the latter a liberal construction should be given.[7]

A contract and an attached agreement will also be construed

[2] Taxicab Motor Co. v. Pacific Coast Casualty Co. 73 Wash. 631, 132 Pac. 393.

[3] Frye v. Bath Gas & Electric Co. 97 Me. 241, 59 L.R.A. 444, 94 Am. St. Rep. 500, 54 Atl. 395.

[4] *Indiana.*—Evansville Ice & Storage Co. v. Fidelity & Casualty Co. of N. Y. 61 Ind. App. 194, 111 N. E. 812.

*Kentucky.*—Ætna Life Ins. Co. v. Bowling Green Gas Light Co. 150 Ky. 732, 43 L.R.A.(N.S.) 1128, 150 S. W. 994.

*Missouri.*—Century Realty Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co. 179 Mo. App. 123, 145, 161 S. W. 624, 631, 43 Ins. L. J. 287.

*New York.*—Press Publishing Co. v. General Accident, Fire & Life Assur. Corp. 148 N. Y. Supp. 711; Cary Brick Co. v. Fidelity & Casualty Co. of N. Y. 147 N. Y. Supp. 414, 162 App. Div. 873.

*North Carolina.*—Henderson Lighting & Power Co. v. Maryland Casualty Co. 153 N. Car. 275, 30 L.R.A. (N.S.) 1105, 69 S. E. 234, 40 Ins. L. J. 127.

*Oregon.*—Schuerman v. Mathison, 74 Oreg. 40, 144 Pac. 1177.

See also §§ 206c, 220b, 222b herein.

[5] Ætna Life Ins. Co. v. Bowling Green Gas Light Co. 150 Ky. 732, 43 L.R.A.(N.S.) 1128, 150 S. W. 994.

[6] Rumford Falls Paper Co. v. Fidelity & Casualty Co. 92 Me. 574, 43 Atl. 503.

[7] Employers' Liability Ins. Corp. Ltd. v. Light, Heat & Power Co. 28 Ind. App. 437, 63 N. E. 54.

together, where the terms thereof so require, so as to indemnify a contractor not only against loss for damages for accidental injuries to employees but also as covering injuries to the public caused by assured and its employees in the performance of its work. The indemnity agreed to be paid may also cover a loss under like condition in case of a subcontractor, where judgment has been rendered against the contractor for injury sustained by a pedestrian and said contractor has recovered judgment over against the subcontractor, but a judgment against the contractor is not one against the subcontractor; and in such case the latter's cause of action arises when judgment is rendered against him regardless of the question of notice to defend the action against the contractor. The office of such a notice, however, is to make the judgment evidence against the subcontractor in so far as the issues involved are concerned.[8]

(c) *Liability or loss: generally.*—Generally stated, insurer's liability for the loss does not extend beyond the amount of indemnity limited in the policy having in view also the right of assurer to defend the action against assured and to litigate the same.[9] And living expenses incurred during an injured employee's sickness do not come within a liability for medical services.[10]

(d) *Injuries, risks or losses covered: nature of employment: operation of assured's business: premises of assured.*—If an employer is compelled to pay damages because of typhoid fever contracted by its employees from drinking water which the former had furnished them, such loss constitutes bodily injuries accidentally inflicted within the meaning of a policy against liability for such loss; for the injuries so sustained will be held to have happened unexpectedly and unintentionally and therefore to have been accidental according to the construction given that word.[11] And when the policy insures against loss from liability imposed by law upon assured for damages on account of bodily injuries suffered by any employee, insurer is liable where an employee became infected with glanders from horses while caring for them, which work he had been negligently directed to do.[12]

A person employed by a contractor who is paid a certain price

[8] Creem v. Fidelity & Casualty Co. of N. Y. 126 N. Y. Supp. 555, 141 App. Div. 493, 40 Ins. L. J. 600, s. c. 116 N. Y. Supp. 1042, 132 App. Div. 241, s. c. 206 N. Y. 733, 100 N. E. 754.

[9] Little Cahaba Coal Co. v. Ætna Life Ins. Co. 192 Ala. 42, 68 So. 317, 46 Ins. L. J. 101. See § 3454a herein.

[10] Employers' Liability Assurance Corp. Ltd. v. Light, Heat & Power Co. 28 Ind. App. 437, 63 N. E. 54.

[11] Ætna Life Ins Co. v. Portland Gas & Coke Co. 229 Fed. 552, 144 C. C. A. 12, L.R.A.1916D, 1027.

[12] H. P. Hood & Sons v. Maryland Casualty Co. 206 Mass. 223, 138 Am. St. Rep. 379, 30 L.R.A.(N.S.) 1192 and note, 92 N. E. 329.

per ton by a mining company for getting out coal is an employee of said company within a liability policy where it reserves the right to see that the work is done according to its rules, carries said employees on its pay rolls, pays them and charges the amount to the contractor and exercises the right to discharge them either directly or through the contractor, even though it is not stipulated that it shall have that right.[13] So where by construction of clauses in the application and the policy, it was manifest that it was intended to cover injuries to an employee of a subcontractor, it will be so held, notwithstanding it is claimed that an exception of liability applies as to losses from liability or injuries dependent upon the inclusion of certain classes with the relation to wages paid.[14]

Where an employer insured itself against liability for claims for personal injuries to his employees while engaged in "operations connected with the business of iron and steel works," it was held that in such a case the policy would cover injuries received by an employee by reason of the construction of a building by the employer for the use of his business.[15] The policy inclusion of the work of making ordinary repairs for the preservation of machinery or buildings and the renewal of existing mechanical equipment covers an employee who is engaged in work intended to protect a plant from flood, as where he is employed in loading dirt to be used in filling up an excavation inside and around the foundation of a new building and in the filling up of the grounds of said plant: and such employment is not excluded by a stipulation that the employers covered by the policy do not make additions to, alterations in, construct or demolish buildings, structures or plants.[16] Again, in case the description of the kind of work in which an employee of assured is permitted by the policy stipulation to be engaged is general, without any attempt to define any specific steps to be taken in the operation of assured's business, or the different processes to be used, or the equipment of assured in its business, and operations "in and about the plant" and also men engaged in making ordinary repairs upon the plant and its facilities are covered, injuries to an employee will be held to be within the policy when suffered by him while assisting in doing work in the nature of ordinary repairs upon a canal located entirely within

[13] Employers Indemnity Co. v. Kelly Coal Co. 156 Ky. 74, 49 L.R.A. (N.S.) 850, 160 S. W. 914. But *compare* Employers Indemnity Co. v. Kelly Coal Co. 149 Ky. 712, 41 L.R.A.(N.S.) 963 and note, 141 S. W. 992. See also Travelers Ins. Co. v. Bright, 24 Ohio Cir. Ct. R. 441.

[14] Dives v. Fidelity & Casualty Co. of N. Y. 206 Pa. 199, 56 Atl. 950.

[15] Hoven v. Employer's Liability Assur. Corp. 93 Wis. 201, 32 L.R.A. 388, 67 N. W. 46.

[16] Charles Wolff Packing Co. v. Travelers' Ins. Co. 94 Kan. 630, 146 Pac. 1175.

assured's plant, where such work is customarily done by its regular employees and said repairs were one of its necessary facilities and a necessary part of maintaining the plant and the canal being repaired was used constantly as a chief means of transporting and receiving material and other supplies and for delivering manufactured products. In addition, the fact that such canal is an unusual convenience in connection with the operation of insured's business does not make it any the less a part of the ordinary plant, especially so when said plant is near navigable water and it had been located where it was for many years and was continuously used in connection with the business of the plant during all the time the insurance had been in force.[17] And insurer is liable where the insurance is against loss for liability imposed by law upon assured for damages, if the injury is suffered by an employee while on duty within the premises of assured in the operation of his trade or business.[18] So a nonsuit was set aside where a mill employee met his death by a cave-in while he was digging sand on assured's premises in order to furnish an independent contractor with material, as per agreement, for the erection of a brick chimney in place of two iron stacks; and in such case and to the extent aforesaid, the employee was engaged in making an alteration which was necessary for insured's plant and its proper maintenance within the protection of a policy condition, which included the "making of repairs and such ordinary alterations as are necessary to the care of the premises and plant and their maintenance in good condition;" at least whether such work of substitution of chimneys was an addition to or "a structural alteration" in "any building or plant," which was an excluded risk, or an "ordinary alteration or repair" which the policy covered, was held to be a mixed question of law and fact which should have been submitted with instructions to the jury.[19] Under another decision insurer's liability was

[17] Cary Brick Co. v. Fidelity Guarantee Co. of N. Y. 147 N. Y. Supp. 414, 162 App. Div. 873, 44 Ins. L. J. 94 (repair work here consisted in dredging a canal).

As to alterations and repairs, see §§ 1708, 2191 et seq. herein.

[18] H. P. Hood & Sons v. Maryland Casualty Co. 206 Mass. 223, 138 Am. St. Rep. 879, 30 L.R.A.(N.S.) 1192, 92 N. E. 329.

[19] Kinston Cotton Mills v. Liability Assurance Corp. 161 N. Car. 562, 77 S. E. 682, 42 Ins. L. J. 892 (the policy insured against damages on account of bodily injuries including death resulting therefrom, accidentally suffered by an employee of assured while within or upon the premises or ways adjacent thereto, by reason of the operation of the trade or business of assured including the making of repairs or such ordinary alterations as are necessary to the care of the premises and plant and their maintenance in good condition, and excluded liability for injury or death caused to any person in connection with the making of additions to, or structural alterations in, or the

limited to cases where the injured person was on duty at the time of the accident, in an occupation described, and the policy excepted as risks the making of additions to or alterations in any building. The described business was that of manufacturing cottonseed oil, including refining and cotton ginning. The policy indemnified against liability for damages on account of bodily injuries suffered by an employee while on duty within the factory, shop or yards specified. It was held that a carpenter was an employee necessary in the operation of the plant, where he had been employed in its erection and after its completion was continued in assured's employ as assistant to the superintendent in regulating the machinery and in making any changes or repairs that were necessary during the operation, and he had also been placed on assured's operating list and his wages were included in the estimated wages set forth in the policy, a few days before his death, which was suffered while he was removing some scaffolding, and it also appeared that a carpenter was required in the operation of said plant.[20] So injury to a workman in iron and steel works, caused by the fall of a girder, which was being raised by an independent crew, building an addition to the works, is within a policy of indemnity against claims for compensation for injuries in "all operations connected with the business of iron and steel works." [1]

It is not necessary that an employee be at the time of injury actually in the service of the employer, where the latter represents in a circular sent the former that they will be insured against accident and protected while at work "or otherwise engaged" and the premium for such insurance is deducted from their wages; and in such case an exemption from liability in case of wilful and wanton exposure to unnecessary danger cannot be imposed upon said employees where the policy insuring them against accident contains no such condition.[2]

The fact that an injury occurs after the expiration of the policy

construction of, any building or plant). See § 2632a herein.

[20] Fidelity & Casualty Co. of N. Y. v. Lone Oak Cotton Oil & Gin Co. 35 Tex. Civ. App. 260, 80 S. W. 541 (the policy indemnified "against loss from common law or statutory liability, on account of bodily injuries, fatal or nonfatal, accidentally suffered within the period of this policy, by any employee or employees of the said assured while on duty within the factory, shop or yards mentioned in the schedule hereinafter given, or upon the ways immediately adjacent thereto, provided for the use of such employees or the public in and during the operation of the trade or business described in such schedule.")

[1] Hoven v. Employers' Liability Assur. Corp. 93 Wis. 201, 32 L.R.A. 388, 87 N. W. 46.

[2] McKenzie v. Garth (Can.) 9 Rap. Jud. Queb. B. R. 224.

does not preclude recovery of the consequent loss where the policy was extended beyond the time said injury was suffered.[3]

(e) *Injuries, risks or losses not covered: nature of employment: operation of assured's business: premises of assured.*—It may be set up in defense to an action against insurer by insured that the injury to the employee was not a liability covered by the policy in that it was suffered or caused by a minor employed contrary to law and suffered by a minor while performing work contrary to law which was a risk excepted from the policy.[4] If the employee suffers an injury while running machinery which is not of such a kind or character as to bring it within the risk described insurer is not liable to indemnify assured where the policy is against common law and statutory liability for bodily injuries to employees caused by its negligence.[5]

An insurer contracting for indemnity to assured for losses paid employees for injuries sustained while engaged in operations of a designated character, connected with a specified business at a particular named place, is not liable for losses paid by assured to employees while engaged in work of a character other than that specified, even though it is customary for parties in such business to do such work.[6] And although a business described as a "sawmill, planing mill, mill yards, kilns, sheds, woodsmen and teamsters" presupposes the use of water and the necessity of obtaining it, the policy does not cover the risk incurred in the employment of mill hands in boring an artesian well for the obtention of water where said business is insured by a company as trustee and the policy is against bodily injuries sustained by the employees, through external, violent, and accidental means, while actually engaged in operations such as are usual to the kind of trade or business described. It was declared that since the business presupposes the use of fuel to convert the water into steam, it would hardly be argued that the risk of mining for coal or boring for fuel oil was covered.[7] So a policy indemnifying assured against losses arising from claims for damages on account of bodily injuries accidentally suffered by employees consequent upon negligence in assured's logging operations does not cover damages recovered by an employee for negligence in the maintenance of

[3] London Guarantee & Accident Co. v. Mississippi Central Ry. Co. 97 Miss. 165, 52 So. 787.

[4] Oxford Coal Co. v. Fidelity & Casualty Co. of N. Y. 248 Pa. 311, 93 Atl. 1072. See § 2632b herein.

[5] Wollman v. Fidelity & Casualty Co. 87 Mo. App. 697.

[6] People's Ice Co. v. Employees' Liability Assur. Corp. of London (Lim.) 161 Mass. 122, 36 N. E. 754.

[7] Rust Lumber Co. v. General Accident Fire & Life Assur. Corp. Ltd. 134 La. 309, 64 So. 122.

a hospital and the malpractice of the assured company's surgeon, although in accordance with the usual custom a hospital fee is deducted from the pay of the employees in consideration of surgical, medical and hospital treatment furnished.[8] If assurer's liability is limited to loss from liability imposed by law upon assured for bodily injuries or death suffered through its negligence by any employee while within certain limits such as the factory, shop or yard, or upon the sidewalk, or other ways immediately surrounding the same and provided for use of the employees or the public in and during the operation of the described trade or business, it does not cover an injury sustained by a general employee or common laborer in and about the plant while helping unload a metal coil intended to be used in an addition to the plant then being constructed, especially so where liability for loss in connection with making additions or repairs to or alteration in any building, structure, or plant is expressly excepted.[9] In a New York case a settlement was made with an injured employee under stipulation, and it was also agreed that the amount paid should be considered as if paid in satisfaction of a judgment and that if assured was entitled to recover anything it was entitled to a specified amount and judgment was rendered for defendant upon the ground that the injuries sustained by said employee

[8] May Creek Logging Co. v. Pacific Coast Casualty Co. 82 Wash. 301, L.R.A.1915C, 155, 144 Pac. 67, 45 Ins. L. J. 99 (Fullerton, J., said: "The respondent's liability of course depends upon the conditions of its policy. If it has thereby undertaken to answer for losses arising from claims of damages on account of the negligent failure of the appellant to perform a special contract wherein it undertook to furnish an employee with hospital, medical, and surgical services, then it is liable to answer to the suit of the appellant, otherwise not. We cannot think the policy bears this interpretation. It purports to cover only losses arising from claims of damages by the appellant's employees on account of accidental injuries suffered by the employees while in the prosecution of the appellant's logging business, and the departments dependent upon and the operations connected therewith. Hospital, medical, and surgical services are no part of the logging operations, and the injured employee while in the hospital was performing no service connected with the appellant's logging business. And while the appellant alleges that it is the custom of logging companies to deduct a hospital fee from the wages of each of its several employees, and use the fee in payment of services to be rendered such employees as become sick or injured and that the respondent knew of this custom, we cannot think the facts in any way alter or modify the terms of the insurance. Aside from the fact that the recovery was had upon a specific contract, and not upon the custom, the insurance is only against losses arising from negligence in the logging operations, not from losses arising from negligence in the maintenance of the hospital").

[9] Evansville Ice & Storage Co. v. Fidelity & Casualty Co. of N. Y. 61 Ind. App. 194, 111 N. E. 812.

while doing work in connection with the replacing after a fire of a roof of large dimensions, did not constitute the "making of ordinary repairs for the preservation of machinery and/or buildings" within the policy terms, but that it came within a specific exception of liability from injuries covered by an employee's liability policy in making additions to or in the construction, etc., of any building unless a written permit was obtained, and it was conceded that no permit was procured as the policy required.[10]

An employee is not within the terms of a policy which stipulates that it shall apply only to such injuries as are sustained while within the factories, shop or yards of a packing house, or upon the premises or ways immediately adjoining, and the injury is sustained by said employee while he is working in a city park across a street running between the packing house yards and said park.[11]

(f) *Risks assumed by second insurer: reinsurance.*—If insurer's risks under its employers' liability policies and all its outstanding liabilities are agreed to be assumed and paid by another insurer, said contract inures to the benefit of a policy holder of the transferring insurer and the second insurer becomes liable to said original insured, for the contract is not merely one of reinsurance.[12]

(g) *When liability attaches or right of action against assurer accrues.*[12a]—In determining when liability attaches or a right of action accrues in this class of indemnity or insurance contracts, the nature of the stipulated indemnity under the contract or policy terms and such distinction as arises by construction thereof necessarily governs; that is, it is requisite to first ascertain for what the indemnity is promised, what distinction, if any, exists in the terms upon which this promise of assurer to pay is based, and the rights of assurer and assured in this respect under the conditions of the contract or policy. These different points appear under the decisions considered herein. Generally stated, however, liability does not attach until assured has suffered some loss;[13]

[10] Syracuse Malleable Iron Works v. Travelers' Ins. Co. 157 N. Y. Supp. 572, 94 Misc. 411. See § 2632a herein.

As to alterations and repairs, see §§ 1708, 2191 et seq. herein.

[11] Charles Wolff Packing Co. v. Travelers' Ins. Co. 94 Kan. 630, 146 Pac. 1175.

[12] Southern States Fire Ins. Co. v. Hand-Jordan Co. 112 Miss. 565, 73 So. 578.

As to extent of reinsurer's liability and rights of original insured, see §§ 131 et seq. herein.

[12a] See subdiv. (a) herein.

[13] Ætna Life Ins. Co. v. Bowling Green Gaslight Co. 150 Ky. 732, 43

or until it sustains a loss by the payment of a liability;[14] or unless it has actually paid the amount of judgment;[15] and the right of action does not accrue until after judgment recovered against insured by the injured employee.[16] The rule may also be stated as follows: Under a policy clause which provides that no action shall lie against assurer unless for "loss actually sustained and paid in money after actual trial of the issue" insured's claim does not accrue until after payment of the judgment against it, and in case of appeal then not until after affirmance of the appeal. If, however, the policy only indemnifies against loss by reason of liability because of an accident to an employee, the obligation to save harmless or to pay would arise when judgment determining liability was entered against assured.[17]

As to injuries suffered by other than employees, it is held that where the liability is for damages for bodily injuries sustained by the operation of a street railroad, such liability accrues as soon as assured's liability is determined, and this does not happen as long as the action against assured is pending on appeal.[18] And assured must have actually paid a judgment rendered against him in an action by the injured person before a right of action accrues against insurer, where the policy contract is not merely against liability, but one of indemnity against loss, as where it indemnifies against loss for damages for injuries to persons while on assured's premises.[19]

(h) *Stipulation that insurer defend accident or injury actions or suits against insured: valid, not champertous.*—A condition is not invalid as champertous and against public policy which obli-

L.R.A.(N.S.) 1128, 150 S. W. 994 (liability for loss limited with agreement to pay expenses).

[14] Carter v. Ætna Life Ins. Co. 76 Kan. 275, 11 L.R.A.(N.S.) 1155, 91 Pac. 178 (condition was against loss from liability and for loss actually sustained and paid, etc.).

[15] Cushman v. Carbondale Fuel Co. 122 Iowa, 656, 98 N. W. 509 (condition was that no action should lie against insurer unless brought by the "assured himself to reimburse him for loss actually sustained and paid in satisfaction of a judgment after trial of the issue").

[16] Texas Short Line Ry. Co. v. Waymire, — Tex. Civ. App.—, 89 S. W. 452.

[17] Saratoga Trap Rock Co. v. Standard Accident Ins. Co. 128 N. Y. Supp. 822, 143 App. Div. 852, 40 Ins. L. J. 1310—Houghton, J., *citing* on last point, Stephens v. Pennsylvania Casualty Co. 135 Mich. 189, 97 N. W. 686. See also as to first point in text, White v. Maryland Casualty Co. 123 N. Y. Supp. 840, 139 App. Div. 179, 39 Ins. L. J. 1357.

As to payment of judgment as prerequisite to bringing suit, see subdivs. (n) et seq. this section.

[18] Fidelity & Casualty Co. v. Fordyce, 64 Ark. 174, 41 S. W. 420, 27 Ins. L. J. 232.

[19] Puget Sound Imp. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co. 52 Wash. 124, 100 Pac. 190.

gates insurer at its cost to defend in insured's name and behalf suits which may be brought against the latter by an injured employee, and to pay the costs and expenses of litigation; and even though such an agreement was champertous in fact as between the parties, the point of invalidity is not open to question by a stranger to the contract.[20]

(i) *Right of insurer to defend such actions or suits.*[1]—The questions of assurer's right, duty or obligation to defend accident or injury actions brought against insured, and the effect of its assuming such defense under the policy stipulations, or of its abandonment thereof, or withdrawal therefrom after having undertaken the same, or of its refusal or neglect to defend, and points of waiver or estoppel in connection therewith, all go not only to loss or liability, but they are also involved with questions relating to parties to the action. While the right of assurer to defend in these cases is closely related to that of its right to be a party to such a suit, still beyond this point the cases leave largely to inference or deduction the application of what is decided therein to either of said points of loss or liability, or parties to the action. What is above stated should, therefore, be considered in applying not only the decisions discussed here, but also those which are relied on under those sections herein which relate to parties to actions.[2]

If insurer is satisfied that under the law no indemnity is recoverable, it has the right to defend by all lawful means actions for damages for injuries, under a policy insuring employers against loss occasioned by accidents to employees.[3] And if a policy, insuring against liability for damages for bodily injuries suffered by persons traveling on insured's street railroad, stipulates that insurer shall have absolute control of defending the case, but that it shall not be bound to defend if it pays assured the full amount insured, it is obligated either to defend or pay as stipulated.[4]

(j) *Effect of defense by insurer of such actions or suits: waiver: estoppel.*—Generally stated and subject to such exceptions or

[20] Ætna Life Ins. Co. v. Week, 163 Ky. 37, 173 S. W. 317.

[1] See subdiv. (a) this section.

[2] See §§ 3658a et seq. herein.

[3] Montreal Steam Laundry Co. v. Demers, Rap. Jud. Queb. 5 B. R. 191.

[4] Fidelity & Casualty Co. v. Fordyce, 64 Ark. 174, 41 S. W. 420, 27 Ins. L. J. 233. ("If any legal proceedings were instituted against the railway company to enforce it," a claim against insured for damages, "the insurance company bound itself to take absolute care and control of defending against the same in the name and behalf of the assured. In only one way could it have absolved itself from this obligation, and that was by paying or offering to pay assured the full amount for which it was liable in such cases by its policy."—Battle, J.).

qualifications as hereinafter appear, if assurer exercises its option and defends it becomes liable;[5] that is, a defense by insurer in an action on the policy that a certain claimed liability is not within the policy terms, may be and is waived where it assumes the defense and control of the injured employee's or claimant's action with full information or knowledge of the character thereof or nature of the claim without denying its liability or reserving its right to do so when it undertakes said defense, or without any notice to assured that it does not intend to waive its rights as to any matters of defense or nonliability; and an estoppel will also be created to the extent that assured is prejudiced by such acts of assurer.[6] And if insurer takes exclusive charge of the defense with assured's consent it thereby waives any defense of nonliability by reason of failure of assured to observe any statute affecting the safety of persons, which failure constitutes under the policy terms an exemption of liability for loss from injury consequent thereon.[7] Assurer is also estopped to avail itself in the action against it by assured of a defense of nonobservance by the latter of statutory requirements for the safety of employees, where said assurer upon notice assumes and retains, without denying liability, full control until judgment rendered of the action against insured by the injured employee.[8] So assurer by defending a

[5] Coast Lumber Co. v. Ætna Life Ins. Co. 22 Idaho, 264, 125 Pac. 185; Ætna Life Ins. Co. v. Bowling Green Gaslight Co. 150 Ky. 732, 43 L.R.A. (N.S.) 1128, 150 S. W. 994.

[6] Royle Mining Co. v. Fidelity & Casualty Co. of N. Y. 161 Mo. App. 185, 142 S. W. 438, 41 Ins. L. J. 571 (*citing* Employers' Liability Assurance Corp. v. Chicago & Big Muddy Coal & Coke Co. 141 Fed. 962, 73 C. C. A. 278; Tozer v. Ocean Accident & Guaranty Corp. 99 Minn. 290, 109 N. W. 410, s. c. 94 Minn. 478, 103 N. W. 509; Fairbanks Canning Co. v. London Guaranty & Accident Co. 154 Mo. App. 327, 133 S. W. 664; Royle Mining Co. v. Fidelity & Casualty Co. of N. Y. 126 Mo. App. 104, 103 S. W. 1098; Myton v. Fidelity & Casualty Co. 117 Mo. App. 442, 92 S. W. 1149; Glens Falls Portland Cement Co. v. Travelers' Ins. Co. 42 N. Y. Supp. 285, 11 App. Div. 411, aff'd 162 N. Y. 399, 56 N. E. 897, 29 Ins. L. J. 748; Globe Navigation Co. v. Maryland Casualty Co. 39 Wash. 299, 81 Pac. 826). See also Wilson v. Frankfort Marine, Accident & Plate Glass Ins. Co. 77 N. H. 344, 91 Atl. 913, 44 Ins. L. J. 606; Brassil v. Maryland Casualty Co. 210 N. Y. 235, L.R.A. 1915A, 629, 104 N. E. 622, 43 Ins. L. J. 672, aff'g 133 N. Y. Supp. 187, 147 App. Div. 815, 41 Ins. L. J. 792; Rosenbloom v. Maryland Casualty Co. 137 N. Y. Supp. 1064, 153 App. Div. 23, 42 Ins. L. J. 180. See Century Realty Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co. 179 Mo. App. 123, 145, 161 S. W. 624, 631.

[7] Empire State Surety Co. v. Pacific National Lumber Co. 200 Fed. 224, 118 C. C. A. 410.

[8] Employers' Liability Assurance Corp. of London v. Chicago & Big Muddy Coal & Coke Co. 141 Fed. 962, 73 C. C. A. 278, 31 Natl. Corp. Rep. 482.

suit for damages brought for death of a person against insured is estopped to set up in action against it by assured that the death did not result from the injuries negligently inflicted but from malpractice by a physician.[9]

If, however, insured has based his claim against insurer on various grounds covered by the policy and also upon one not within the terms thereof, insurer has an election to refuse to defend the action of the employee against insured, taking the chance that the ground of liability established will be the one for which it is not liable, or it can proceed with the defense of said action under a reservation of its rights or with an understanding with or notice to insured, express or implied, that it will defend against all allegations of fault, and in case the only allegation sustained is the one for which it claims nonliability its rights should be preserved and it should not be liable. "Of course there was no method by which it could compel the insured to make an explicit agreement of the kind above suggested covering this subject. All it could or was bound to do was to fairly and reasonably assert its rights under the policy in such a manner as would be notice to the insured that it did not intend to waive those rights by proceeding with the defense of the action. This it did." [10] And to the same effect, it is also held that if assurer elects to defend an employee's action against assured with a reservation of its rights under the policy to assert its nonliability, a judgment against assured in said suit as a liability not covered by the indemnity or insurance contract or which is a risk excepted therefrom is conclusive against said assured in its suit against assurer.[11] So, under another

[9] Taxicab Motor Co. v. Pacific Coast Casualty Co. 73 Wash. 631, 132 Pac. 393.

[10] Mason-Henry Press v. Ætna Life Ins. Co. 211 N. Y. 489, 105 N. E. 826, 44 Ins. L. J. 316.—Hiscock, J., aff'g 139 N. Y. Supp. 1133, 155 App. Div. 876, s. c. 130 N. Y. Supp. 961, 146 App. Div. 181, 40 Ins. L. J. 2046. See Holland Laundry v. Travelers' Ins. Co. 152 N. Y. Supp. 92, 166 App. Div. 621, 45 Ins. L. J. 638; United Waste Manufacturing Co. v. Maryland Casualty Co. 148 N. Y. Supp. 852, 44 Ins. L. J. 497; Buffalo Steel Co. v. Ætna Life Ins. Co. 141 N. Y. Supp. 1027, 156 App. Div. 453 (Aff'g 136 N. Y. Supp. 977, 41 Ins. L. J. 1653) Aff'd 215 N. Y. 638, 109 N. E. 1067; Wachs & Co. v. Fidelity & Deposit Co. of Md. — Pa. —, 93 Atl. 1007, 46 Ins. L. J. 87.

[11] Buffalo Steel Co. v. Ætna Life Ins. Co. 136 N. Y. Supp. 977, 41 Ins. L. J. 653, aff'd 141 N. Y. Supp. 1027, 156 App. Div. 453, aff'd 215 N. Y. 638, 109 N. E. 1067 (a case where insurer defended the action against it on the ground that the insured employee was employed in violation of law, and that the policy expressly excepted such risk from its operation; Labor Laws 1897, c. 415, sec. 81, as am'd by L. 1899, c. 192, sec. 1. The judgment referred to was in Tetter v. Buffalo Steel Co. 117 N. Y. Supp. 1148, 132 App. Div. 946, and it was paid by assured. See § 2632b herein).

decision, where the defense is assumed with a reservation of assurer's rights under the policy and without assuming any liability for any judgment that might be recovered in the employee's action such reservation means that it only assumes the defense for such liability as the policy imposes upon it, if any.[12] Again, in case the insured employer fails to furnish assurer with information vitally essential as to an excepted risk, which was that of the employment of a minor without a permit and therefore illegal, and assurer without knowledge of said fact assumes the defense and continues in control of the litigation, it is not thereby estopped to deny liability in an action against it to recover on the policy, especially so where in the action against insured there were other grounds of negligence upon which the claimant therein relied and had he prevailed upon any of them it would have been within the risks insured against; nor in such case is assurer, in view of its possible or probable liability on the other grounds above stated, put to its election and required to change its attitude as to continuing in the defense, even though it might be urged that it was put upon inquiry as to said illegal employment by certain evidence given in that action.[13] And if insured is sued by an employee and

[12] Hartigan v. Casualty Co. of America, 161 N. Y. Supp. 145, 97 Misc. 464.

[13] Stearns Lumber Co. v. Travelers' Ins. Co. 159 Wis. 627, 150 N. W. 991, 45 Ins. L. J. 553. The court, per Marshall, J., said: "In each of the adjudications cited to us, which deal with the particular matter, the element of estoppel was very prominent and upon that, instead of waiver, in the technical sense, the defense of illegal employment was held inefficient. Tozer v. Ocean Accident & Guarantee Corp. 94 Minn. 478, 103 N. W. 509; Humes Construction Co. v. Philadelphia Casualty Co. 32 R. I. 246, 79 Atl. 1, Ann. Cas. 1912D, 906; Royle Mining Co. v. Fidelity & Casualty Co. of N. Y. 126 Mo. App. 104, 103 S. W. 1098; Employers' Liability Ins. Corp. v. Chicago & Big Muddy Coal & Coke Co. 141 Fed. 962, 73 C. C. A. 278; Fairbanks Can. Co. v. London Accident Co. 154 Mo. App. 327, 133 S. W. 664; Globe Navigation Co. v. Maryland Casualty Co. 39 Wash. 299, 81 Pac. 826; Glens Falls Portland Cement Co. v. Travelers' Ins. Co. 162 N. Y. 399, 56 N. E. 897.

"In the first of those cases the insurance company, from first to last, knew all the facts, yet insisted upon carrying on the litigation and neglected to notify the insured of an opportunity, which was presented, of making an advantageous settlement.

"In the next case, the facts were all known to the insurance company, but it, through mistake of law, supposed itself liable and handled the litigation to the practical exclusion of the employer.

"In the next, with full knowledge of all the facts, the insurance company conceded its liability until the doors were fully closed for the assured to do anything for protection in its own behalf.

"In the last case, the insurance company took charge of the litigation . . . and continued it down to the trial, and then abandoned it under such circumstances as to leave defendant unable to make a defense and so the case went, practically, by

by amendment liability is placed upon the ground of employing a minor contrary to law, which ground of liability is not covered by the policy, and insurer continues to participate in the defense after notice that it disclaims liability, if recovery is had on said ground set forth in the amendment, it is not thereby estopped to deny liability in an action by assured to recover from it.[14] The rule is also deducible under a Minnesota decision, that if insurer undertakes the defense of the action against assured, but expressly disclaims liability if judgment is awarded against assured upon a liability which it notifies assured is a risk specifically excepted by the policy, and assured participates in the defense and the recovery against the latter proves to be within the exceptions so specified, assurer is not liable on the policy. A distinction is made between a case of this character and those wherein assurer assumes the defense as stipulated in the policy without denying liability, or where it has conducted the defense down to trial and then withdrew. The rule was also applied in such case that there may be an estoppel against an alleged estoppel which sets the matter at large so that assured will be relegated to the provisions of the policy and precluded from recovering, as where a policy is issued to assured as copartners and their conduct is such as to prevent them from asserting that assurer had waived its right to defend on the ground that the loss was not within the policy and the dissolution of the partnership does not affect the result.[15] But

default. Thus it will be seen that prejudicial features which operated efficiently, in the many cases cited, were entirely absent here."

That insurer not liable to reimburse insured for damages recovered for covered for injuries sustained through latter's negligence by child employed contrary to law, see Goodwillie v. London Guarantee Accident Co. 108 Wis. 207, 84 N. W. 164.

[14] Sargent Manufacturing Co. v. Travelers Ins. Co. 165 Mich. 87, 34 L.R.A.(N.S.) 491 and note, 130 N. W. 211; Pub. Acts 1901, No. 113, sec. 3, prohibiting employment of infants.

See § 2632b herein.

[15] Mann v. Employers' Liability Assurance Corp. 123 Minn. 305, 143 N. W. 794, 43 Ins. L. J. 150. The court, per Brown, J., said: "We must start with the proposition that there was no express contractual liability on defendant's part to pay plaintiffs any sum under the policy because of the judgment obtained against them. Consequently the burden rested on plaintiffs to establish a state of facts from which a liability might be implied by law. There are numerous cases holding that where an insurance company takes up the defense of an action, knowing the facts bring it within a risk exception, and, under the general agreements of the policy authorizing it to control litigation, conducts the case to the end, and nothing further appears, it will be deemed precluded, by the way of either estoppel or waiver, from taking a position inconsistent with the one previously assumed and denying liability. Empire State Surety Co. v. Pacific National Lumber Co. 200 Fed. 224, 118 C. C. A. 410; Employers' Liability Assurance Corp. v. Chicago Big

notwithstanding the preceding decisions it is held, that by assuming defense of the action against assured, insurer is not concluded by the judgment in that case and that it may nevertheless in the suit against it, set up any defense it may have.[16]

(k) *Assurer's refusal or neglect to defend such actions or suits.*[17] —Under a Federal decision a judgment against insured precludes or estops insurer where it has expressly stipulated that it will defend or settle or otherwise satisfy assured, and it receives notice but refuses to defend and disclaims all liability.[18] It is also decided in Massachusetts that insurer may refuse to defend on the ground that the alleged accident was not an accident, and so not covered by the policy, and if it is not within the policy terms for that or for other reasons, assured will not be held liable.[19] And in a Missouri case it is held that although insurer acts at its peril in refusing to defend the suit for damages, nevertheless so long as any peril exists its act in defending or negotiating for a settlement does not operate as a waiver.[20] So under a Minnesota decision if assurer denies liability and refuses to defend after notice it thereby breaches its contract and waives the condition making a judgment after trial of the issue a condition precedent to recovery by insured. The latter is also thereby released from its agreement not to settle without insurer's consent, so that if

Muddy Coal & Coke Co. 141 Fed. 962, 73 C. C. A. 278; Royle Mining Co. v. Fidelity & Casualty Co. 126 Mo. App. 104, 103 S. W. 1008. So, also, under like circumstances, the company has been held estopped where it conducted the defense down to the trial and then withdrew, leaving assured no reasonable opportunity to prepare his own defense. Glens Falls Portland Cement Co. v. Travelers' Ins. Co. 162 N. Y. 399, 56 N. E. 897. And our decisions are in line with the general holding. Tozer v. Ocean Accident & Guarantee Corp. 94 Minn. 478, 103 N. W. 509; Id. 99 Minn. 290, 109 N. W. 410. If, however, the trial court's conclusion upon defendant's contentions is sustainable in point of fact, which we will consider later, the cases cited are clearly distinguishable from the present one; for plaintiff's assent to the status assumed by defendant with regard to the litigation by the notice of nonliability referred to and thereafter, when measured by the same legal standard of responsibility for acts indicated by the grounds of the decisions cited and which they seek to apply as against defendant would equally estop them from doing the identical thing which they deny defendant's right to do, namely, repudiation of the effect of conduct. The doctrine of equitable estoppel prevents this."

[16] Gutfreund v. Standard Life & Accident Ins. Co. 98 N. Y. Supp. 699.

[17] See subdiv. (a) this section.

[18] B. Roth Tool Co. v. New Amsterdam Casualty Co. 161 Fed. 709, 88 C. C. A. 569.

[19] Graustein & Co. v. Employers' Liability Assurance Corp. Ltd. of L. 214 Mass. 421, 101 N. E. 1073.

[20] Compton Heights Laundry v. General Accident Fire & Life Assurance Corp. Ltd. 195 Mo. App. 313, 190 S. W. 382).

insured in such case defends said action against it to recover for injuries sustained and effects a settlement, the amount paid therein is recoverable from insurer unless it appears that there was no liability for which insured could be held or that the amount so paid was excessive. The settlement, however, affords presumptive evidence of a pre-existing liability and of the amount thereof.[1] And in a Tennessee case it is decided that assurer obligates itself to defend the suit against assured at its own cost; or to settle the same; or to pay assured the stipulated indemnity and by the refusal, upon notice, to defend or to do any of said things it breaches the insurance contract and is liable for the consequences; and in such case there is no limitation of liability to include only meritorious claims whereby assurer is justified in determining in advance that the employees suit is groundless.[2] In Texas where assurer refuses to defend such damage suits it is held liable upon a policy indemnifying against liability as distinguished from loss.[3] Assurer is also liable where it refuses to defend the employee's suit, claiming that it was not liable for the particular accident suffered.[4] But a denial by assurer of liability does not waive a provision requiring the recovery of judgment by the injured employee against the assured before action would lie on the policy.[5]

In New York assurer has the right to refuse to defend an action against insured for damages, on account of injuries sustained by persons not employees, where its liability does not attach until after payment of judgment.[6] And when assured,

[1] Butter Bros. v. American Fidelity Co. 120 Minn. 157, 44 L.R.A. (N.S.) 609, 139 N. W. 355 (it was also held that there was no failure of assured to observe a statute affecting the safety of persons, see upon this last point of precautions against loss, Despatch Laundry Co. v. Employers' Liability Assur. Corp. Ltd. 105 Minn. 384, 117 N. W. 506, 118 N. W. 152; Compton Heights Laundry Co. v. General Accident, Fire & Life Assurance Corp. 195 Mo. App. 313, 190 S. W. 382).

[2] South Knoxville Brick Co. v. Empire State Surety Co. 126 Tenn. 402, 150 S. W. 92, 42 Ins. L. J. 192.

[3] Royal Indemnity Co. v. Schwartz, — Tex. Civ. App. —, 172 S. W. 581 (case of recovery of expenses, etc., incurred by assured in defending suit of person injured by assured's auto, although the loss itself was within an excepted risk).

[4] Southwestern Surety Co. v. Thompson, — Tex. Civ. App. —, 180 S. W. 947 (liable for expenses, etc., in employer's suit).

[5] Texas Short Line Ry. Co. v. Waymire, — Tex. Civ. App. —, 89 S. W. 452.

[6] White v. Maryland Casualty Co. 123 N. Y. Supp. 840, 139 App. Div. 179, 39 Ins. L. J. 1357 (condition was that no action shall lie against insurer "as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment," etc.).

who held a public contract with a city, was insured under a policy for indemnity against liability suffered to its employees and others arising out of personal injury caused by assured or its workmen, and judgment against the city was recovered by a person who had suffered injury while the work was being done in pursuance of the contract, for the payment of which judgment assured was liable under its city contract, it was held that assurer by its refusal upon notice from assured, to defend such action, was not estopped from setting up the defense, in a suit by assured against it, that the injury on which said judgment was recovered was not a liability or risk covered by the policy.[7] In another New York case the policy covered loss from liability to employees of assured and also the liability of insured to persons other than employees who might accidentally sustain bodily injuries directly occasioned by the business operations of insured as described, and which should impose upon assured a common law or statutory liability to such persons therefor. The contract also stipulated that if legal proceedings should be commenced to enforce such claims against insured that it, assurer, should pay insured, etc., or that "it shall defend said proceedings on behalf of the insured and shall have control of such defense." Only claims for liability to persons other than employees were involved. The court referred the stipulation as to defending suits back to a preceding provision that insurer should have the sole right and it should be its duty to "negotiate settlements and adjustments of all claims made against the insured covered by this policy;" and held that the obligation to defend was limited and controlled thereby, so that when assurer received notice of suits against insured it had the right to determine for itself whether the injuries had in fact occurred under such circumstances as to impose a liability upon the latter therefor, and to act accordingly, either by defending the suits or entirely ignoring them, taking its chances on an adverse result. The court also in its opinion clearly makes the case turn upon the result of said suits since it appeared that they were based upon a state of facts which imposed no liability upon assured. The gist of this decision is, that if insurer refuses to defend it takes its chances, or in other words, so refuses at its peril, that is, it takes its chances, resting its liability upon the result of the damage suit against insured.[8] But it is also decided that where

[7] Tolmie v. Fidelity & Casualty Co. 84 N. Y. Supp. 1020, 41 Misc. 451, aff'd 88 N. Y. Supp. 717, 95 App. Div. 352, aff'd 183 N. Y. 581, 76 N. E. 1110.

[8] Cornell v. Travelers' Ins. Co. 175 N. Y. 239, 67 N. E. 578, 32 Ins. L. J. 769, rev'g 73 N. Y. Supp. 341, 66 App. Div. 559 (the above determination was the basis for preclusion of a

assured has become obligated to pay judgment after notice to insurer of actions on the claims of employees, the latter is liable under the policy where it has failed to defend.[9]

(1) *Where assurer undertakes such defense and surrenders or abandons it or withdraws therefrom.*—Insurer may surrender the defense of an action against assured for negligently causing an employee's death where it has undertaken the same under a misapprehension of its obligations and learns from testimony during the trial that it is not liable.[10]

But insurer cannot undertake the defense of the accident suit against insured and then withdraw on the eve of trial leaving assured no reasonable opportunity to prepare its defense, and if insurer so improperly abandons the same and judgment is suffered by assured by default it will be estopped to defend the action on the policy by setting up a matter of nonliability which it might have shown upon the trial of the action against insured and thereby have successfully defended that action; and it is also precluded from claiming that that adjudication precluded assured from insisting upon the stipulated policy indemnity.[11] So where the policy permits assurer to determine which of certain courses it will adopt, as where it has the right to defend in the name and on behalf of assured against proceedings brought against him to enforce a claim for damages on account of an accident or bodily injury suffered by an employee or to settle the claim at its own cost; or pay the stipulated amount of indemnity, leaving assured to defend itself against the claim as best he may, the adoption of either of these courses necessarily implies the rejection of the others, and the election to assume the defense precludes the abandonment thereof to assurer's advantage and the assertion of a

recovery from assurer of assured's expenses incurred in defending said suits which the latter had successfully defended; but this part of the decision rested upon other provisions of the policy. This question of expenses is, however, fully considered elsewhere. See § 3454a herein). See Henderson Lighting & Power Co. v. Maryland Casualty Co. 153 N. Car. 275, 30 L.R.A.(N.S.) 1105, 69 S. E. 234, 40 Ins. L. J. 127.

[9] E. M. Upton Cold Storage Co. v. Pacific Coast Casualty Co. 147 N. Y. Supp. 765, 162 App. Div. 842.

[10] London Guarantee & Accident Co. v. American Cereal Co. 159 Ill. App. 537, 41 Natl. Corp. Rep. 833, see London Guarantee & Accident Co. v. American Cereal Co. 251 Ill. 123, 95 N. E. 1064; American Cereal Co. v. London Guarantee & Accident Co. 211 Fed. 96, 138 C. C. A. 24, 43 Ins. L. J. 834.

[11] Glens Falls Portland Cement Co. v. Travelers' Ins. Co. 162 N. Y. 399, 56 N. E. 897, 29 Ins. L. J. 748, aff'g 42 N. Y. Supp. 285, 11 App. Div. 411 (liability question in original injury suit and urged in defense in insurance action was negligence in not properly safe-guarding machinery, etc., as required by statute. Laws 1892, c. 673, sec. 8).

claim inconsistent with the course adopted, to the prejudice of assured's policy rights.[12]

If assurer assumes the defense with a reservation of its rights as to liability under the policy but, upon ascertaining that irrespective of assured's liability it would not be liable, it notifies assured that it will not continue in the defense after a certain date and requests the latter to come in and defend, the question of the reasonableness of such notice is one of law and not one for the jury.[13]

(m) *Where assurer fails to exercise reasonable care in conducting such defense: negligence.*—It is obligatory upon assurer to exercise reasonable care in defending the suit against assured where it, upon receiving notice, assumes such defense, and this applies whether or not the contract requires it to defend, and action lies by assured against assurer for breach of implied contract, or in tort for negligence, where the latter has so negligently and carelessly prepared for trial of the cause that a judgment is recovered against the employer assured much in excess of the stipulated policy indemnity.[14] And where a judgment is rendered against assured in the employee's suit and it pays the same in satisfaction thereof in order to prevent a sale of its property, insurer is liable for the amount so paid where it has defended the action and has taken an appeal from the adverse judgment but has failed to execute any stay bond.[15] But it is decided that if a judgment in excess of the insurance has been obtained against assured and assurer, who has a right under the policy to defend, agrees to perfect an appeal, it is not liable for negligently failing to perfect an appeal whereby judgment is affirmed, where it does not appear that said judgment was erroneous and that plaintiff could not have succeeded on a second trial.[16]

(n) *Indemnity against loss or damages and indemnity against liability distinguished: effect as to payment of judgment or loss in suit or claim against insured.*[17]—We have considered elsewhere the question of whether or to what extent this contract is one of

[12] Brassil v. Maryland Casualty Co. 133 N. Y. Supp. 187, 147 App. Div. 815, 41 Ins. L. J. 792, aff'd 210 N. Y. 235, L.R.A.1915A, 629, 104 N. E. 622, 43 Ins. L. J. 672.

[13] United Waste Manufacturing Co. v. Maryland Casualty Co. 148 N. Y. Supp. 852, 85 Misc. 1539, 44 Ins. L. J. 497.

[14] Attleboro Manufacturing Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co. (U. S. C. C.) 171 Fed. 495.

[15] E. M. Upton Cold Storage Co. v. Pacific Casualty Co. 147 N. Y. Supp. 765, 162 App. Div. 842.

[16] Getchell & Martin Lumber & Manufacturing Co. v. Employers' Liability Assurance Corp. 117 Iowa, 180, 62 L.R.A. 617, 90 N. W. 616.

[17] See subdiv. (a) this section.

indemnity or of insurance;[18] and a distinction exists in this class of insurance or indemnity, between an indemnity against loss or damages and an indemnity against liability for damages and even though the object of both is to save insured from loss or damage the legal consequences differ, for in the former case payment is essential, while in the latter it is not.[19]

[18] See §§ 27a et seq. 337e herein.

[19] Stephens v. Pennsylvania Casualty Co. 135 Mich. 189, 97 N. W. 685, 33 Ins. L. J. 180, 183.

See also the following cases:

*United States.*—Georgia Casualty Co. v. Bowron, 233 Fed. 89, 147 C. C. A. 159, L.R.A.1916F, 876; Bowron v. Georgia Casualty Co. 223 Fed. 673 (where the distinction between insurance against loss and against liability is made and conceded); Van Reen v. Ætna Life Ins. Co. (U. S. D. C.) 209 Fed. 691, 43 Ins. L. J. 525 ("Further, it" the contract "did not undertake to insure Brogan against mere liability to others for bodily injuries sustained through such negligent use, nor did it assume his liability or indebtedness in such cases, but only agreed to indemnify him against 'loss and/or expense arising or resulting from claims upon the assured for damages' on account of such injuries . . . and then only 'for loss and/or expense actually sustained and paid in money by him after actual trial of the issue.' " Id., per Bradford, D. J., a case where specific performance was sought by injured person to compel insurer to pay to him the amount of his judgment, etc., against insured).

*Alabama.*—Little Cahaba Coal Co. v. Ætna Life Ins. Co. 192 Ala. 42, 68 So. 317, 46 Ins. L. J. 101 ("By the great weight of authority contracts of this character are contracts of indemnity against loss and not against liability merely, and the liability of the underwriter is deemed fixed only upon payment of the judgment by assured."—Sayre, J. *Examine* opinion of Somerville, J., in Goodman v. Georgia Life Ins. Co. 189 Ala. 130, 66 So. 649, 45 Ins. L. J. 239, repudiating the doctrine of Patterson v. Aden, 119 Minn. 308, 48 L.R.A.(N.S.) 184, 138 N. W. 281; Sanders v. Frankfort Marine, Accident & Plate Glass Ins. Co. 72 N. H. 485, 101 Am. St. Rep. 688, 37 Atl. 655, and *citing* as opposed thereto by the weight of authority, Allen v. Ætna Life Ins. Co. 145 Fed. 881, 76 C. C. A. 265, 7 L.R.A.(N.S.) 958 and note; Frye v. Bath Gas & Electric Co. 97 Me. 241, 59 L.R.A. 444, 94 Am. St. Rep. 500, 54 Atl. 395; Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981; Travelers' Ins. Co. v. Moses, 63 N. J. Eq. 260, 92 Am. St. Rep. 663, 49 Atl. 720).

*Indiana.*—Campbell v. Maryland Casualty Co. 52 Ind. App. 228, 97 N. E. 1026, 41 Ins. L. J. 1097. (If contract is to indemnify against loss, damage must be shown, if indemnity is against liability only the recovery may be had regardless of whether or not any actual loss or damage has been suffered.—Larry, J.; Adams, J., dissented as to point that insurance here was against loss).

*Iowa.*—West Riverside Coal Co. v. Maryland Casualty Co. 155 Iowa, 161, 48 L.R.A.(N.S.) 145 and note, 135 N. W. 414, 41 Ins. L. J. 1102 (contract against actual loss and not against liability only, so that proof of payment of actual loss necessary).

*Kentucky.*—Fidelity & Casualty Co. of N. Y. v. Martin, 163 Ky. 12, 173 S. W. 307 (policy held to insure against loss and not liability only).

*Maine.*—Frye v. Bath Gas & Electric Co. 97 Me. 241, 94 Am. St. Rep. 500, 59 L.R.A. 444, 54 Atl. 395 (contract not one of insurance but only of indemnity to reimburse insured

(o) *Same subject: payment of such judgment or loss as condition precedent or prerequisite to recovery.*—The parties have a

for loss actually sustained and paid by reason of his liability to injured employees).

*Missouri.*—Century Realty Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co. 179 Mo. App. 123, 161 S. W. 624, 43 Ins. L. J. 287 (agreement in this case was to indemnify assured "against loss arising from any legal liability for damages," etc. The court, per Reynolds, P. J., said: "not a suggestion can be drawn from any of this language" in the indemnity clause "that the payment is only to be made by the insurer in reimbursement of what the assured shall or may have paid. On the contrary, as we understand it, it is more in the nature of 'a policy which insures directly against liability, and one that insures against loss or damage by reason of liability.' . . . We conclude on this point then, that it was not within the expressed intention of this policy . . . that liability to make payment to the assured should fall in only after the assured had paid whatever damage may have been awarded to the injured party") s. c. 179 Mo. App. 145, 161 S. W. 631. This case was *followed* in its decision upon the points in issue in Century Realty Co. v. Travelers' Ins. Co. 179 Mo. App. 144, 161 S. W. 630.

*New York.*—Appel v. Peoples' Surety Co. 132 N. Y. Supp. 200, 148 App. Div. 70, 41 Ins. L. J. 589 (point briefly discussed whether clause stipulating that policy should only cover losses sustained by and liability for any claims, indemnifies against liability as well as loss, but not determined, although court declared at outset that it was one of the important points involved and also distinguished and held inapplicable. O'Connell v. New York, New Haven & Hartford R. Co. 187 Mass. 272, 72 N. E. 979; and St. Louis Dressed Beef Co. v. Maryland Casualty Co. 201 U. S. 173, 50 L. ed. 712, 26 Sup. Ct. 400, in that the former was against loss from common law or statutory liability, and the latter was a contract of indemnity against loss); Saratoga Trap Rock Co. v. Standard Accident Ins. Co. 128 N. Y. Supp. 822, 143 App. Div. 852, 40 Ins. L. J. 1310 (the clause prohibiting action for loss shall lie against insurer unless brought by assured for "loss actually sustained and paid in money after trial of the issue" has the "effect of changing the policy from one of indemnity when liability shall be established, to one for indemnity for money paid out on the occurrence of a particular event, to wit, payment of the judgment because of such liability."—Houghton, J.); Creem v. Fidelity & Casualty Co. 126 N. Y. Supp. 555, 141 App. Div. 493, 40 Ins. L. J. 600 ("liability and loss are not the same. The contract was to indemnify against loss from liability. The loss was not sustained until the liability was established by a judgment."—Miller, J. Condition was, "against loss from liability for damages on account of bodily injuries fatal or otherwise, accidentally suffered" by employees and to the public for personal injuries, etc.), s. c. 116 N. Y. Supp. 1042, 132 App. Div. 241.

*North Carolina.*—Lowe v. Fidelity & Casualty Co. of N. Y. 170 N. Car. 445, 87 S. E. 250 (insured was not indemnified against liability but only against actual loss).

*Oregon.*—Fenton v. Fidelity & Casualty Co. 36 Oreg. 283, 48 L.R.A. 770, 56 Pac. 1096 (policy indemnified not merely for actual damages but against liability for damages).

*South Carolina.*—Pickett v. Fidelity & Casualty Co. 60 S. Car. 477, 38 S. E. 160, 629 (insurance not one of

right to stipulate that assurer's undertaking shall, in actions against it by assured, be limited to a reimbursement of the latter for losses actually sustained and paid; that is, that this shall constitute the condition upon which indemnity shall rest.[20] And it is a condition precedent that assured shall have actually paid the loss where the stipulation is that insurer shall be liable only for losses actually sustained and paid by assured in satisfaction of a judgment after trial of the issues.[1] Nor is any loss sustained where the damage claim of assured's employee has not been paid, where the policy indemnifies against actual loss and not against liability.[2]

It is held in Minnesota that the condition that no action shall lie against insurer unless brought by insured for loss or expense actually sustained and paid in money by him after trial of the issue, applies only in case insurer denies liability and refuses to defend.[3] And a policy providing for reimbursement for loss actually sustained and paid in satisfaction of a judgment after trial will be construed with an attached rider providing for indemnity only for losses sustained by and any liability for any claims against assured as a result of the risk, and in such case the contract is modified so as to cover not only losses sustained by assured but also liabilities for any claim against assured so that recovery may be had without any actual loss being shown, as it is sufficient to show that a liability has been legally fixed.[4]

indemnity against loss but against liability).

*Texas.*—Royal Indemnity Co. v. Schwartz, — Tex. Civ. App. —, 172 S. W. 581 (policy indemnified against liability as distinguished from loss).

*Washington.*—Ford v. Aetna Life Ins. Co. 70 Wash. 129, 126 Pac. 69 (indemnity against loss actually sustained and paid and not against liability; policy against loss from claims for personal injury suffered by one not an employee, etc.); Puget Sound Imp. Co. v. Frankfort Marine, Accident & Plate Glass Co. 52 Wash. 124, 100 Pac. 190 (indemnity against loss and not liability; policy covered damages for injuries to third persons on assured's premises, etc.).

[20] Frye v. Bath Gas & Electric Co. 97 Me. 241, 59 L.R.A. 444, 94 Am. St. Rep. 500, 54 Atl. 395.

[1] Brassil v. Maryland Casualty Co. 133 N. Y. Supp. 187, 147 App. Div. 815, 41 Ins. L. J. 792, aff'd 210 N. Y. 235, 104 N. E. 622, 43 Ins. L. J. 672. See also Atlas Hardwood Lumber Co. v. Georgia Life Ins. Co 129 Tenn. 477, 167 S. W. 109.

[2] Lowe v. Fidelity & Casualty Co. of N. Y. 170 N. Car. 445, 87 S. E. 250.

[3] Patterson v. Adan, 119 Minn. 308, 48 L.R.A.(N.S.) 184, 138 N. W. 281 (liability policy against loss by reason of operation of assured's automobile and against loss by reason of the liability imposed by law upon assured for damages on account of bodily injuries, or death accidentally suffered by any person or persons by reason of the maintenance or use within certain territorial limits of assured's automobile). See also Taxicab Motor Co. v. Pacific Coast Casualty Co. 73 Wash. 631, 132 Pac. 393. See subdiv. (k) herein.

[4] Campbell v. Maryland Casualty

Under a Michigan decision payment by assured of the loss is not essential to liability or recovery under contract of indemnity against liability for damages although it is essential when the indemnity is merely against damages.[5] And in South Carolina if the insurance does not indemnify against loss but against liability for damages for accidental injuries to employees, neither payment of the loss nor of any part thereof is a prerequisite to recovery.[6] Again, if the policy under its conditions is not merely one of indemnity but an agreement to assume and pay assured's liability, the payment of the judgment rendered against him in the employee's accident suit is not a prerequisite to an action against insurer, for it may be maintained after the rendition of said judgment.[7] So a contract insuring an employer from liability for claims for personal injuries to his employees is a contract of indemnity, and payment by the employer of a judgment obtained against him is not a condition precedent to the assurer's liability.[8] And payment of the amount found due against insured is not essential under a policy indemnifying against liability, damages for bodily injuries sustained by operation of a street rail-

Co. 52 Ind. App. 228, 97 N. E. 1026, 41 Ins. L. J. 1097, one judge dissenting.

[5] Stephens v. Pennsylvania Casualty Co. 135 Mich. 189, 97 N. W. 685, 33 Ins. L. J. 180 (in this case the condition was "against legal liability of the assured for injury to or death of persons, and all legal liability arising or accruing therefrom for loss of service, funeral expenses, and medical attendance, being the result of casualties occurring by reason of the operation of" etc.; also that "the indemnity hereby provided for shall not be payable until the loss or damage has been adjusted and settled by the company," etc. The action here, however, was to recover costs and interest on the costs on the judgment). In support of the text statement the court, per Grant, J., *cites* the following cases:

*California.*—McBeth v. McIntyre, 57 Cal. 49.

*Minnesota.*—Anoka Lumber Co. v. Fidelity & Casualty Co. 63 Minn. 286, 30 L.R.A. 689, 65 N. W. 353.

*New York.*—Gilbert v. Wiman, 1 N. Y. 550.

*Oregon.*—Fenton v. Fidelity & Casualty Co. 36 Ore. 283, 48 L.R.A. 770, 56 Pac. 1096.

*South Carolina.*—Pickett v. Fidelity & Casualty Co. 60 S. Car. 477, 38 S. E. 160, 629.

*Wisconsin.*—Hoven v. Employers' Liability Assurance Corp. 93 Wis. 201, 32 L.R.A. 388, 67 N. W. 46.

[6] Pickett v. Fidelity & Casualty Co. 60 S. Car. 477, 38 S. E. 160, 629.

[7] Anoka Lumber Co. v. Fidelity & Casualty Co. 63 Minn. 286, 30 L.R.A. 689, 65 N. W. 353 (policy here insured against liability for injuries to employees and provided that insurer might settle any loss and have control of any legal proceedings against assured for such injuries, that assured should not settle such claims without insurer's consent; also that no action should be brought on the policy after the period in which one might be brought by the employee against the employer, unless a suit was pending against the employer when that time expired).

[8] Hoven v. Employer's Liability Assurance Co. 93 Wis. 201, 32 L.R.A. 388, 67 N. W. 46.

road.[9] Nor is payment of a judgment by an injured teamster against insured, a condition precedent to an action by assured against assurer, where the policy indemnified assured against loss imposed upon him by law for injuries to third persons; and the claim that the liability of assured thereunder was limited to loss actually sustained and paid will not be sustained where the policy is not in evidence.[10]

(p) *Same subject: payment with borrowed money.*—A payment is sufficient although made with borrowed money furnished upon security and for which insured remains indebted, for in such case assured pays its own money and it is no concern of insurer that a third party creditor may eventually suffer; and this applies where the contract is to indemnify against actual loss and not against liability alone so that assured cannot recover except upon proof that it has suffered actual loss in the payment of the judgment against it.[11]

(q) *Same subject: payment by note or check: notes of insolvent or receiver.*—Payment and satisfaction of a judgment are made by the execution and delivery of promissory notes where the transaction is in good faith.[12]

Under a casualty insurance policy providing that no action shall lie against the company unless brought by the assured to reimburse him for loss actually sustained and paid in satisfaction of a judgment recovered, payment and satisfaction of the judgment may be made by the assured by the execution and delivery of promissory notes, if executed in good faith and so accepted by the judgment creditor; and thereupon a cause of action accrues in favor of the assured and against the company.[13] And where the transaction is in good faith and the judgment against assured is extinguished, a payment in cash is unnecessary, but may be made by note, and this applies where, even though the policy stipulated that the loss be "paid in money," insured made its note in an amount sufficient to pay the judgment and costs and discounted

[9] Fidelity & Casualty Co. v. Fordyce, 64 Ark. 174, 41 S. W. 420, 27 Ins. L. J. 233.

[10] Lewintham v. Travelers' Ins. Co. 113 N. Y. Supp. 1031.

[11] West Riverside Coal Co. v. Maryland Casualty Co. 155 Iowa, 161, 48 L.R.A.(N.S.) 195n, 135 N. W. 414, 41 Ins. L. J. 1102. *Citing* Wilson v. Smith, 23 Iowa, 252; Lyon v. Northrup, 17 Iowa, 314; Kennedy v. Fidelity & Casualty Co. 100 Minn. 1, 117 Am. St. Rep. 658, 10 Ann. Cas. 673, 9 L.R.A.(N.S.) 478 and note, 110 N. W. 97; Seattle & San Francisco R. & Nav. Co. v. Maryland Casualty Co. 50 Wash. 44, 18 L.R.A.(N.S.) 121, 96 Pac. 509.

[12] Seattle & San Francisco R. & Nav. Co. v. Maryland Casualty Co. 50 Wash. 44, 18 L.R.A.(N.S.) 121, 96 Pac. 509.

[13] Kennedy v. Fidelity & Casualty Co. 100 Minn. 1, 9 L.R.A.(N.S.) 478n, 110 N. W. 97.

it at bank, paid the judgment, and said note constituted valid claims against insured, and under agreed facts there is no collusion which could affect any modification of its liability therein.[14] So an unsecured promissory note not proven to have been given in bad faith and which is accepted by deceased's administratrix with the consent of the court, constitutes payment of the judgment against insured.[15] And even though there is a possibility that insured may become insolvent, or that it may compromise or settle for a less amount than that specified in the policy as indemnity, nevertheless there is a satisfaction of judgment and a loss within the policy, where assured in good faith gives its note for the amount and in full satisfaction of the judgment against it for personal injuries and obtains a release thereof, under a policy providing for reimbursement for loss actually sustained and paid in satisfaction of a judgment, etc.[16]

The execution, delivery, and acceptance of notes in compromise of the suit and the entry of satisfaction and release of judgment are sufficient to preclude a defense, in a suit against insurer, that the same was prematurely brought, in that such facts did not constitute payment; another point closely connected with the above was also urged in defense and that was based upon the facts that it appeared that notes given in satisfaction and release of the judgment were by order of court, obtained at request of the guardian of the heirs of the employee, compromised for a certain sum which was paid. The order authorized the guardian to compromise the *judgment*. It was held, on this point, that the reference to a *judgment* in the order instead of to the notes was clearly an inadvertence for the judgment had been settled and compromised long before said order of court was made, and therefore the claim that the giving of the notes in payment of the judgment was a mere subterfuge and that the transaction was not in good faith, was not sustained.[17]

The payment of a check and not the giving of the check itself

[14] Herbo-Phosa Co. v. Philadelphia Casualty Co. 34 R. I. 567, 84 Atl. 1093.

[15] Taxicab Motor Co. v. Pacific Coast Casualty Co. 73 Wash. 631, 132 Pac. 393.

[16] Seattle & San Francisco Ry. & Navigation Co. v. Maryland Casualty Co. 50 Wash. 44, 18 L.R.A.(N.S.) 121, 96 Pac. 509.

[17] Hill v. Maryland Casualty Co. 28 Cal. App. 422, 152 Pac. 953, 47 Ins. L. J. 222, s. c. 12 Cal. App. 461, 107 Pac. 707. (Stipulation was: "No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue").

is held to be that payment of the loss which is intended by the policy stipulation as a condition precedent to bringing suit.[18]

But where the policy is solely one of reimbursement the mere giving of its notes by an insolvent assured to one who has recovered judgment against it for an injury, and their immediate return in consideration of an assignment of an indemnity insurance policy, are not such a satisfaction of the judgment, although it is in fact marked satisfied, as to make enforceable the liability on the policy.[19] So when the giving to the employee of his note, by a receiver appointed in supplementary proceedings to collect a judgment against an insolvent employer for injury to his employee, is a mere subterfuge resorted to in order to nominally comply with the policy terms; it is not a satisfaction of the claim within the indemnity contract, which makes payment of loss in satisfaction of a judgment a prerequisite to action against insurer, and in such case the receiver has no standing to enforce the policy.[20]

(r) *Same subject: payment by vendee under bankrupt estate sale: trustee suffers loss.*—In case of the sale of a bankrupt's estate, with a condition that the vendee shall pay the judgment recovered by an employee against the trustee for personal injuries, the trustee suffers a loss for which insurer is liable within the meaning of an insurance policy indemnifying him against loss actually sustained and paid in money by the assured in satisfaction of the judgment although said vendee paid the judgment, since it may be inferred that the amount realized by the estate was lessened by the amount of the claim.[1]

[18] Harbor & Suburban Building & Savings Assoc. v. Employers' Liability Assurance Corp. Ltd. of L. Eng. 140 N. Y. Supp. 717, aff'd 143 N. Y. Supp. 1120, 159 App. Div. 900, aff'd 213 N. Y. 677, 107 N. E. 1078.

[19] Davies v. Maryland Casualty Co. 89 Wash. 571, L.R.A.1916D, 395, 154 Pac. 1116, 155 Pac. 1035.

[20] Stenbom v. Brown-Corliss Engine Co. 137 Wis. 564, 20 L.R.A. (N.S.) 956, 119 N. W. 308.

[1] Georgia Casualty Co. v. Bowron, 233 Fed. 89, 147 C. C. A. 159, L.R.A. 1916F, 876. Judgment for plaintiff in Bowron v. Georgia Casualty Co. 223 Fed. 673 aff'd ("The decree under which the bankrupt's property was sold expressly provided that the sale and conveyance of it should 'be subject to the condition that the court may retake and resell the property in case the purchaser or purchasers or assigns shall fail to pay any part of the purchase price remaining unpaid, or to comply with any order duly made by this court with respect to the making any payment which it is herein provided the purchaser or purchasers shall make, or to perform or discharge any contract or liability of the trustee which by the terms of this order the purchaser shall assume.' . . . The policy sued on inured to the benefit, not of James Bowron, the individual, but of the bankrupt estate which the court was administering and which was in his charge as the court's agent and trustee. It well may be

(s) *Same subject: waiver or estoppel.*[1a]—Although it is a condition precedent to recovery that payment be not made until after the trial of the issue, or that judgment be first rendered against insured and payment made, this condition may be waived.[2] And where the policy is solely one of reimbursement one who has undertaken to indemnify assured against loss because of judgments paid for accidents to employees estops itself from insisting on prepayment of judgment as a condition to its own liability by assuming the defense of the employee's action, so that the policy may be enforced when the judgment is entered against assured.[3] It is also held in Missouri that where through insurer's neglect to furnish an appeal bond insured is obligated to pay the judgment before final determination of the employee's suit by a court of last resort, insurer is estopped to insist on the policy terms requiring judgment to be affirmed by a court of last resort, also that it be paid as a condition precedent to bringing an action against insurer, and in such case where it is further stipulated that assured shall not voluntarily assume any liability nor, without insurer's written consent incur any expense except at its own cost, that the former need not furnish an appeal bond as it would by so doing incur a liability within the policy terms.[4] Again, if the policy insures against loss and not liability only, if neither insured nor his administrator has paid any part of the judgment obtained by the injured employee, insurer is not liable

inferred that the net amount realized from that estate was lessened—in other words, that the estate was subjected to a loss—by selling it conditionally and subject to the charge against it of the amount to be recovered as damages for a personal injury that had been sustained before the sale was made, instead of selling it unconditionally and free from any encumbrance. But aside from that consideration, a vendor who brings about the payment of a demand of a third party against him by making it a charge upon the thing sold, which is worth greatly more than the amount of the demand so provided for, may well be regarded as in reality the payer of that demand, though the money used in making the payment is supplied by the conditional owner of the thing sold, who is practically coerced into making the payment for the vendor to save himself. In such case it is at least the vendor who supplies the means of bringing about the payment, a result of the orders of the court above referred to and what was done under them was to put the bankrupt estate, represented by the assured, its trustee, in the position of such a vendor."—Walker, Cir. J.).

[1a] See subdiv. (a), (k) herein.

[2] Dunham v. Philadelphia Casualty Co. 179 Mo. App. 558, 162 S. W. 728; Century Realty Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co. 179 Mo. App. 145, 161 S. W. 624.

[3] Davies v. Maryland Casualty Co. 89 Wash. 571, L.R.A.1916D, 395, 154 Pac. 1116, 155 Pac. 1035.

[4] Rochester Mining Co. v. Maryland Casualty Co. 143 Mo. App. 555, 128 S. W. 204.

to said administrator even though insurer has, in conformity with the contract stipulations, defended the suit, for such act of defending does not operate as an estoppel; and in such case there is nothing which the judgment creditor can attach for there is no liability to insured's administrator.[5] In another case insurer unsuccessfully defended the employee's accident suit and then repudiated all liability under the policy on account of alleged breaches and consented to a substitution of attorneys in place of its attorneys should assured desire to continue the defense, whereupon assured without paying the judgment instituted an action against insurer under the policy. It was held that the repudiation of liability by insurer was not a waiver of a condition that no action shall be brought by assured unless for loss actually sustained and paid in money by assured in satisfaction of a judgment after trial of the issue; also that the doctrine of waiver is not peculiar to insurance, to constitute a technical waiver there need be only an intention to waive either expressly or plainly to be inferred from the circumstances; furthermore that the doctrine of estoppel rested upon a different basis and had no application here, for there was no pretense that insured was misled by assurer's conduct, and a refusal to pay did not indicate an intention to waive a condition which only had to be complied with in case of such refusal.[6]

(t) *Insolvency of assurer or assured.*—So insolvency constitutes an involuntary breach of contract and operates as a waiver of such a condition as that above stated and relieves assured from complying therewith or with any other policy condition; and it follows that since on liquidation insurer repudiated its contract to defend suits, such provision cannot be set up to defeat claims and all such claimants are entitled to share in the distribution of assets whether said claims against insurer were based upon judgments rendered against insured before the insolvency decree, or those where the cause of action arose before the order of liquidation and were settled thereafter; or those where the accident occurred prior thereto but the claims were thereafter brought against it and settled.[7]

[5] Fidelity & Casualty Co. of N. Y. v. Martin, 163 Ky. 12, 173 S. W. 307. See subdiv. (k) this section.

[6] Appel v. Peoples Surety Co. 132 N. Y. Supp. 200, 148 App. Div. 70, 41 Ins. L. J. 589, s. c. 128 N. Y. Supp. 200, 143 App. Div. 931, s. c. 121 N. Y. Supp. 1116 (the last part of the above text is in substance the opinion of the court, per Miller, J., *distinguishing* St. Louis Dressed Beef Co. v. Maryland Casualty Co. 201 U. S. 173, 26 Sup. Ct. 400, 50 L. ed. 712; O'Connell v. New York, New Haven & Hartford R. Co. 187 Mass. 272, 72 N. E. 979). See also White v. Maryland Casualty Co. 123 N. Y. Supp. 840, 139 App. Div. 279, 39 Ins. L. J. 1357.

[7] Empire State Surety Co., In re

If assured is forced into bankruptcy and payment of judgments against it enjoined, the policy condition is held not to apply which stipulates that no action shall lie against insurer respecting any loss unless brought by assured himself to reimburse him for loss actually sustained and paid in satisfaction of a judgment.[8]

(u) *Final judgment: "court of last resort:" effect and conclusiveness of judgment.*—If assurer is to have control of the defenses and it is not to be liable until the loss has been adjusted and settled by it and the right of appeal on assurer's part is absolute under the contract the final judgment determines the liability.[9] So a judgment against insured which is appealed from by assurer is held a "final judgment."[10] And if assurer, having assumed control of the case against insured, neglects to appeal, it cannot seriously urge that there has been no adjudication by a court of last resort.[11]

A judgment by default after insurer has withdrawn from the case and disclaimed liability on the ground of failure to give the required notice of the accident is a "judgment of a court of last resort" and where insured pays such judgment it is a judgment paid and satisfied and insurer is liable.[12]

A judgment against an insured subcontractor obtained by a pedestrian is res judicata as to insurer's liability where the latter has failed to deny liability.[13] And where the controversy turns upon the question whether the employee was within the classification covered by the policy terms, and, a jury trial being waived, the court without special findings enters judgment for a recovery, it is conclusive of the facts determined, unless the lack of evidence to sustain the finding has been suggested by a request for a ruling thereon, or a motion for judgment, or some motion proper to present to the court the issue of law so involved, before close of the trial.[14] A judgment, however, which is recovered

(Hasbrouck v. Buffalo House Wrecking & Salvage Co.) 214 N. Y. 553, 108 N. E. 825, aff'g 150 N. Y. Supp. 567, 165 App. Div. 135, appealed by permission in 151 N. Y. Supp. 1114.

[8] Beacon Lamp Co. v. Travelers' Ins. Co. 61 N. J. Eq. 59, 47 Atl. 579.

As to parties to action: employee against insurer: insolvency of assured, see § 3658d, herein.

[9] Stephens v. Pennsylvania Casualty Co. 135 Mich. 189, 97 N. W. 685, 33 Ins. L. J. 180.

[10] Cannon Manufacturing Co. v. Employers' Indemnity Co. 161 N. Car. 19, 76 S. E. 536.

[11] Rosenbloom v. Maryland Casualty Co. 137 N. Y. Supp. 1064, 153 App. Div. 23, 42 Ins. L. J. 180.

[12] Tighe v. Maryland Casualty Co. 218 Mass. 463, 106 N. E. 135, 44 Ins. L. J. 603.

[13] Creem v. Fidelity & Casualty Co. of N. Y. 126 N. Y. Supp. 555, 141 App. Div. 493, 40 Ins. L. J. 600, s. c. 116 N. Y. Supp. 1042, 132 App. Div. 241.

[14] Pennsylvania Casualty Co. v.

against assured in an action for injuries sustained both prior and subsequent to the insurance, will be insufficient where it does not appear therefrom which injury was the one for which damages were recovered and therefore whether or not the injury was one covered by the policy.[15]

Insurer is also obligated to pay when the liability of assured is finally determined.[16] But assurer does not become obligated to pay so much of the judgment against assured as does not exceed the stipulated indemnity as soon as the suit against the latter is finally determined on appeal when an appeal is taken.[17]

(v) *Judgment: collateral attack: fraud and collusion.*—A judgment of record in a suit by an employee against assured cannot be collaterally attacked, in a suit by said employee against assured and assurer on the ground that insured and insurer had colluded to defraud said employee in procuring such judgment. The court, per Martin, D. J., said: "I recognize the principle of law that fraud may vitiate a contract, and extrinsic fraud may vitiate even a judgment of a court of competent jurisdiction under proper proceedings brought for that purpose, but not by collateral proceedings." [18]

(w) *Judgment or payment: whether analogous to proofs of loss.*—It is declared in a New Jersey case that the judgment resembles the proof of loss required to be furnished an ordinary insurer against fire, etc., as a prerequisite to liability.[19] But it is held that in so far as the requirement of the payment of a loss actually sustained, etc., is required as a condition precedent to suing assurer, and whether or not there has been a waiver of such condition by the repudiation by assurer of liability after unsuccessfully defending the employee's accident suit against assured, it is declared that "The cases in which the filing of proof of loss and the like have been held to be waived by an absolute repudiation of liability have no application. Proofs of loss are required to enable

Whiteway, 210 Fed. 782, 127 C. C. A. 332, 43 Ins. L. J. 663.

[15] Reigler v. Sherlock, 66 Ark. 215, 49 S. W. 1080.

[16] Fidelity & Casualty Co. v. Fordyce, 64 Ark. 174, 41 S. W. 420, 27 Ins. L. J. 233.

[17] Fidelity & Casualty Co. v. Fordyce, 64 Ark. 174, 41 S. W. 420, 27 Ins. L. J. 232.

[18] Morris v. Travelers' Ins. Co. (U. S. C. C.) 189 Fed. 211, 40 Ins. L. J. 2054. *Citing* United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; French v. Raymond, 82 Vt. 156, 137 Am. St. Rep. 994, 72 Atl. 324, and adding in this connection: "This principle of law is too familiar to require the citation of further authorities."

As to impeaching judgment, see §§ 3487, 3529 herein.

As to defense of fraud and deceit, see §§ 3732 et seq. herein.

[19] Ross v. American Employers' Liability Ins. Co. 56 N. J. Eq. 41, 38 Atl. 22.

the insurer to adjust the loss, and of course, an unqualified refusal to pay indicates an intention to waive the doing of the thing which is thereby rendered useless." [20]

(x) *Action by assurer against third person whose negligence caused employee's injury.*—In case assurer has paid the loss and seeks recovery from a third person whose negligence occasioned the injury to the employee and consequent loss to assured under his policy, there is no merit in the contention by way of defense that it does not appear that judgment was actually taken against assured, thereby raising the implication that the liability was settled without judgment, for even if actual payment of the liability was a prerequisite to recovery in an action of this character, the only effect of the judgment would be its value as evidence to establish liability.[1]

(y) *Pleadings.*—The complaint should sufficiently set forth the hazards undertaken or the terms of the policy, and where this is not done or the policy annexed a general averment is demurrable, where the complaint declares that insurer contracted to insure plaintiff "on certain terms and conditions in said contract of insurance specified" against the "hazards enumerated and set forth upon a certain premium schedule to said contract of insurance annexed." [2] A motion by assured for leave to file a supplemental answer by setting up a settlement between assured and the injured employee of the latter's pending suit contrary to the policy stipulation forbidding such settlement without assurer's consent is properly refused where the facts alleged do not constitute a prima facie showing that they are material to the defense and occurred after the prior pleading or that at that time assured was ignorant thereof; nor is it error to refuse a motion to conform the pleadings to facts alleged to have been proven as to said compromise by assured and the employee of the latter's damage suit where such amendment would substantially change the defense contrary to the code provision governing the same.[3] An answer in an action to recover from insurer the loss on a judgment paid by insured need not allege that the injury to the employee was contributed to by a violation of law where the defense relied on was that the injured person was a minor employed in violation

[20] Appel v. Peoples' Surety Co. 132 N. Y. Supp. 200, 148 App. Div. 70, 41 Ins. L. J. 589. Miller, J. s. c. 128 N. Y. Supp. 1112, 143 App. Div. 931, s. c. 121 N. Y. Supp. 1116.

[1] Travelers' Ins. Co. v. Great Lakes Engineering Works Co. 184 Fed. 426, 107 C. C. A. 20, 36 L.R.A.(N.S.) 60, 40 Ins. L. J. 1078. See §§ 3579b, 3658h herein.

[2] Todd v. Union Casualty & Surety Co. 74 N. Y. Supp. 1062, 70 App. Div. 52.

[3] Pickett v. Fidelity & Casualty Co. 60 S. Car. 477, 38 S. E. 160, 629; under Code Civ. Proc. sec. 194.

of law contrary to the provisions of the policy exempting assurer in such case.[4] If a waiver is relied on, a complaint is insufficient where it neither properly avers performance nor sets forth the facts and circumstances which constitute the claimed waiver.[5] So a complaint in an action against assurer and assured, brought by an employee to recover for injuries sustained by him while in assured's employ is insufficient and too indefinite where it alleges fraud, collusion, and negligence between assured and assurer, but no particular act is set forth as having been performed by any particular person acting for and in behalf of said insured and assurer and there is no averment as to the persons, officers, or counsel of either assurer or assured who had to do with the claimed deceit, while the only specific act alleged is that a stipulation upon which the judgment was rendered for a certain sum paid in satisfaction was fraudulently procured by false representations to be signed by said employee, a minor.[6]

§ 2801. **"Personal injury and loss of human life" caused by explosion: recovery back of money paid therefor by insured.**—If the insured contracts for indemnity for money paid out by him, for which he is liable "for personal injury and loss of life" when caused by said boilers or any machinery of whatever kind connected therewith and operated thereby, and if an explosion is directly caused by reason of the fact that a steam pipe connected with the boilers heated and operated a starch kiln, the assurer is liable for the amounts paid out by assured for loss of life and injuries caused by said explosion.[7]

§ 2802. **Personal injuries to several by one cause constitutes separate accidents and not one accident.**—If one cause operates upon several at one time, this is not one accident, but each individual injured is a separate accident, within the meaning of an insur-

[4] Wind River Lumber Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co. 196 Fed. 340, 116 C. C. A. 160.

[5] Todd v. Union Casualty & Surety Co. 74 N. Y. Supp. 1062, 70 App. Div. 52.

[6] Morris v. Travelers' Ins. Co. (U. S. C. C.) 189 Fed. 211, 40 Ins. L. J. 2054.

[7] Chicago Sugar Refining Ins. Co. v. American Steam-Boiler Co. 48 Fed. 198, 21 Ins. L. J. 59. It will be noted that in stating the above rule we have used the words "if an explosion be directly caused by," etc. In the case cited and relied on the explosion was held to have been "directly" caused, but if there is any doubt upon the point whether it was "directly" caused or not it would not change the rule in the text, for the principle is undoubtedly correct. This case is reversed as to the point that under the facts the fire was not the proximate cause of the loss, but that the explosion was merely an incident of the fire; 57 Fed. 294, 6 C. C. A. 336, 21 L.R.A. 572. See chapter herein on excepted risks and losses by fire.

ance contract in a specified sum against liability to pay claims for personal injuries or damages caused by accidents by vehicles of assured, and the amount specified applies to each separate accident, and not to all of them as one accident.[8]

**§ 2803. Personal injuries to persons not employees: against liability or for losses paid.**[9]—(a) *Generally.*—Protection to a person against loss or liability by reason of personal or bodily injury to others than employees is afforded under various forms of insurance or indemnity contracts.[10] And the right of assured to recover thereunder must depend both upon the terms or stipulations of the particular contract and upon the facts involved and properly before the court.

A policy insuring against loss for injuries, fatal or otherwise, to employees will be construed to also cover loss by reason of liability to the public where there is an agreement attached to the policy extending liability to include that of insured for personal injuries only to the public, caused by said insured or its workmen.[11] If the indemnity under policies issued to employers and

[8] South Staffordshire Tramways Co. v. Sickness & Accident Assurance Assoc. 60 L. J. Q. B. 47, 63 L. T. 807, [1891] 1 Q. B. 402, 55 J. P. 168.

[9] See § 2800, subdiv. (a) herein.

[10] In a Massachusetts case the court makes the following statement and classification: "The *'horse or vehicle policies'* have not been issued as separate contracts, but have been either attached to employer's liability policies, or included in the outside liability policies. By this contract the employer is insured against claims for compensation for accidental personal injuries to others than employees caused by any horses, teams or vehicles owned by the assured, if engaged in his business and in charge of his employees, the injuries being those for which assured is legally liable.

"The *'elevator policies'* are issued as separate contract, or an elevator clause may be inserted in a general liability policy. By the elevator policy or clause the petitioner insures against claims for compensation for accidental personal injuries caused to persons by the elevator of the assured, or its appurtenances, and for which injuries he shall become liable.

"The *'general liability policies'* insure against claims for accidental personal injuries to any persons other than employees or persons injured by elevator, for which assured may be legally liable in his capacity as landlord or tenant of certain described premises, and, as noted, may also include an elevator clause.

The *'outside liability policies'* are issued to builders and contractors, and insure against claims for compensation for accidental personal injuries to workmen, employed by other contractors, and to the public, caused by the assured and by his own workmen, but not caused by a subcontractor or his workmen; and, as noted, the horse and vehicle clause is sometimes also inserted in these policies." Employers Liability Assurance Corp. v. Merrill, 155 Mass. 406, 407, 29 N. E. 529, per Barker, J. (italics are ours) a case where action was to determine whether petitioner was illegally issuing certain forms of policies.

[11] Creem v. Fidelity & Casualty Co.

railroad companies, is for damages for which they may be legally charged for accidents, etc., the liability depends not upon the intrinsic character of the accident, but the test is whether or not a judgment shall be rendered thereon against insured. In such case it is declared that the judgment resembles the proof of loss to be furnished an ordinary insurer against fire, etc., before suit as prerequisites to liability. Another point is that the liability relates back to the time of the accident itself, even though it is legally fixed at the time of the judgment.[12]

If the contract is against loss "arising solely" from insurers "*contingent liability*" as owner, from common law or any statute, for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered by any person or persons during the construction of a certain building, and resulting from the negligence of any contractor or subcontractor engaged in construction, and the work is to be done by contract at the risk of the contractor or subcontractors, but assurer does not assume any liability for losses on account of bodily injuries suffered by any person or persons by reason of the negligence of any contractor or subcontractor, the words "contingent liability" in this connection mean that the loss for which assured was to be indemnified was that which arose, not through its own negligence, but only that loss for which it was contingently liable as owner for negligent acts of an independent contractor or those under him, and the word "contingent" is construed to be a liability which depends upon an uncertain event. In other words insurer incurred no liability and was not obligated to indemnify assured unless someone, during the construction of the building by an independent contractor, actually suffered bodily injury through the negligence of the contractor or

of N. Y. 126 N. Y. Supp. 555, 141 App. Div. 493, 40 Ins. L. J. 600, s. c. 116 N. Y. Supp. 1042, 132 App. Div. 241.

[12] Ross v. American Employers' Liability Ins. Co. 56 N. J. Eq. 41, 38 Atl. 22. There were two forms of policies in this case. In one, insurer issued an "*Employers' Liability Policy*" providing that, "said company will pay to the insured all damages with which the insured may be legally charged under the common law, or any statute (not exceeding the amount hereinafter limited) for, or by reason of, any accidental injuries, fatal or otherwise, happening to any employee or employees of the insured," etc. A policy was also issued to railroads called a "*Railroad Liability Policy*" which stipulated: "That said company will pay to the insured, or their legal representatives, all damages with which the insured may be *legally charged* or which the insured may be required to pay (not exceeding the amount hereinafter limited) for or by reason of any liability on account of injuries inflicted upon the person or property of any person or persons whomsoever while traveling on the railroad of the insured."

a subcontractor for which negligence assured was only contingently liable as owner and in nowise directly liable as causer or doer of the negligent act.[13]

(b) *Injuries, risks, or losses covered.*[13a]—Assured may sustain a loss from liability to the public on account of personal injuries caused by them, or their workmen, and such loss be brought within the terms of the policy by circuity of action and the case be as plainly within the policy terms as though the injured person's suit had been brought against them in the first instance.[14] And if a policy indemnifies assured, who are performing work for a city under contract, against loss from liability imposed by law upon them on account of bodily injuries accidentally suffered by any person while in or about the construction of said work, the indemnity contemplated covers any loss that assured is compelled to pay to said city, a stranger to the contract of insurance, because of damages to injured persons from negligence: as where said city is sued by the injured person and a judgment is recovered against it and paid by it, and the amount thereof is deducted from the sum due insured under its contract with the city. The contention, therefore, will not be sustained that in such case the policy contemplates indemnity only against direct actions by injured persons against insured, and not losses for which it might suffer

[13] American Cereal Co. v. London Guarantee & Accident Co. 211 Fed. 96, 138 C. C. A. 24, 43 Ins. L. J. 834. *Citing* the following cases:

*United States.*—Allen v. Gilman, McNeil & Co. 145 Fed. 881, 76 C. C. A. 265, 7 L.R.A.(N.S.) 958.

*Illinois.*—London Guarantee & Accident Co. v. American Cereal Co. 251 Ill. 123, 95 N. E. 1064.

*Iowa.*—Cushman v. Carbondale, 122 Iowa, 656, 98 N. W. 509.

*Kansas.*—Carter v. Aetna Life Ins. Co. 76 Kan. 275, 11 L.R.A.(N.S.) 1155, 91 Pac. 178.

*Maine.*—Frye v. Bath Gas & Electric Co. 97 Me. 241, 59 L.R.A. 444, 94 Am. St. Rep. 500, 54 Atl. 395.

*Massachusetts.*—Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981.

*New York.*—Rosenbloom v. Travelers' Ins. Co. 78 N. Y. Supp. 1135, 38 Misc. 744.

*Utah.*—State (ex rel. Breeden) v. Sheets, 26 Utah, 105, 72 Pac. 334.

See also Words & Phrases, 1501.

[13a] See § 2800, subdiv. (a) herein.

[14] Creem v. Fidelity & Casualty Co. of N. Y. 126 N. Y. Supp. 555, 141 App. Div. 493, 40 Ins. L. J. 600 (s. c. 116 N. Y. Supp. 1042, 132 App. Div. 241). "The recoveries in the Johnston suits were upon the theory that Kate Johnston was injured by falling over an obstruction in the street, caused by the assured in the performance of a contract between them and the Phoenix Bridge Co. (Johnston v. Phoenix Bridge Co. 44 App. Div. 581, 60 N. Y. Supp. 947, aff'd 169 N. Y. 581, 62 N. E. 986), wherefore the latter recovered in the suit on the Bernard Johnston judgment, on the principle that one who has been held legally liable for damages, which another ought to pay, is entitled to indemnity from the latter (Phoenix Bridge Co. v. Creem, 102 App. Div. 354, 92 N. Y. Supp. 855). The right to indemnity in such case exists independently of contract. Oceanic Steam Navigation Co., Ltd.

by reason of being liable over to said city for any sum it was compelled to pay because of damages to injured persons in the negligent performance of the work, for the city's liability in such case for damages for said injury does not lessen the liability "imposed by law upon the assured for damages" to persons injured because of assured's negligence in doing the work contracted for with the city, even though damages are recovered against the latter in the first instance.[15]

Replacing with a new one a roof destroyed by fire, constitutes making such repairs as are necessary for the care of the premises so as to render assurer liable to insured for injuries suffered by a third person who is on the premises during said repairs, where the policy agrees to indemnify assured against liability for bodily injuries occurring on its premises.[16] Insurer is also liable for injuries suffered by a pedestrian occasioned by negligence of assured's workmen while erecting a fire escape over a theater, where such negligent acts are not within a policy exception from liability covering assured's noncompliance with a city ordinance affecting the safety of persons.[17] And the fact that a third person on whose land employees of an insured telephone company, who were engaged in putting up lines, refused permission to continue the trimming of trees on said land unless a tree already cut was trimmed as he desired, does not preclude recovery against insurer, where a person not employed by insured was accidentally killed

v. Compania Transatlantica Espanola, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685, and cases *cited* by Follett, C. J., particularly Gray v. Boston Gaslight Co. 114 Mass. 149, 19 Am. St. Rep. 324. By cercuity of action, then, these plaintiffs have sustained a loss from liability to the public on account of personal injuries, caused by them or their workmen, and the case is as plainly within the terms of the policy as though the Johnston suits had been brought in the first instance against them." Id. per Miller, J.

[15] Kibler v. Maryland Casualty Co. 74 Wash. 159, 132 Pac. 878, 42 Ins. L. J. 1390.

[16] Harbor & Suburban Building & Savings Assoc. v. Employers' Liability Assurance Corp. Ltd. of L. Eng. 140 N. Y. Supp. 717, aff'd 143 N. Y. Supp. 1120, 159 App. Div. 900, aff'd 213 N. Y. 677, 107 N. E. 1078. See Kresge v. Maryland Casualty Co. 154 Wis. 627, 143 N. W. 668, 43 Ins. L. J. 146. See §§ 1708, 2191 et seq., 2800, subdivs. (d), (e) herein.

*Under a manufacturers' public liability policy.*—The questions are for the jury concerning what repairs are "usual and necessary to the care and maintenance of the premises;" also what constitutes "all usual or special operations incident thereto" or "unusual alteration or repair of premises" as applied to the repair of a platform on the premises; and in such case it is not error to refuse a nonsuit or direct a verdict. John Summer Faucet Co. v. Commercial Casualty Co. — N. J. —, 99 Atl. 342. See § 2632a herein.

[17] W. N. Kratzer & Co. v. Pennsylvania Casualty Co. 238 Pa. 515, 86 Atl. 303.

while said tree was being trimmed, for in such case the accident will be held to have been suffered within a provision of a policy indemnifying assured against damage to any person not employed by assured from the operation of the telephone plant and limiting loss from liability to injuries happening during the "immediate doing of the work of construction." [18] So where the policy is one of indemnity against loss to assured arising from claims for personal injuries to others than employees on assured's premises, it covers loss consequent upon the killing of a person by a car run upon a tramway of the kind usual and customary in assured's business where it also appears that assurer knew of the use of said tramway, had examined the premises and had paid one claim arising there and had never protested that the operation of this tramway was not within the policy terms; nor can it be successfully insisted in such case that the operation thereof is within an excepted liability for loss "caused by any draught or driving animal or vehicle, or any person in charge thereof." [19] Assurer is also liable for injuries sustained by commercial travelers while being transported over assured's private railroad, used by them and assured, in direct connection with its business, said method of conveyance being assented to by them and assured; and this applies where the policy insures a lumber company against loss from liability to every person who should sustain accidental bodily injuries under circumstances imposing on assured a common law or statutory liability; and even though liability was limited or excepted by the stipulation that the insurance covered accidents upon the railroad only when it was used for assured's own lumbering purposes, assured was not aided thereby where said travelers had come to assured's premises to transact business with it in the matter of taking orders to supply its stores with stock or merchandise necessary to be kept for sale to its agents and workmen.[20]

Assurer is not released from liability nor the policy forfeited where assured is sometimes driven to business in a buggy not within the protection of the policy, the application for which specified the vehicles covered and the insurance is against liability for bodily injury caused by the horses or vehicles used by insured in his business, conditioned to be avoided by failure to report an increase in the number of vehicles unless an additional

[18] Camden & Atlantic Telephone Co. v. United States Casualty Co. 227 Pa. 242, 75 Atl. 1077.

[19] South Knoxville Brick Co. v. Empire State Surety Co. 126 Tenn. 402, 150 S. W. 92, 42 Ins. L. J. 192.

[20] Travelers' Ins. Co. v. Wild River Lumber Co. 83 Fed. 977, 28 C. C. A. 127, 50 U. S. App. 256, 27 Ins. L. J. 428.

premium is paid.[1] If the policy is issued to the members of a partnership for loss resulting from casualties caused by the operation of their automobile, it covers not only losses as to the partnership funds, but also such losses as either firm member may sustain as individuals through the operation of said automobile by another partnership composed of said members and another to whom the car had been loaned.[2] Again where the owner of a motor car through his negligence causes his guest to suffer injury, the fact that said owner is entitled to be reimbursed under an insurance policy for loss sustained if recovery is had against him, does not deprive the court of jurisdiction of an action to recover damages for such injury, even though insurer is not a party and his rights are affected and the action might not have been brought except for the fact that insured was thus protected.[3]

(c) *Injuries, risks, or losses not covered.*[4]—An injury to a trespasser on insured's premises is not within a policy against loss from liability imposed by law on insured for damages for injuries suffered by persons who are not employees while in or about or during the prosecution of insured's work.[5] And if the alleged accident to another than an employee for which assured has been held liable is not within the terms of the policy in that it did not occur within or upon its premises at the location described or the premises or ways adjacent thereto, recovery from insurer is precluded even though to the description of the location is added the words, "and elsewhere in service of employers," for these words are held not to extend the risk to all places where insured was engaged in any business but confined the same to the location described, notwithstanding the policy included "all operations incidental to the business" "and covered accidental injuries suf-

[1] Gray v. Standard Life & Accident Ins. Co. 170 Mass. 558, 49 N. E. 921.

[2] Hartigan v. Casualty Co. of America, 161 N. Y. Supp. 145, 97 Misc. 464.

*When insurance of owner and driver of automobile not permitted.*—A policy "against loss from liability imposed by law for damages and expenses incurred on account of bodily injuries, including death resulting therefrom, accidentally suffered by any person or persons by reason of the maintenance, use, loading and unloading of" said automobile and against loss from "liability imposed by law on the insured for damages to property, and resulting from any accident caused directly by" said automobile. See American Fidelity Co. v. Bleakley, 157 Iowa, 442, 138 N. W. 508, 42 Ins. L. J. 166; Code Supp. 1907, § 1709, subd. 5, cl. 1, 2, see §§ 338b, 338c herein.

[3] Fitzjarrell v. Boyd, 123 Md. 497, 91 Atl. 547.

[4] See § 2800, subdiv. (a) herein.

[5] Henderson Lighting & Power Co. v. Maryland Casualty Co. 153 N. Car. 275, 30 L.R.A.(N.S.) 1105, 69 S. E. 234, 40 Ins. L. J. 127.

fered by persons other than employees" "by reason of the operation of the trade or business described." Another point in the case holding as above was, however, that the injury sustained was consequent upon an assault although the decision rested upon what is above stated.[6] In case a statute gives a new right of action to personal representatives where death is suffered and not a right of action to deceased which survives, cases of instantaneous death without conscious suffering through injuries for which assured is responsible are not covered by a policy insuring a railroad company against loss for liability to persons who accidentally sustain personal injuries while traveling on its road under circumstances which impose upon assured a common-law or statutory liability.[7] Again, if insurer contracts for indemnity to assured for losses paid persons not employees for injuries sustained by reason of accidents resulting from the use of particular kinds of vehicles specified, the insurer is not liable for losses occasioned by the use of a vehicle which is not one of the kind designated, although under particular circumstances it is customary to use such vehicles temporarily.[8]

An insured corporation cannot by voluntarily defending an action against its stockholder, to which it was not a party, and paying the judgment, make insurer indemnify such stockholder against the consequences of his negligence and for which loss insured would not otherwise be liable; and this applies where the policy was issued to reimburse insured against loss actually sustained and paid in money after trial of the issue in satisfaction of final judgment, consequent upon injuries to persons or property caused by insured's automobile, and while insured's chauffeur was conveying therein said stockholder and others to certain places the property of another was injured.[9]

(d) *Landlord's contingent policy.*—In the case of a landlord's contingent policy which indemnifies the owner of the building, who is not in control or occupation thereof, for sums paid in

[6] Graustein & Co. v. Employers' Liability Assurance Corp. Ltd. of L. 214 Mass. 421, 101 N. E. 1073.

[7] Worcester & S. St. R. Co. v. Travelers' Ins. Co. 180 Mass. 263, 57 L.R.A. 629, 91 Am. St. Rep. 275, 62 N. E. 364.

[8] Phillipsburg Horsecar Co. v. Fidelity & Casualty Co. of New York, 160 Pa. St. 350, 28 Atl. 823.

As to exception of liability for violation of law allowing a minor to drive auto in city contrary to ordinance and killing child by running over it, no recovery. See Royal Indemnity Co. v. Schwartz, — Tex. Civ. App. —, 172 S. W. 581.

[9] Rock Springs Distilling Co. v. Employers Indemnity Co. of Phila. 160 Ky. 317, 169 S. W. 730, 44 Ins. L. J. 704.

As to payment of judgment or loss in claim of injured person against insured, see § 2800, subdivs. (n) et seq. herein.

liquidation of claims by reason of personal injuries sustained because of defects in the building or the owner's neglect and which are chargeable to him at law, it appeared that at the time the policy was issued and at all times the building was in the possession of tenants; that a considerable portion of the cornice, on a quiet evening with only a little air stirring, fell and injured several pedestrians and insured settled the injured persons' claims and sued to recover the amount from insurer. It was expressly stipulated that the policy was issued with the understanding that assured was the owner of the property, but not in occupation or control of it, the actual occupation and control being in a lessee or lessees; and it was further agreed that insurer should not be responsible for any loss unless occasioned by some fault or neglect on the part of assured or chargeable to him by law notwithstanding that the property was leased or beyond his control. A distinction was made between "occupation" or "control," and "possession," and it was held that the former words related to the property and not merely to the roof or the cornice. It was found that the injuries received by pedestrians were caused by some fault or neglect on insured's part as to said cornice and that they were properly chargeable to it by law and a judgment for plaintiff was affirmed.[10]

(e) *Physician's liability policy.*—If assurer's liability, under a policy insuring a physician against loss from liability for bodily injuries or death suffered in consequence of error or malpractice by any employee assistant, is qualified by the words "while acting under" his "instructions," said words will not be given a meaningless construction by treating them as covering general instructions for thereby insurer's liability would be neither expanded nor restricted; accordingly assurer will not be held liable upon a judgment for damages against assured rendered by reason of a mistaken diagnosis by one of his assistants who acted in conformity only with prior general instructions prevailing under the contract between said assistant and assured, and the latter evidently was without knowledge of the case so treated, and had given no personal attention to the patient, but had left the entire matter of diagnosis and treatment to said assistant.[11]

(f) *Pleadings.*—A complaint is insufficient which alleges that assurer assumed his contract obligation and took charge and control of the defense until after a jury trial when it so carelessly, negligently and improperly conducted the same as to cause other

[10] De Mun Estate Corp. v. Frankfort General Ins. Co. — Mo. App. —, 187 S. W. 1125.

[11] Seay v. Georgia Life Ins. Co. 132 Tenn. 673, 179 S. W. 312.

defendants than assured to be discharged and relieved; that it abandoned the defense after said trial, notwithstanding assured's protest and notified assured that it would be required to conduct the same on its own account and at its own expense, disclaiming all liability; that in consequence thereof assured undertook said defense and incurred expenses in a certain amount and finally settled the action for a specified sum which was reasonable. In such case there is no estoppel unless assured was injured, and if assurer outside of its contract obligation assumed the defense of a personal injury action in which others were also directly liable with assured, the latter could not be injured since there could be no contribution, or liability over among the joint-feasors, and it appears that the pleader is careful not to allege that after the trial a verdict was returned and a final judgment entered against assured although it is alleged as aforesaid that assurer notified assured after the trial that it would withdraw from the case and thereupon the latter undertook the defense.[12] Where it is clear from the policy that assurer is not obligated to indemnify assured unless during the construction of a building by an independent contractor, someone suffered bodily injury through the negligence of a contractor or subcontractor for which assured was only contingently liable as owner of said building, a complaint which fails to charge that the injury was occasioned by the negligence of an independent contractor or a subcontractor which would make assured liable as such owner, is insufficient, for such injuries may have been occasioned through the fault of the injured person himself, or of others for whose negligence assured as owner was not answerable over.[13] If a risk excepted by the policy is set up in defense in an action by insured upon the policy, and the latter relies upon an estoppel against assurer to set up such defense, it

[12] American Cereal Co. v. London Guarantee Co. 211 Fed. 96, 138 C. C. A. 94, 43 Ins. L. J. 834. See London Guarantee & Accident Co. v. American Cereal Co. 251 Ill. 123, 95 N. E. 1064, 159 Ill. App. 537, 41 Natl. Corp. Rep. 833. (The court in the Federal case [211 Fed.] per Baker, C. J., *cites* on the point of no estoppel Empire Surety Co. v. Pacific National Lumber Co. 200 Fed. 224, 118 C. C. A. 410; Employers Liability Assurance Corp. v. Chicago & Big Muddy Coal Co. 141 Fed. 962, 73 C. C. A. 278; Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981, and also says that the allegations of the court were no bar to believing that certain supposititious circumstances may have actually existed in that assured was misled into undertaking the defense by reason of certain misrepresentations of assured and that the latter came into charge of the defense de novo).

[13] American Cereal Co. v. London Guarantee & Accident Co. 211 Fed. 96, 138 C. C. A. 24, 43 Ins. L. J. 834. See London Guarantee & Accident Co. v. American Cereal Co. 251 Ill. 123, 95 N. E. 1064; 159 Ill. App. 537, 41 Natl. Corp. Rep. 833.

should plead the same where it has ample opportunity to do so, otherwise said estoppel will be held to have been waived, although the court, per Marshall, J., declared that the rule "had been rather softened in recent years, and probably should be administered equitably—not technically." [14]

§ 2804. **Pirates, rovers, assailing thieves: marine risks.**—Piracy, under the statutes both in England and here, includes various acts not within the common-law definition, which latter comprehends acts of robbery and depredation committed upon the high seas, and which if perpetrated on land would be a felony. It is a brigandage, a cruising at sea and plundering of ships without authority, differing herein from acts of cruising at sea by privateers lawfully commissioned by authority of a sovereign state, or of a de facto government exercising sovereign powers and recognized as a belligerent, exercised against declared enemies, and being acts of hostility in so far as they are confined within the limits and purposes contemplated under the law of nations by the authority granted, but a privateer may commit acts of robbery and piracy upon the high seas.[1] Contracts calculated to encourage fitting out

[14] Stearns Lumber Co. v. Travelers' Ins. Co. 159 Wis. 627, 150 N. W. 991, 45 Ins. L. J. 553.

[1] Emerigon on Ins. (Meredith's ed. 1850) c. xii. secs. 28, 35, 27, pp. 412, 437, 441 et seq.; 2 Marshall on Ins. (ed. 1810) *556 et seq.; Rev. Stats. U. S. secs. 2324, 5323–25, 5368–76; 1 Hawk. P. C. 98–100; Mauran v. Alliance Ins. Co. 6 Wall. (73 U. S.) 1, 18 L. ed. 836; The Malek Adhel, 2 How. (43 U. S.) 210, 11 L. ed. 239; Marianna Flora, 11 Wheat. (24 U. S.) 1, 6 L. ed. 405; The Antelope, 10 Wheat. (23 U. S.) 66, 67, 6 L. ed. 268; United States v. Pirates, 5 Wheat. (18 U. S.) 184, 5 L. ed. 64; The Joseph Segunda, 5 Wheat. (18 U. S.) 338, 5 L. ed. 104; The States v. Smith, 5 Wheat. (18 U. S.) 153, 5 L. ed. 57; United States v. Klintock, 5 Wheat. (18 U. S.) 144, 5 L. ed. 55; United States v. Furlong, 5 Wheat. (18 U. S.) 184, 5 L. ed. 64; United States v. Palmer, 3 Wheat. (16 U. S.) 610, 4 L. ed. 471; L'Invincible, 1 Wheat. (14 U. S.) 238, 252, 4 L. ed. 80; The Exchange v. McFladen, 7 Cranch (11 U. S.) 147, 3 L. ed. 297; United States v. Peters, 3 Dall. (3 U. S.) 121, 127, 1 L. ed. 535; United States v. Haskell, 4 Wash. (U. S. C. C.) 402, Fed. Cas. No. 15,321; United States v. Jones, 3 Wash. (U. S. C. C.) 209, Fed. Cas. No. 15,494; United States v. Howard & Beebe, 3 Wash. (U. S. C. C.) 340, 344, Fed. Cas. No. 15,404; United States v. Tully, 1 Gall. (U. S. C. C.) 247, Fed. Cas. No. 16,545; Dole v. New England Mutual Marine Ins. Co. 2 Cliff. (U. S. C. C.) 394, 421, Fed. Cas. No. 3,966, s. c. 6 Allen (88 Mass.) 373; United States v. Baker, 5 Blatchf. (U. S. C. C.) 6, Fed. Cas. No. 14,501; United States v. Kessler, 1 Bald. (U. S. C. C.) 15, 27, Fed. Cas. No. 15,528; Dole v. Merchants' Mutual Marine Ins. Co. 51 Me. 465; Swinnerton v. Columbian Ins. Co. 37 N. Y. 174, s. c. 93 Am. Dec. 560, 9 Bosw. (N. Y.) 361; Fifield v. Insurance Co. of Pennsylvania, 47 Pa. St. 166, 86 Am. Dec. 523; Monongahela Ins. Co. v. Chester, 43 Pa. St. 491; Le Louis, 2 Dods. 210.

For definition of piracy, see article by Francis Wharton, "Insurgents as Belligerents," 33 Alb. L. J. 125.

of privateers by neutrals in a neutral port, and cruising against one belligerent under another belligerent's flag, are unlawful and void.[2] Acts done under a commission by a government in fact exercising supreme power within its jurisdiction, with resources of men and money and engaged in war, and recognized as a belligerent, are not acts of piracy or of assailing thieves.[3] Mutiny of the crew will render insurers liable under a clause as to pirates and rovers.[4] So also of a loss of a cargo of corn caused by a mob taking possession of a vessel lying in harbor and running her upon a reef.[5] But it may be a question for the jury whether the act was done by a mob, or as an act of war and of hostility, where a vessel lying in harbor was seized and sunk by men professing to act under authority of the state of Virginia during the Civil War.[6] And under the Marine Insurance Act of 1906 of England "the term 'pirates' includes passengers who mutiny and rioters who attack the ship from the shore."[7]

The wrongful seizure and sale of a cargo by a consul of the United States is not covered by the clause "pirates and assailing thieves."[8] It is held in Tennessee that the word "thieves" does not render the insurers liable for a loss by simple theft, but only

[2] Pond v. Smith, 4 Conn. 297.

Where loss not due to "piracy" seizure not for private but political object; seizure on river, see Bolivia Republic v. Indemnity Mutual Marine Ins. Co. 78 L. J. K. B. 596, [1909] 1 K. B. 785, 100 L. T. 503, 11 Asp. M. C. 218, 14 Com. Cas. 156, 53 S. J. 266, 25 T. L. R. 254.

Under Declaration of Paris, 1856, signed by representatives of all European Powers, and acquiesced in or acceded to by all except United States, Spain and Mexico, "I. Privateering is and remains abolished."

[3] Dole v. New England Mutual Marine Ins. Co. 2 Cliff. (C. C.) 394, Fed. Cas. No. 3.966, s. c. 6 Allen (88 Mass.) 373; Mauran v. Alliance Ins. Co. 6 Wall. (U. S.) 1, 18 L. ed. 836; Dole v. Merchants' Mutual Marine Ins. Co. 51 Me. 465; Fifield v. Insurance Co. of Pennsylvania, 47 Pa. St. 166, 86 Am. Dec. 523; Monongahela Ins. Co. v. Chester, 43 Pa. St. 491. But see United States v. Klintock, 5 Wheat, (18 U. S.) 144, 5 L. ed. 55.

[4] Brown v. Smith, 1 Dow, 349, 14 R. R. 78. See Naylor v. Palmer, 10 Exch. 382, 22 L. J. Ex. 329, 23 L. J. Ex. 323, 21 L. T. (O. S.) 168, 24 L. T. (O. S.) 83, 91 R. R. 731, 8 Exch. 739. But see Dixon v. Reed, 5 Barn. & Ald. 597, 1 D. & R. 207, 24 R. R. 481. As to what acts of seamen or officers and crew are piracy, see Rev. Stats. U. S. sec. 5369; United States v. Gilbert, 2 Sum. (U. S. C. C.) 19, Fed. Cas. No. 15,204.

[5] Nesbitt v. Lushington, 4 Term Rep. 783, 2 R. R. 519, per Lord Kenyon.

[6] Swinnerton v. Columbian Ins. Co. 37 N. Y. 174, s. c. 93 Am. Dec. 560, 9 Bosw. (N. Y.) 361. See Babbitt, Goode & Co. v. Sun Mutual Ins. Co. 23 La. Ann. 314.

[7] Marine insurance act 1906 (6 Edw. VII. c. 41) Sched. I. r. 8 (rules of construction); Butterworth's Twentieth Century Stats. (1900–1909) pp. 425–427; 15 Chitty's Stats. (1902–1907) pp. 907, 908.

[8] Paddock v. Commercial Ins. Co. 2 Allen (84 Mass.) 93.

by robbery,[9] while in New York "thieves" is held to cover a loss by simple larceny, as well as by "assailing thieves." [10] And in a line within this decision it is also held in another case in the same state that the insurer against loss by "thieves" is liable for thefts by persons not connected with the vessel, whether furtive or violent.[11] Under the Marine Insurance Act 1906, of England, "the term 'thieves' does not cover clandestine theft, or a theft committed by any one of the ship's company, whether crew or passengers." [12]

**§ 2805. Passage money: loss of.**—If passage money for the transportation of passengers is insured, said money being paid for in advance for the entire voyage, and the ship is never heard of after sailing, the owners are liable to refund said passage money to the representatives of the deceased, and the insurers are liable therefor.[1] But the loss of passage money by an unjust claim prosecuted by passengers and followed by a decree at a port of necessity is held not a loss for which the underwriters are liable, even though the decree was justified by the evidence.[2] So insurers are not liable for the cost in excess of the passage money of maintaining passengers at a port of necessity consequent upon delay for repairs.[3]

[9] Marshall v. Nashville Marine & Fire Ins. Co. 1 Humph. (20 Tenn.) 99.

[10] American Ins. Co. v. Bryan, 1 Hill (N. Y.) 25, 26 Wend. (N. Y.) 563, 37 Am. Dec. 278. The policy here was against "thieves," etc., "barratry of the master and mariners." See 3 Kent's Commentaries, 303.

[11] Atlantic Ins. Co. v. Storrow, 5 Paige (N. Y.) 285, 295. See De Rothschild v. Royal Mail Steam Packet Co. 7 Exch. 734, 14 Eng. L. & Eq 327; Bonbrett v. Hentigg, Holt N. P. 149, 17 R. R. 625; 1 Phillips on Ins. (3d ed.) 642, sec. 1106. Emerigon notes two kinds of theft: "Simple theft, called 'furtum,' and theft accompanied with violence, called 'latrocinium.' The first is not placed in the rank of perils cas fortuits; the law presumes that it might have been prevented by vigilance; 'furtum non est casus fortuitus,' says Cujus. The second is considered as a case fatal, which could neither be foreseen nor prevented, latrocinium fatale damnum seu casus fortuitus est. Hence it follows: 1. That the insurers are not responsible for simple theft committed on board the vessel, because it is presumed with reason that the accident has happened through the fault of the captain or crew:" Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 29, p. 419; and to same effect see 3 Kent's Commentaries, 303, n.; 2 Arnould on Marine Ins. (Perkins' ed. 1850) 822, *818; 2 Id. (Maclachlan's ed. 1887) 771.

[12] Marine insurance act 1906 (6 Edw. VII. c. 41) Sched. I. r. 9 (rules of construction); Butterworth's Twentieth Century Stats. (1900–1909) pp. 425–427; 15 Chitty's Stats. (1902–1907) pp. 907, 908.

[1] Ogden v. Mutual Ins. Co. 35 N. Y. 418.

[2] Marks v. Nashville Co. 6 La. Ann. 127.

[3] Willis v. Cooke, 5 El. & B. 641, 25 L. J. Q. B. 16, 1 Jur. (N. S.) 1164, 4 W. R. 54.

§ 2805a. **Plate glass insurance.**—Insurer may agree to indemnify against loss by breakage of plate glass by a third party and its liability in such case, as well also as its right to subrogation, may depend upon recovery by insured from the person occasioning the injury and assurer's knowledge thereof.[4] And it is held that although there was a hole near the center of the glass and that it was subsequently found broken its entire length it does not follow that the glass was uninsurable or that the break was occasioned by reason of such defect.[5] Inasmuch, however, as questions arising under this class of insurance are for the greater part those which relate to excepted risks and losses in connection with fire, explosion, windstorms and tornado, they have been considered thereunder and reference is made thereto.[6]

§ 2805b. **Plate glass insurance: window breaking by suffragists: "civil commotion" or "rioting."**—Window breaking by members of a woman's social and political union, even though done by prearrangement in different localities, does not constitute "civil commotion" or "rioting," where in each case a woman went quietly alone and without assistance and broke one or more windows, there being at that time no crowd and no excitement and where there was no resistance to arrest nor any attempt at rescue, and although a crowd collected where the window was broken, still it was orderly, did not take part in the proceedings, and shortly dispersed. The following definition of civil commotion was adopted: "A civil commotion is this: An insurrection of the people for general purposes, although it may not amount to a rebellion, where there is an usurped power." [7]

§ 2806. **Profits.**—In determining the liability of insurers for a loss on profits in marine risks, there should be borne in mind the difference between the rule in this country and that in England, since the former does not require proof that profits would have been realized had the goods arrived,[8] while in England some proof

[4] Weaver v. New Jersey Fidelity & Plate Glass Ins. Co. 56 Colo. 112, 51 L.R.A.(N.S.) 414, 136 Pac. 1180.

[5] McMyler v. Union Casualty & Surety Co. 84 N. Y. Supp. 170.

[6] See § 2634 herein.

[7] London & Manchester Plate Glass Ins. Co. v. Heath, 82 L. J. K. B. 1183; (1913) 3 K. B. 411; (1913) W. C. & I. Rep. 696; 108 L. T. 1009, 29 L. T. R. 581, adopting Lord Mansfield's definition of "civil commotion" in Langdale v. Mason, reported in Park on Mar. Ins. 7th ed. p. 667, 8th ed. p. 965.

[8] Alsop v. Commercial Ins. Co. 1 Sum. (U. S. C. C.) 451; Fed. Cas. No. 262; Patapsco Ins. Co. v. Coulter, 3 Pet. 28 (U. S.) 222, 7 L. ed. 659; Fosdick v. Norwich Ins. Co. 3 Day (Conn.) 108; Loomis v. Shaw, 2 Johns. Cas. (N. Y.) 36; Abbott v. Sebor, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139. See French v. Hope Ins. Co. 16 Pick. (33 Mass.) 397.

to that effect is necessitated.[9] And, as stated elsewhere, the insured may recover a total or an average loss on profits, according as the loss of the goods is total or partial.[10] So that if an insurance be effected upon profits valued, and the cargo having arrived is lost by a peril insured against before the goods can be landed, the insurers are liable, even though it is not shown that profits would have been realized had no peril intervened.[11] But the assured cannot sell his goods and then recover from the underwriters for a loss on the profits.[12] Under an open policy where the ship was captured, but five-eighths of the goods were restored, it was held, an abandonment being made as for a total loss on profits, that insured was entitled to recover three-eighths as a partial loss, and it was also held in this case that insured was entitled to share pro rata.[13] It may be stated as a rule that if profits are not specially insured they cannot be recovered as such.[14] And in such case insured cannot recover under a fire risk, as a part of the damages, profits of a business which are not realized at the time of the loss, such damages being too remote and difficult to ascertain, even approximately. Thus, a loss of tolls sustained by the insured on its road while a bridge destroyed by fire is rebuilding is not covered by a policy on the bridge. "If the bridge was totally destroyed, the loss would be the total amount of the insurance, but if only partially destroyed, it would be the value of the injury. Under no circumstances can there be a legitimate measure of liability on a fire insurance policy which represents the loss of profits of a business which might be carried on at the structure destroyed if it were standing. Such is not the contract of the parties," and the court also said that there could be no recovery "for any other advantage which may have been denied from its use."[15] Nor does a policy on a building cover a loss of profits during repairs.[16] But insurance under fire policies may

[9] Hodson v. Glover, 6 East, 316, 8 R. R. 495. See Barclay v. Cousins, 2 East, 544, 6 R. R. 505.

[10] Abbott v. Sebor, 3 Johns. Cas. (N. Y.) 39, 2 Am. Dec. 139; Putnam v. Mercantile Ins. Co. 5 Met. (46 Mass.) 386, 391. See § 1019 herein. See total loss and constructive total loss.

[11] Patapsco Ins. Co. v. Coulter, 3 Pet. (28 U. S.) 222, 7 L. ed. 659.

[12] Tom v. Smith, 3 Caines (N. Y.) 245.

[13] Loomis v. Shaw, 2 Johns. Cas. (N. Y.) 36.

[14] See § 1760 herein. But see Holbrook v. Brown, 2 Mass. 280.

On insurance against loss of profits, see note in L.R.A.1917C, 726.

[15] Farmers' Mutual Ins. Co. v. New Holland Turnpike Road, 122 Pa. St. 37, 15 Atl. 563.

As rents are said to be analogous to profits, see § 2814 herein.

[16] Wright & Pole, Matter of, 1 Ad. & E. 621; Niblo v. North American Fire Ins. Co. 1 Sand. (N. Y.) 551.

cover, by express stipulation, profits unearned because of the destruction by fire of property, by the use of which they may have been secured; for the right to profits is an insurable interest, capable of supporting the contract of profits as the inevitable result of the destruction of property by fire; as in the case of royalties.[17] And where there is an insurance on "profit due" derivable from the use of hotel rooms agreed to be of a specified value fixed in the policy and it does not appear that insurer issued the policy with respect to any options or contingencies, and the property is so damaged by fire that it cannot be used for the purposes contemplated, the fixed amount governs the recovery and assured is entitled to the full sum in the policy.[17a]

§ 2807. **Profits of lessee.**—If a lessee insures his interest, he is entitled in case of loss to the profits lost, owing to the suspension of rent under his sublease.[18]

§ 2808. **Promise of insurer to pay although loss not covered by policy.**—If property is insured and the loss thereto is not covered by the policy, it is held that the insurers may render themselves liable to pay therefor upon the performance of certain conditions to which the parties have agreed at the time of making the promise to pay; for although such promise is void when made, yet the performance constitutes a consideration which relates back to the making of the promise; as where the insurers promise the assured that if he will find the damaged property, have it inspected, and sold at auction, they will pay the deficiency, and assured performs these acts, it has been declared that he is entitled to recover the deficiency.[19]

§ 2809. **Promissory note.**—Insurers may become liable for the loss where it affects a policy guaranteeing the prompt payment of a promissory note, the statute under which the company is organized permitting such insurances to be effected, and the form of the contract is immaterial and the policy negotiable.[20]

§ 2810. **Railroad, right to recover from, although insurance paid.**—The fact that a party has recovered insurance for a loss of his property by fire will not prevent him from recovering from a railroad company, whose negligence caused the fire, the entire

[17] Employer's Liability Assurance Corp. v. Merrill, 155 Mass. 404, 29 N. E. 529; National Filtering Oil Co. v. Citizens' Ins. Co. 106 N. Y. 535, 60 Am. Rep. 473, 13 N. E. 337.

[17a] O'Brien v. North River Ins. Co. 212 Fed. 102, 128 C. C. A. 618, 44 Ins. L. J. 48.

[18] Carey v. London Provincial Fire Ins. Co. 33 Hun (N. Y.) 315.

[19] Willetts v. Sun Mutual Ins. Co. 45 N. Y. 45, 6 Am. Rep. 31.

[20] Ellicote v. United States Ins. Co. 8 Gill & J. (Md.) 166. This case, however, could not be strictly called one of insurance.

amount of his loss.[1] A railroad company is not entitled to any part of the insurance contracted for and collected by the owner of property destroyed by a fire communicated from a railroad locomotive, although the railroad company is given by statute an insurable interest in such property, with the right to insure it for its own protection.[2]

**§ 2811. Removal of goods in case of threatened fire: damages and expenses incurred.**—Although there has been some question on this point, yet the rule seems to be this, that if the danger from fire to the insured goods or to the building in which they are contained is so imminent that a prudent uninsured person would, under the circumstances, hardly have omitted the precaution to remove his goods from the building, then the insured will also be justified in using such reasonable precaution to protect them from the impending or threatened peril, exercising in their removal such care as, under the circumstances, a prudent uninsured man could reasonably be assumed to have used, and insurer is liable, within the limits of this rule, even though the building be not actually consumed or burned, for the loss, damage, and injury sustained by their removal, as well as for such expenses incurred in their removal as are reasonable under the circumstances.[3]

[1] Lake Erie & Western Ry. Co. v. Griffin, 8 Ind. App. 47, 35 N. E. 396. *Examine* St. Louis Iron Mountain & Southern Railway Co. v. Commercial Union Ins. Co. 139 U. S. 223, 35 L. ed. 154, 11 Sup. Ct. 554, per Gray, J.; Chicago, St. Louis & New Orleans Railroad Co. v. Pullman Southern Car Co. 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. 490, per Harlan, J.; Phœnix Ins. Co. v. Erie & Western Transp. Co. 117 U. S. 312, 320, 29 L. ed. 873, 6 Sup. Ct. 1176; Mobile & Montgomery Railway Co. v. Jurey, 111 U. S. 584, 28 L. ed. 527, 4 Sup. Ct. 566; Hart v. Railroad Co. 13 Met. (54 Mass.) 99, 46 Am. Dec. 719, per Shaw, C. J.; Weber v. Railroad Co. 35 N. J. L. 409, 10 Am. Rep. 253.

[2] Matthews v. St. Louis & Santa Fe Ry. Co. 121 Mo. 298, 25 L.R.A. 161, 24 S. W. 29, aff'd 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243.

[3] *United States.* — Holtzman v. Franklin Fire Ins. Co. 4 Cranch (U. S. C. C.) 295, Fed. Cas. No. 3,561.

*Kentucky.*—Leibner v. Liverpool & London & Globe Ins. Co. 6 Bush (69 Ky.) 630, 99 Am. Dec. 695.

*Louisiana.* — Balestracci v. Fireman's Ins. Co. 34 La. Ann. 844; Talaman v. Home & Citizens Mutual Ins. Co. 16 La. Ann. 426.

*Maine.*—White v. Republic Fire Ins. Co. 57 Me. 91, 2 Am. Rep. 22.

*North Carolina.* — Whitehurst v. Fayetteville Mutual Ins. Co. 6 Jones L. (51 N. C.) 352.

*England.*—Thompson v. Montreal Ins. Co. 6 U. C. Q. B. 319. See Wood's Mayne on Damages, sec. 442; Case v. Hartford Fire Ins. Co. 13 Ill. 676. See § 2821, on theft and fire risks. "The insurer is liable where the thing insured is rescued from a peril insured against that would otherwise have caused a loss if in the course of such rescue the thing is exposed to a peril insured against which permanently deprives the insured of its possession, in whole or in part; or where a loss is caused by

This rule applies even though the policy is "on goods whilst they shall be and remain in said building."[4] So where there was a furious fire in the neighborhood and the building was burned to some extent and a stock of frangible goods was considerably damaged and broken by removal, the company was held liable, even though the property burned would have neither burned or have been injured if it had been left in the house.[5] So damages resulting from efforts made in good faith to save property from a fire, by breakage, removal, water, or from loss by theft consequent thereto, are within the loss covered by a policy against damage by fire, unless expressly excepted therefrom by stipulation.[6] Again, where there was a conflagration and the building being in imminent danger of destruction the goods were removed from the store to the pavement, where they were injured, the insurers were held liable for the damage sustained as well as for expenses of removal.[7] The court in this case says: "The question presented is one of considerable difficulty, and one upon which the authorities are at variance. While the supreme court of Illinois, in a case like the one at bar, have held that the underwriters are liable for the damage to the goods and the expense of removing them, the court in Pennsylvania have denied their liability.[8] We think the liability of the underwriters in these and similar cases depends very much upon the imminence of the peril and the reasonableness of the means used to effect the removal. . . . The imminence of the peril must be apparent, and such as would prompt a prudent uninsured person to remove the goods; it must be such as to inspire a conviction that to refrain from removing the goods would be a violation of a manifest moral duty; the damage and expense of removal, too, must be such as might reasonably be incurred under the circumstances of the occasion.[9] When such a case exists, we think it the better opinion to hold that the underwriters are chargeable for the damage and expense of removing the goods, as this result seems most in accordance with reason, the analogies of the law, and public policy."

efforts to rescue the thing insured from a peril insured against:" Deering's Annot. Civ. Code Cal. sec. 2627.

[4] Holtzman v. Franklin Fire Ins. Co. 4 Cranch (U. S. C. C.) 295. Fed. Cas. No. 3,561.

[5] Balestracci v. Fireman's Ins. Co. 34 La. Ann. 844.

[6] Farmers' & Merchants' Ins. Co. v. Cuff, 29 Okla. 106, 35 L.R.A. (N.S.) 892 (annotated on loss by theft during fire), 116 Pac. 435.

[7] White v. Republic Fire Ins. Co. 57 Me. 91, 2 Am. Rep. 22.

[8] Case v. Hartford Ins. Co. 13 Ill. 676; Hillier v. Alleghany Ins. Co. 3 Pa. 470, 45 Am. Dec. 656. But see Agnew v. Insurance Co. 3 Phila. (Pa.) 193, 15 L. I. 308, aff'd 34 Pa. 96, 75 Am. Dec. 368.

[9] Angell on Fire Ins. sec. 117.

**§ 2812. Same subject: duty of assured: stipulation.**—If the policy stipulates that assured shall, in case of exposure of the insured goods to loss or damage by fire, use all possible diligence to preserve the property, or that he shall labor for the protection thereof, and that insurer shall not be liable for losses arising from failure or neglect so to do, the question as to the necessity for removal is dependent upon the circumstances existing at the time. If the danger of destruction from the threatened peril is so imminent, direct and immediate that it would be gross negligence for the assured not to effect its removal, then the insurer is responsible, whether loss or damage is reasonably and necessarily sustained by such removal, for the fire will then be regarded as the proximate cause of the loss. So also if the danger is reasonably imminent, within the limits of the rule stated under the last section, the assured would not only be justified in removing the goods to protect them from threatened loss, but would be obligated under a stipulation of the kind above mentioned to use reasonable efforts in removing the goods.[10] And if due care and reasonable means, under the circumstances, is not exercised at or after the fire to preserve the property as required by the stipulation recovery is precluded for the amount of loss of property which could have been saved;[11] nor can insurer be held liable for the value of property destroyed by a fire, if the owner exerted no proper diligence to save it, although there was ample time and opportunity to do so, and the policy contained a stipulation that the insurer should not be liable for loss caused directly by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises.[12] So where goods insured under a policy containing a like clause were being removed during a dark night and sustained damage by flood, mud, and water, the insurers were held liable therefor.[13] And where it clearly appears from uncontroverted evidence that no effort was made to save the personal property destroyed and there was ample opportunity to do so no recovery under the policy can be had.[14] And the rejection of evidence as to the feasibility of the removal of goods from a part of the build-

[10] Case v. Hartford Fire Ins. Co. 13 Ill. 676; Brady v. Northwestern Ins. Co. 11 Mich. 425. See last section, and under § 2821, theft.

[11] Beavers v. Security Mutual Ins. Co. 76 Ark. 595, 90 S. W. 13.

[12] First National Bank v. German American Ins. Co. 23 N. Dak. 139, 38 L.R.A.(N.S.) 213, 134 N. W. 873.

[13] Talamon v. Home & Citizens' Mutual Ins. Co. 16 La. Ann. 426.

[14] First National Bank of Nome v. German American Ins. Co. 23 N. Dak. 139, 38 L.R.A.(N.S.) 213, 134 N. W. 873, 41 Ins. L. J. 899.

ing during the early part of the fire is immaterial and harmless error where insured had admitted that they could have been removed at that time but no effort was made to do so.[15]

But a provision in a fire policy that "it shall be the duty of the insured to use their best endeavors for saving and preserving the property" defines the duty of the insured when the property covered by the policy is on fire, or when it is menaced by fire in its vicinity and damage is likely to result, does not apply to some action by which the risk of the property taking fire might be increased.[16] So the requirement in a policy against loss by the accidental discharge of an automatic fire extinguishing apparatus, that assured must use all reasonable means to save and preserve the property insured, refers to care to be taken after an accidental discharge of the apparatus, and not to care to prevent an accident.[17]

**§ 2813. Same subject: how far assured must exert himself to save property.**—In cases where there is no stipulation, although the rule as to removal of goods or other efforts to save property cannot be more strictly enforced than as stated under the last section, nevertheless the assured is obligated to act in good faith, and to do all that he can to lighten the burden of probable or possible loss, and to exert himself to save, as far as he reasonably can, the property from threatened destruction, but in applying this rule all the circumstances of the particular case must be considered. The assured ought not to negligently or carelessly stand by and permit the destruction of the property by the peril insured against, or the injury or damage to said property by others, when it is in his power to avert the same by the exercise of ordinary prudence, such as an uninsured man would use under the same circumstances. To do so would, as a general rule, be an evidence of that want of honesty and good faith which parties to contracts of insurance are presumed to exercise. No arbitrary rule can, however, be laid down which will govern all cases.[18] So in marine insurances the master and crew, as a part of their bounden duty to the ship in the capacity in which they are employed, must see the ship through the hazards of the voyage, and bestow their best efforts and entire possible service for the preservation of the ship and cargo.[19]

[15] Palatine Ins. Co. v. Santa Fe Mercantile Co. 13 N. Mex. 241, 82 Pac. 363.

[16] Siemers v. Meeme Mutual Home Protection Ins. Co. 143 Wis. 114, 139 Am. St. Rep. 1083, 126 N. W. 669, 39 Ins. L. J. 1138.

[17] Wertheimer-Swarts Shoe Co. v. United States Casualty Co. 172 Mo. 135, 61 L.R.A. 766, 72 S. W. 635.

[18] See last two sections and § 2081, sue and labor clause, etc.; 2 Wood on Fire Ins. (2d ed. 1056) sec. 492.

[19] Miller v. Kelly, Abb. Adm. 564, Fed. Cas. No. 9,577, per the court; Schooner John Perkins (U. S. C. C.)

§ 2814. **Rents.**—Unless otherwise stipulated, if the premises are destroyed by fire there is no liability for rent of the premises; the liability of the insurer, if the building is never restored, is not for the loss of the use or rental of the property, but for the value of the loss.[20] But the insurance even though a fire policy may expressly provide for indemnity for the loss of rents by failure of tenants to promptly pay the same, and also from the loss of rents during a specified period occasioned by a peril specified, or it may insure the tenant againt loss from liability to pay rent.[1] If the policy insures against a loss of rents from a specified building not exceeding four months in any one year, and the term of the policy was for one year, terminating June 7, 1891, and there was a total loss of the building by fire on June 5, 1891, the insured may recover the loss of the rent for the four months specified.[2] The parties to a contract of rent insurance may stipulate for a method of ascertaining and computing the loss, notwithstanding the statute provides that the sole object of insurance is indemnity.[3] And where the policy stipulates for a reasonably necessary time for the restoration of the building to a tenantable condition the same as before the fire does not operate as a limitation to the time actually spent for repairs but includes time necessarily spent in placing the contract therefor, and the loss of rents during such period as was reasonably necessary for such restoration of the building is recoverable.[4] The gross rentals, and not the amount less cost of janitor and other service to which the landlord is subject, are covered, by a policy providing that the insurer shall be liable for the actual loss of rent, based on rentals in force at the time of fire, and requiring the assured to carry insurance in an amount equal to the annual rents of the premises, in the absence of which the assured shall be held as a coinsurer in the amount of the deficiency.[5] But insurer is not liable for rents consequent upon delay

3 Ware, 87, 89, Fed. Cas. No. 10,252, rev'd Fed. Cas. No. 7,360, 21 L. R. 87, per Curtis, J.

[20] Farmers' Mutual Ins. Co. v. New Holland Turnpike Road, 122 Pa. St. 37, 15 Atl. 563, per Green, J.

[1] "Fire insurance is now made to cover rents lost by the destruction of buildings by fire:" Employer's Liability Assur. Corp. v. Merrill, 155 Mass. 404, 29 N. E. 529, per Barker, J. See § 2820 herein.

On construction of policy or contract insuring against loss of rents, see notes in 16 L.R.A.(N.S.) 1055; 23 L.R.A.(N.S.) 123; and L.R.A. 1916F, 694.

[2] Becker v. Merchants' Mutual Ins. Co. (C. of A. Parish of New Orleans, 1893) 22 Ins. L. J. 227.

[3] Whitney Estate Co. v. Northern Assur. Co. 155 Cal. 521, 23 L.R.A. (N.S.) 123, 101 Pac. 911, 18 Am. & Eng. Ann. Cas. 512.

[4] Hartford Fire Ins. Co. v. Pires, — Tex. Civ. App. —, 165 S. W. 565.

[5] Whitney Estate Co. v. Northern Assur. Co. 155 Cal. 521, 23 L.R.A. (N.S.) 123n, 101 Pac. 911.

necessitated by a city ordinance relocating street lines, etc., which delayed the issuing of building permits, where it is stipulated that insured shall rebuild in as short a time as the nature of the case will admit and the policy also provides an exemption where loss is occasioned by ordinance or law regulating construction or repairs of buildings, or by interruption of business, etc., or otherwise; nor in such case is there a liability for loss of rents consequent upon interruption of business caused by delay in rebuilding owing to the fall of debris throughout the burnt district.[6]

If there is a contract to convey ground rents and to build on unimproved lands and to give a guaranty bond for completion of such building the measure of recovery for failure to complete said buildings is the market value of the uncompleted buildings and the difference between said value and the market value of the ground rent had the contract been fulfilled.[7]

**§ 2814a. Repairs of building by assurer: assured's liability to third persons.**—Although an owner's building is in the hands of an insurance company for repairs, after a fire, this does not relieve him of his duty to see that it is in a safe condition. It is especially his duty, after the fire, to see how that occurrence has affected the situation, and he cannot, as between himself and the public, shift this responsibility from himself to the insurance company by leaving the latter to determine the necessity and extent of repairs. He is still liable for the condition of the building, and must respond in damages, if anyone is injured by one of its falling walls.[8]

**§ 2815. Shipowner's liability.**—To the extent that the shipowner may protect his interests and cover his liability by insurance he should do so, and the nature and extent of that liability may therefore be briefly considered here. At the common law the shipowner is responsible up to the full extent of the damage or loss caused to goods or to another ship by the acts of the master and mariners, and this is the rule also of the civil law and of England and this country, except so far as legislative provisions provide otherwise.[9] In England, however, the responsibility of shipowners has been

[6] Palatine Ins. Co. v. O'Brien, 109 Md. 100, 71 Atl. 775, 38 Ins. L. J. 432, s. c. 107 Md. 341, 68 Atl. 484, 16 L.R.A.(N.S.) 1055, s. c. 152 Fed. 922, 82 C. C. A. 70, 36 Ins. L. J. 616.

[7] German-American Title & Trust Co. v. Citizens Trust & Surety Co. 190 Pa. 247, 42 Atl. 682.

[8] Steppe v. Alter, 48 La. Ann. 363, 55 Am. St. Rep. 281, 19 So. 147.

[9] Abbott on Shipping (6th Am. ed.) 394, and notes; Maclachlan on Shipping, 121 et seq.; 3 Kent's Commentaries (5th ed.) 217; 1 Arnould on Marine Ins. (Perkins' ed. 1850) *775; 2 Id. (Maclachlan's ed. 1887) 734; Id. (9th ed. Hart & Simey) sec. 802, pp. 1004 et seq. See note under § 2751 herein.

On law covering limitation of liability, see note in L.R.A.1916B, 642.

limited by legislative enactments.[10] So also in the United States under the acts of Congress there are certain limitations on the shipowner's liability.[11] Under the act of 1851,[12] the destruction of goods on land by fire communicated by a vessel is not an included liability, even though the vessel is duly licensed and engaged in the coast trade.[13] A loss of goods by fire on board the vessel upon which they are shipped, the fire happening by the neglect of the corporation owning the vessel, is not a loss incurred without the privity or knowledge of the owners of the vessel under the United States Statutes of 1851, chapter 43, limiting the liability of shipowners.[14] The act of Congress of 1884,[15] limiting the individual liability of a shipowner for any debt contracted on account of the ship, does not affect the liability of owners of fishing vessels, which remains as at common law.[16] The Harter or carriers act, 1893, exempts from liability the vessel, owners, etc., under certain conditions as to seaworthiness where the vessel is engaged in transporting merchandise to or from any port in the United States

[10] 2 Arnould on Marine Ins. (Maclachlan's ed. 1887) 734, *citing* shipping act 17 & 18 Vict. c. 104, sec. 503, 25 & 26 Vict. c. 63, secs. 54, 55; Preamble 7 Geo. II. c. 15; Gale v. Lawrie, 5 Barn. & C. 156, 4 L. J. (O. S.) K. B. 149, 7 D. & R. 711, 29 R. R. 199, per Lord Tenterden; Brown v. Wilkinson, 16 L. J. Ex. 34, 36, 15 M. & W. 391, per Parke, B. See also as to present English statutes 2 Arnould on Marine Ins. (9th ed. Hart & Simey) sec. 802, pp. 1004 et seq.

[11] See Rev. Stats. U. S. secs. 4282, 4284, 4285. The act of Congress (act of June 19, 1886, 24 U. S. Stats. p. 80) extending the limited liability of owners to all vessels is not retroactive, nor is the act which excepts lighters from the limited liability of shipowners (act of March 3, 1851, 9 U. S. Stats. p. 635; Rev. Stats. U. S. sec. 4283, repealed by the act of June 26, 1884, 23 U. S. Stats. p. 57; Chappell v. Bradshaw, 35 Fed. 923.

On applicability to government of statutes limiting liability of shipowners, see note in L.R.A.1917C, 1110.

[12] Acts of March 3, 1851, 9 U. S. Stats. p. 635, Rev. Stats. U. S. sec. 4283, limiting the liability of shipowners to their interest in the vessel and pending freight "for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or occurred without the privity or knowledge of such owner or owners." See Great Lakes Towing Co. v. Mills Transportation Co. 155 Fed. 11, 83 C. C. A. 807, 22 L.R.A.(N.S.) 769 and note (on lack of knowledge or privity on part of owners as a condition of limitation of liability under act of 1884); Loughlin v McCaulley, 186 Pa. 517, 48 L.R.A. 33, 40 Atl. 1029. See note § 2751 herein.

[13] Goodrich Transportation Co. v. Gagnon, 36 Fed. 123.

[14] Hill Manufacturing Co. v. Providence & New York Steamship Co. 113 Mass. 495, 18 Am. Rep. 527.

[15] U. S. Stats. 1884, c. 121, sec. 18. See Great Lakes Towing Co. v. Mills Transportation Co. 155 Fed. 11, 88 C. C. A. 607, 22 L.R.A.(N.S.) 769. See note under § 2751 herein.

[16] Simpson v. Story, 145 Mass. 497, 14 N. E. 641.

and also in case of losses from damages of the sea or other navigable waters, acts of God or public enemies, etc., faults or errors in navigation or management of the vessel or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.[17] But it is held that said act does not remove liability for damage done by careless navigation which had become fixed at the time of its passage;[18] nor for loss of cargo by fire during deviation.[18a]

Exactly where the responsibility of the owner or master as carriers of goods commences and ends is not definitely determined, the matter being largely dependent upon the practice and customs of particular ports or places where the voyage begins and ends.[19] Where a common carrier by water is notified that the goods are perishable, and must not be put out in rainy weather; and he places the property on the dock on a day unsuitable for landing and cartage because raining during the greater part thereof, and without reasonable notice to the consignee, to enable him to have them weighed, carted, and protected from the weather, the carrier is guilty of negligence, and is liable for a breach of his duty.[20]

Although a carrier by water may land goods on a wharf, it is his duty to give the consignee due notice of their arrival and landing, and afford him a reasonable time to take charge of and secure them. The consignee has also a reasonable time to inspect goods on the wharf before he determines whether he will accept them. Time, place, the character of the weather, and other circumstances are all material factors, and until acceptance, such as to release the carrier, the latter must take charge of them for the owners. The acts of acceptance, upon notice or otherwise, may, however, be

[17] Act of Feb. 13, 1893, c. 105, sec. 3, 27 Stat. 445, U. S. Comp. Stat. 1901, p. 2946.

[18] Humboldt Lumber Manufacturing Assoc. v. Christopherson, 73 Fed. 239, 19 C. C. A. 481, 44 U. S. App. 434, 46 L.R.A. 264. As to loss or liability for damage to cargo by peril of the seas, under this act of 1893, see Hanson v. Haywood Bros. & Wakefield Co. 152 Fed. 401, 81 C. C. A. 527. Ship must be seaworthy; insufficient that due diligence exercised. Insurance Co. of North America v. North German Lloyd Co. (U. S. D. C.) 106 Fed. 973. Affirmative proof required, under act, that vessel was seaworthy. Bradley v. Lehigh Valley Rd. Co. 153 Fed. 350, 82 C. C. A. 426, aff'g 145 Fed. 569. See note § 2751 herein. See also for construction of said act, Congdon's General Average (ed. 1913) pp. 189 et seq.

[18a] The Indrapura (U. S. D. C.) 171 Fed. 929, 38 Ins. L. J. 1163; U. S. Rev. Stat. secs. 4282, 4283, Comp. St. 1906, p. 2943.

[19] 2 Arnould on Marine Ins. (Perkins' ed. 1850) *778.

[20] McAndrew v. Whitlock, 52 N. Y. 40, *cited* and *considered* in Constable v. National Steamship Co. 154 U. S. 51, 80, 82, 38 L. ed. 918, 14 Sup. Ct. 1062 (in dissenting opinion); McKinney v. Jewett, 90 N. Y. 267, 270; Richmond v. Union Steamboat Co. 87 N. Y. 240, 245.

such as to relieve the carrier of responsibility.[1] A carrier by water is not excused from liability for loss by the act of God operating upon an unseaworthy vessel, when such act would have proved harmless to a seaworthy vessel.[2] And it is held that the owners of a tugboat are not common carriers, and that they are bound only by ordinary care.[3] The owners are not liable for any injury caused by a defect in the tackle arising from the ordinary wear and tear, unless a knowledge of such defect is brought home to them.[4] Goods should not be improperly stowed,[5] and the carrier is liable if they are.[6] Thus, it is bad and improper stowage to stow bags of ripe seed over chalk in the hold of a vessel,[7] or salt over iron, so that water may chance to come through.[8] So damage to goods from other goods stowed in the hold is held chargeable to the general owners of a ship.[9] The general owners of a vessel are not liable for damages occasioned by a collision happening through the fault or negligence of the master of the vessel, who

[1] *United States.*—Constable v. National Steamship Co. 154 U. S. 51, 38 L. ed. 918, 14 Sup. Ct. 1062; Richardson v. Goddard, 23 How. (64 U. S. 28, 16 L. ed. 412, same case Salmon Falls Mfg. Co. v. Bark Tangier, 1 Cliff. (U. S. C. C.) 396, Fed. Cas. No. 12,266; 3 Ware, 110, Fed. Cas. No. 12,267; Schooner Treasurer (U. S. C. C.) Sprague, 473, Fed. Cas. No. 14,159; Vose v. Allen, 3 Blatchf. (U. S. C. C.) 289, Fed. Cas. No. 17,006.

*Louisiana.*—Northern v. Williams, 6 La. Ann. 578.

*New York.*—Tarbell v. Royal Exchange Shipping Co. 110 N. Y. 170, 181, 6 Am. St. Rep. 350, 17 N. E. 721; McAndrew v. Whitlock, 52 N. Y. 40, 11 Am. Rep. 657; Goodwin v. Baltimore & Ohio R. R. Co. 50 N. Y. 154, 10 Am. Rep. 457; Price v. Powell, 3 Comst. (3 N. Y.) 322.

*England.*—Hyde v. Trent & Mersey Navigation Co. 5 Term Rep. 389, 1 Esp. 36, 2 R. R. 620.

[2] Packard v. Taylor, 35 Ark. 402, 37 Am. Rep. 37.

[3] Varble v. Bigley, 14 Bush (77 Ky.) 698, 29 Am. Rep. 435; Arctic Fire Ins. Co. v. Austin, 69 N. Y. 470, 25 Am. Rep. 221; Hays v. Millar, 77 Pa. St. 238, 18 Am. Rep. 445. That a towboat is a common carrier, see Bussey & Co. v. Mississippi Valley Transportation Co. 24 La. Ann. 165, 13 Am. Rep. 120.

[4] Thus, the owners of a vessel are not liable to the employee of a stevedore who has full charge of the unloading of the vessel for injury to the employee caused by defective tackle furnished by the vessel, when it is shown that the tackle had no apparent defect, and that the stevedore was an experienced and competent one who had the exclusive employment of his laborers and control of the work: Riley v. State Line Steamship Co. 29 La. Ann. 791, 29 Am. Rep. 349.

[5] As to goods carried on deck, see Wood v. Phœnix Ins. Co. 1 Fed. 235.

[6] Alston v. Herring, 11 Exch. 822.

[7] The Bitterne, 35 Fed. 927.

[8] The Nith, 36 Fed. 86, 383.

[9] Gillespy v. Thompson, 6 El. & B. 477, n. 483, 2 Jur. (N. S.) 712, in note to Baxter v. Leland, 1 Blatchf. (U. S. C. C.) 526, Fed. Cas. No. 1,125.

As to damage to cargo: negligence: bad storage: carrier's liability, see Insurance Co. of North America v. Frederick Leyland & Co. Ltd. (U. S. D. C.) 171 Fed. 524.

controls her pro hac vice and is sailing her "on shares." [10] Under a marine policy insuring against the usual perils, including barratry, the underwriters are not liable to repay to the insured damages paid by him to the owners of another vessel and cargo suffered in a collision occasioned by the negligence of the master or mariners of the vessel insured.[11] If a vessel is insured for a part only of its value, the owner is a co-insurer as to the uninsured part, and in case of loss to that part which is called the owner's risk, it must be taken into consideration in fixing the proportion of their loss to be paid by the insurers.[12]

**2815a. Smallpox: assumption by assured of risk of: warranty.**—If insured in answer to a question states that he has never been successfully vaccinated and that until he is he waives all claims under his certificate should his death result from smallpox, and he also states that "for the purposes of this application I declare and warrant the foregoing answers and statements to be correct," and the certificate is also stipulated to be null and void "if any of the statements or declarations" "shall be found in any respect untrue," and said answer was false in that he had prior thereto been successfully vaccinated, said statement is not a warranty and its falsity does not operate as a waiver of all claims under the certificate, and assured was not required to waive his claim under his certificate except in the interim between making the application and the time when he was successfully vaccinated.[13] The same question and the same waiver appear in a Mississippi case as existing under an amended constitution and by-law at the time of assured's death, although they were in a different form in assured's application, but in this case the member was successfully vac-

[10] Somes v. White, 65 Me. 542, 20 Am. Rep. 718.

[11] General Mutual Ins. Co. v. Sherwood, 14 How. (55 U. S.) 351, 14 L. ed. 452.

*Cited: United States.*—The Barnstable, 181 U. S. 464, 469, 45 L. ed. 954, 958, 21 Sup. Ct. 684; The Manitoba, 104 Fed. 145, 156; Phoenix Ins. Co. v. Erie & Western Transportation Co. 10 Biss. 18, 24 Fed. Cas. No. 11,112.

*Massachusetts.*—Wharf v. Equitable Marine Ins. Co. 144 Mass. 68, 69, 10 N. E. 513; Emery v. Huntington, 109 Mass. 437, 12 Am. Rep. 725.

*New York.*—Mathews v. Howard Ins. Co. 11 N. Y. 9, 19.

*South Carolina.*—Street v. Augusta Ins. & Banking Co. 12 Rich. L. (So. Car.) 13, 22, 75 Am. Dec. 714.

[12] Egan v. British Foreign Marine Ins. Co. 193 Ill. 295, 86 Am. St. Rep. 342, 61 N. E. 1081.

As to right of owner of vessel to policy proceeds when insured as freighter, etc., for account of whom it may concern, see Symmers v. Carroll, 134 N. Y. Supp. 170, 149 App. Div. 641, 41 Ins. L. J. 976, aff'd 207 N. Y. 632, 101 N. E. 698, 42 Ins. L. J. 1063, s. c. 134 N. Y. Supp. 1147, 150 App. Div. 902; Symmers v. Howard (N. Y.) 42 Ins. L. J. 695.

[13] Sovereign Camp Woodmen of the World v. Gray, 26 Tex. Civ. App. 457, 64 S. W. 801.

cinated and died of smallpox and it was held no defense that he had so died. There was, however, no question here of warranty.[14] In still another case a waiver of death from smallpox because of nonvaccination was attempted to be availed of as a defense, in that assured died from smallpox but the waiver was part of the application and it was held that the claim could not be defeated on the ground of death from smallpox, neither the application nor a copy thereof being attached to the policy.[15]

**§ 2816. Stranding defined: marine risk.**—Stranding is where the ship takes ground or strikes some obstruction to navigation, such as a rock or reef or submerged piles, and is arrested and remains fixed for some space of time, or settles, being forced thereto by some accidental or extraneous cause, or by some unusual, extraordinary, and unexpected casualty, or by force of the winds or seas, and not a grounding caused solely by those natural causes necessarily incident to the ordinary and usual course of navigation; as in case of the ebb and flow of the tide in tide rivers or harbors. It is also distinguished from a mere temporary stoppage; as where the ship merely strikes or runs against or into some obstruction, but is not fixed or settled, but passes on. This is not a stranding, and the degree of damage sustained by the ship is important in determining whether there has been stranding.[16] But if the con-

[14] Sovereign Camp Woodmen of the World v. Woodruff, 80 Miss. 546, 32 So. 4.

[15] Grand Lodge Ancient Order United Workmen v. Edwards, 27 Ky. L. Rep. 469, 85 S. W. 701; Ky. Stat. 1903, sec. 679.

[16] Potter v. Insurance Co. 2 Sum. (U. S. C. C.) 197, Fed. Cas. No. 11,339; Lake v. Columbus Ins. Co. 13 Ohio, 48, 42 Am. Dec. 188; McDougle v. Royal Exch. Assur. Co. 4 Camp. 283, 1 Stark. 130, 4 Maule & S. 503, 16 R. R. 532, per Lord Ellenborough; Wells v. Hopwood, 3 Barn. & Ald. 20, 26, 34, 37 R. R. 307, 14 Eng. Rul. Cas. 200, per Lord Tenterden; Fletcher v. Inglis, 2 Barn. & Ald. 315, 20 R. R. 448; Leitchford v. Oldham, L. R. 5 Q. B. D. 538, 49 L. J. Q. B. 458, 28 W. R. 789; Mitchell v. Calder, 1 Shaw & D. 276, 298; Magnus v. Buttemer, 21 L. J. Com. P. 119, 11 Com. B. 876, 16 Jur. 480, 87 R. R. 795; Kingsford v. Marshall, 8 Bing. 458, 1 Moore & S. 657, 1 L. J. C. P. 135, 34 R. R. 756, per Tinsdale, C. J.; Baker v. Towry, 1 Stark. 436, 18 R. R. 803; Rayner v. Godmond, 5 Barn. & Ald. 225, 24 R. R. 335; Harman v. Vaux, 3 Camp. 429, 14 R. R. 773; De Mattos v. Saunders, 7 L. R. Com. P. 570, 27 L. T. 120, 20 W. R. 801; Thomson v. Murison, 14 R. R. 773, 6 C. C. S. 1120, 16 Scot. Jur. 491; Hearne v. Edmunds, 1 Brod. & B. 388, 4 Moore, 15, 21 R. R. 660; Carruthers v. Sydebotham, 4 Maule & S. 77, 16 R. R. 392; Corcoran v. Gurney, 1 El. & B. 456, 22 L. J. Q. B. 113, 17 Jur. 1152, 1 W. R. 129, 93 R. R. 232, per Lord Campbell; Bishop v. Pentland, 7 Barn. & C. 214, 219, 1 Man. & R. 49, 6 L. J. (O. S.) K. B. 6, 31 R. R. 177; Dobson v. Bolton, reported in 1 Marshall on Ins. (ed. 1810) *240; Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 13, pp. 323 et seq.

See § 2699 herein.

sequences of the stranding are such as not to be capable of adjustment, because so indefinite that no estimate or evidence can be given as to the damage sustained, there is no liability therefor on the part of insurers.[17] Stranding may also be voluntary; as where the ship is intentionally run aground in what appears the least perilous place to escape a more pressing danger, such as shipwreck, an enemy, foundering, or sinking, the object being the common safety or the general benefit.[18] If the words used are "strand or ground" and "grounding" or "stranding" they are to be taken in their ordinary and accepted meaning and do not cover a sinking in deep water, even though the vessel did undoubtedly come to the ground at the bottom of the sea.[19]

**§ 2817. Stranding: cases.**—It is a stranding where the ship is forced by the wind into a mud bank and remains two hours;[20] or where having her head moved she is forced by the wind to so change her position that at the ebbing of the tide she is greatly strained and springs a leak;[1] or where breaking a rope at her moorings, it being an unforeseen accident, she falls over on her side;[2] or where she runs on piles under water a short space from shore

[17] Orrok v. Commonwealth Ins. Co. 21 Pick. (38 Mass.) 456, 32 Am. Dec. 271; Sage v. Middletown Ins. Co. 1 Conn. 239.

[18] See the following cases:

*United States.*—Fowler v. Rathbone, 12 Wall. (79 U. S.) 102, 20 L. ed. 281; The Star of Hope, 9 Wall. (76 U. S.) 203, 19 L. ed. 638, per Clifford, J.; Columbian Ins. Co. v. Ashby, 13 Pet. (38 U. S.) 331, 10 L. ed. 186; Caze v. Reilley, 3 Wash. (U. S. C. C.) 298, Fed. Cas. No. 2,538; Bales of Cotton, 8 Blatchf. (U. S. C. C.) 221, Fed. Cas. No. 4,319; Stringess v. Cary, 2 Curt. (U. S. C. C.) 59, Fed. Cas. No. 13,572; Mutual Safety Ins. Co. v. Cargo of the George, Olc. Adm. 89, Fed. Cas. No. 9,981.

*Massachusetts.*—Reynolds v. Ocean Ins. Co. 22 Pick. (39 Mass.) 191, 33 Am. Dec. 727; Bedford Commercial Ins. Co. v. Parker, 2 Pick. (19 Mass.) 1, 13 Am. Dec. 388.

*New York.*—Bradhurst v. Columbian Ins. Co. 9 Johns. (N. Y.) 9.

*Pennsylvania.* — Meech v. Robinson, 4 Whart. (Pa.) 360; Bevan v. Bank of United States, 4 Whart. (Pa.) 301.

*England.*—Barrow v. Bell, 4 Barn. & C. 736, 7 Dowl. & R. 244, 4 L. J. (O. S.) K. B. 47, 28 R. R. 468; Burnett v. Kensington, 7 Term Rep. 210, 1 Esp. 416, Peake's Add. Cas. 71, 4 R. R. 424, 14 Eng. Rul. Cas. 187; Corcoran v. Gurney, 1 El. & B. 456, 22 L. J. Q. B. 113, 17 Jur. 1152, 1 W. R. 129, 93 R. R. 232.

Emerigon on Ins. (Meredith's ed. 1850) c. xii. sec. 13, p. 324. See chapter on general average.

[19] Baker-Whitely Coal Co. v. Marten, 26 Times L. R. 314.

That stranding is loss by perils of the sea, see American-Hawaiian Steamship Co. v. Bennett & Goodall, 207 Fed. 510, 125 C. C. A. 172, 42 Ins. L. J. 1783.

[20] Harman v. Vaux, 3 Camp. 429, 14 R. R. 773. See § 2699 herein.

[1] Wells v. Hopwood, 3 Barn. & Adol. 20, 37 R. R. 307, 14 Eng. Rul. Cas. 200.

[2] Bishop v. Pentland, 7 Barn. & C. 214, 219, 1 Man. & R. 49, 6 L. J. (O. S.) K. B. 6, 31 R. R. 177. See

and remains until cut away;[3] or where a vessel, being forced by stress of weather and leaking takes ground, founders on making port and is fixed there;[4] or where having suffered the loss of her anchors and masts she is taken in tow by sailors and placed on the bank, where she lies over on her side for several tides.[5] So also if she is forced upon a rock and is there fixed even though for only about fifteen minutes;[6] or where being necessary to draw off the water to repair artificial inland navigation the vessel grounds on piles not known to be there;[7] or where for the common safety she slips her cables and under sail enters a tide harbor at low water, and is grounded and floats only about eight days during the month;[8] or where she springs a leak by running upon an anchor upon entering a harbor of necessity, and upon being moored she is warped higher up to prevent sinking and takes the ground.[9] It is not a stranding if a ship strikes and bilges and passes without stopping;[10] nor where she strikes a rock and remains there about a minute and a half;[11] nor where she takes ground in a tide harbor on the ebbing of the tide, either after being moved or while entering, this being incident to the ordinary course of navigation.[12] If the policy insures against injury resulting in liability while vessels are in tow it does not extend to stranding resulting from negligently cutting the hawser and sending the tow adrift or abandoning her.[13] Where a vessel, seaworthy at the commencement of her voyage, would have completed it in safety except for delays caused by stranding causing her boilers to develop leaks, the policy is not invalidated as stranding is a peril covered by the policy.[14] Again, a wind, which is strong enough to break a rope

Carruthers v. Sydebotham, 4 Maule & S. 77, 16 R. R. 392.

[3] Dobson v. Bolton, reported in 1 Marshall on Ins. (ed. 1810) *240.

[4] Mitchell v. Calder, 1 Shaw & D. 276, 298.

[5] De Mattos v. Saunders, 7 L. R. Com. P. 570, 27 L. T. 120, 20 W. R. 801, 1 Asp. M. C. 377.

[6] Baker v. Towry, 1 Stark. 436, 18 R. R. 803.

[7] Rayner v. Godmond, 5 Barn. & A. 225, 24 R. R. 335.

[8] Corcoran v. Gurney, 1 El. & B. 456, 22 L. J. Q. B. 113, 17 Jur. 1152, 1 W. R. 129, 93 R. R. 232.

[9] Barrow v. Bell, 4 Barn. & C. 736, 7 Dowl. & R. 244, 4 L. J. (O. S.) K. B. 47, 28 R. R. 468.

[10] Lake v. Columbus Ins. Co. 13 Ohio, 48, 42 Am. Dec. 188.

[11] MacDougle v. Royal Exchange Assur. Co. 1 Stark. 130, 4 Maule & S. 503, 4 Camp. 283, 16 R. R. 532.

[12] Hearne v. Edmunds, 1 Brod. & B. 388, 4 Moore, 15, 21 R. R. 660; Magnus v. Buttemer, 21 L. J. Com. P. 119, 11 Com. B. 876, 16 Jur. 480, 87 R. R. 795; Kingsford v. Marshall, 8 Bing. 458, 1 Moore & S. 657, 1 L. J. C. P. 135, 34 R. R. 756.

[13] Cahill v. Standard Marine Ins. Co. Ltd. 124 N. Y. Supp. 496, 139 App. Div. 780, aff'd 204 N. Y. 190, 97 N. E. 486, 41 Ins. L. J. 773.

[14] St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co. 157 Fed. 625, 87 C. C. A. 14, 14 L.R.A.(N.S.) 1161.

connecting a barge with a steamer, and causes the latter to strand, comes under the term "stress of weather" in a policy containing the clause "that no claim will be made for loss, damage or expense resulting from stranding or grounding, unless caused by stress of weather;" and it is not necessary to constitute "stress of weather" that the wind in such case should be a tornado or extraordinary or unusual in the section where the stranding occurred.[14a]

**§ 2818. Sue and labor clause: rescue clause: marine risk.**—The object of this clause was to enable the assured to do that which it was formerly assumed he could not do without losing his right to abandon; that is, to take every measure necessary for the preservation and recovery of the property, and this it is his duty to do under the stipulation, the underwriters being bound to contribute to the charges under a Lloyds' policy, where there are several subscriptions, "each one according to the rate and quality of his sum herein assured." [15] Under the suing and laboring clause the underwriters are liable for a proportion of any reasonable expenses incurred in preserving the property from the operation of the perils insured against,[16] and for expenses incurred in attempting

[14a] Huntington, Ashland & Big Sandy Transportation Co. v. Western Assur. Co. (Transportation Co. v. Western Assur. Co.) 61 W. Va. 324, 57 S. E. 140.

As to rights and liabilities under contract to release stranded vessel, see Klauck v. Federal Ins. Co. 115 N. Y. Supp. 1049, 131 App. Div. 519.

[15] One form is as follows: "In case of any loss or misfortune resulting from any peril insured against, the party insured hereby engages for himself or themselves, his or their factors, servants, and assigns, to sue, labor, and travel, and use all reasonable and proper means for the security, preservation, relief, and recovery of the property insured, or any part thereof, and also to use all proper and legal means to recover, through general average or otherwise, from any parties interested in hull, freight, or cargo, either or all sums due to the vessel or its owners on account of sacrifices, losses, or expenses incurred for the general safety or common good, to the charges whereof this company will contribute in proportion as the sum insured is to the whole sum at risk, nor shall the acts of the insured or insurers in recovering, saving, and preserving the property insured in case of disaster be considered as a waiver or an acceptance of abandonment:" See Mitchell v. Edie, 1 Term Rep. 608, 1 R. R. 318, 1 Eng. Rul. Cas. 132; Kidtson v. Empire Marine Ins. Co. L. R, 1 Com. P. 535, L. R. 2 Com. P. 357, 36 L. J. C. P. 156, 12 Jur. (N. S.) 665, 16 L. T. 119, 286, 15 W. R. 769, 14 Eng. Rul. Cas. 247, per Willis, J.; Booth v. Gair, 33 L. J. Com. P. 99, 15 C. B. (N. S.) 291, 9 Jur. (N. S.) 1326, 9 L. T. 286, 12 W. R. 186. The master's duty is not only to navigate the ship in favorable weather, but it is his duty in adverse weather inducing shipwreck to exert himself to save as much of the ship and cargo as he can. This a part of his bounden duty in his character as seaman of that ship: The Neptune, 1 Hagg, Adm. 227, 236, per Lord Stowell.

[16] Cory v. Boylston Fire & Marine Ins. Co. 107 Mass. 140, 9 Am. Rep. 14.

to recover the property in addition to the payment of a total loss;[17] So insurers of the cargo of a vessel against loss by a collision with ice, under a policy containing a sue and labor clause, are liable for the cost of moving the cargo overland, when, the vessel having been delayed by low water in ascending a river to its destination until formation of ice compelled laying it up for the winter, it was moved with the consent of the underwriter to avoid the effect of the ice upon its breaking up in the spring, and the goods, being perishable, could not have been otherwise preserved.[18] The cost of getting boats which are part of a vessel's cargo from the point where she is wrecked to a place of safety may be recovered under a marine insurance policy upon them, although they are not injured by the disaster, where the policy requires insured to labor to secure the property insured, and binds the insurer to contribute to the expense thereof in proportion as the sum insured is to the whole sum at risk while the policy covers the whole value of the property.[19] And liability of insurer of the cargo of a steamer is not destroyed by the fact that, to reach its destination on the course of a river, the cargo is transferred and divided between a smaller steamer and a barge. And the expense of such transportation is within the sue and labor clause.[20] One adjusting the liability of an underwriter for expense of moving a cargo overland to avoid a threatened peril may properly consider the expense vouchers, the question whether or not the goods have been exposed to a peril covered by the sue and labor clause of the policy, and whether insured properly incurred expenses in averting the loss, and, if so, what.[1] But expenses incurred in defending an insured tug in a suit to establish its liability are not within the sue and labor clause where said tug is merely insured against liability for loss or damage to its tows by collision or stranding.[2] And under this clause

[17] Jumel v. Marine Ins. Co. 7 Johns. (N. Y.) 412, 5 Am. Dec. 283. See Orrok v. Commonwealth Ins. Co. 21 Pick. (38 Mass.) 456, 32 Am. Dec. 271; Providence & Stonington Steam Ship Co. v. Phœnix Ins. Co. 89 N. Y. 559, 562.

[18] St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co. 157 Fed. 627, 87 C. C. A. 14, 14 L.R.A.(N.S.) 1161.

On right to recover under "sue and labor" clause in policy of marine insurance for moving cargo overland, see note in 14 L.R.A.(N.S.) 1161.

[19] Standard Marine Ins. Co. v. Nome Beach Lighthouse & Transportation Co. 133 Fed. 636, 67 C. C. A. 602, 1 L.R.A.(N.S.) 1095.

[20] St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co. 157 Fed. 625, 87 C. C. A. 14, 14 L.R.A.(N.S.) 1161.

[1] St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co. 157 Fed. 625, 87 C. C. A. 14, 14 L.R.A.(N.S.) 1161.

[2] Munson v. Standard Marine Ins. Co. 156 Fed. 44, 84 C. C. A. 210, 209 U. S. 543, 52 L. ed. 919, 28 Sup. Ct. 570.

assurers are not liable where there is no necessity to defend safeguard or recover property; as in case where expense is unnecessarily incurred in employing a tug in searching for boats reported adrift, which had not in fact gone adrift but were tied up in a safe place.[3] The clause has references to charges not covered by the insurance, and where expenditures are incurred to repair losses caused by the risks insured against, such as for temporary repairs to make the vessel seaworthy, she being safe in port, these are not covered.[4] Nor is insured bound to defend an attempt to condemn property captured, but he may abandon on notice thereof.[5] The question is whether such reasonable and proper means were used for the safety, care, preservation, and recovery of the property as a prudent uninsured owner would have used under the circumstances, and not whether all the care was used that possibly could have been exercised, or whether the plan pursued was the best one that could have been adopted.[6] In the case of memorandum articles of one species, such as hides, the underwriters are not liable for salvage under the sue and labor clause, unless perhaps an actual loss of the cargo may have been prevented by the salvage.[7] Although where there was a partial loss under the ten per cent, excepted by the warranty free from average, and expenses were incurred to save the goods under the sue and labor clause, the insurers were held liable for such expenses.[8] Nor is the liability that of particular average under such clause.[9] Where the insured was obligated to labor for the safeguard and recovery of a steamboat in case of accident, the expense incurred in launching the boat, which has run upon a bar or flat and is in danger of loss, was held to be at the charge of the insurer.[10] Insurers have no right by virtue of this clause to take possession of the ship and make permanent repairs; the clause has reference only to relief from present peril and temporary care,[11] although if the assured fails to recover and repair, the insurers after the disaster may do so.[12] Neither ex-

[3] Barney Dumping Boat Co. v. Niagara Fire Ins. Co. 14 U. S. C. C. A. 408, 67 Fed. 341.

[4] Alexandre v. Sun Mutual Ins. Co. 51 N. Y. 253. See Lohre v. Atchison (Aitchison v. Lohre, 3 Q. B. D. 558, 4 App. Cas. 755, 764, 49 L. J. Q. B. 123, 41 L. T. 323, 28 W. R. 1, 4 Asp. M. C. 168) 2 Q. B. D. 501, 509.

[5] Gardere v. Columbian Ins. Co. 7 Johns. (N. Y.) 514.

[6] Franklin Ins. Co. v. Cobb, 2 Cinc. Supr. Ct. 87.

[7] Biays v. Chesapeake Ins. Co. 7 Cranch (11 U. S.) 415, 3 L. ed. 389.

[8] Shultz v. Ohio Ins. Co. 1 B. Mon. (Ky.) 336.

[9] Kidston v. Empire Marine Ins. Co. L. R. 1 Com. P. 535, 2 C. P. 357, 36 L. J. C. P. 156, 12 Jur. (N. S.) 665, 16 L. T. 119, 286, 15 W. R. 769, 14 Eng. Rul. Cas. 247.

[10] Dix v. Union Ins. Co. 23 Mo. 57.

[11] Gloucester Ins. Co. v. Younger, 2 Curt. (U. S. C. C.) 322, Fed. Cas. No. 5,487.

[12] Cincinnati Mutual Ins. Co. v. May, 20 Ohio, 211.

penses for ascertaining the amount of the loss nor expenses of refitting the property for market are covered.[13] Expenses incurred in saving or preserving sea damaged goods whereby a loss to the insurers is diminished is covered by this clause.[14] The insurers have the undoubted right to save and restore the vessel and render it certain that there is no total loss, and if they act in good faith they are entitled to reimbursement for their expenses out of the vessel or the insured under a rescue clause giving the underwriters the right "to interfere and save the vessel" in case of loss or misfortune, and in case the insurance is "against total loss only, and no claim for the same is sustained, then the whole of such expenditure and the amount paid or incurred by insurers should be a lien upon the vessel, and recoverable against the vessel or insured at the option of the insurers." [15] An insurer of the cargo of a vessel which agrees to have it removed from the vessel to avoid a threatened peril after being notified of the cost, cannot escape payment of the cost by claiming that the expenditure was disproportionate to the interests of the case.[16] Where cattlemen supplied by the shipper refused to work and the master deviated to discharge them and supply others and expenses are incurred solely to prevent the mortality of cattle and incidentally the loss of freight which was insured, insurers are liable for the expenses incurred in such deviation.[17] The sue and labor clause does not impose any obligation on insurer to recover the vessel and repair her. It has a right, however, for the protection of their interests to have the vessel renewed and repaired.[18]

In another case a vessel was insured for a voyage, "against war risk only as excluded by the f. c. and s. clause in marine policies, including risk of mines, torpedoes and bombs." All claims arising from delay were excluded, and the usual sue and labor clause was also in the policy. On her voyage from Raumo to Garston she was stopped by German war vessels and put into Grimstadt where she discharged her cargo, subsequently they chartered two vessels and reshipped the cargo to England. A claim was made for the

[13] Cory v. Boylston Fire & Marine Ins. Co. 107 Mass. 140, 9 Am. Rep. 14.

[14] Kidston v. Empire Marine Ins. Co. L. R. 1 Com. P. 535, 2 C. P. 357, 36 L. J. C. P. 156, 12 Jur. (N. S.) 665, 16 L. T. 119, 286, 15 W. R. 769, 14 Eng. Rul. Cas. 247.

[15] Carr v. Security Ins. Co. 109 N. Y. 504, 17 N. E. 369, per Andrews, J.

[16] St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co. 157 Fed. 625, 87 C. C. A. 14, 14 L.R.A.(N.S.) 1161.

[17] Tweedie Trading Co. v. Western Assur. Co. 179 Fed. 103, 102 C. C. A. 397, 39 Ins. L. J. 1343, aff'g 168 Fed. 962.

[18] Searles v. Western Assur. Co. 88 Miss. 260, 40 So. 866.

expenses of the storage of the cargo and the reshipping, said claim was allowed, it being also declared that the clause excluding all claims from delay in any way, *affected the sue and labor clause.* There was also a claim that the goods were safe when they were landed and stored at Grimstadt and that the assured had sued and labored to avert a loss which was not covered by the policy, but the claim was not sustained, the court declaring that: "If the loss was incurred by the perils insured against—namely, war risk—it covered particular average loss as well as total loss; and it seems to me there was at all events a partial loss here. . . . On the evidence, however, I think that if the plaintiffs had acted with reasonable diligence they would have had the ship ready to load the cargo for carriage . . . at a lower rate of freight than they in fact paid. The proportion of the expenses of storage and reshipping which they are entitled to recover from the defendant must therefore be calculated upon that footing." [18a]

[18a] Wilson Bros. Bobbin Co. v. Green, 86 L. J. K. B. 713, [1917] 1 K. B. 860. As to the last point Bray, J., said: "Counsel relied mainly on the case of Great Indian Peninsular Railway v. Saunders (31 L. J. Q. B. 206, 2 B. & S. 266, 9 Jur. N. S. 198, 6 L. T. 297, 10 W. R. 520, 127 R. R. 363, 30 L. J. Q. B. 218, 1 B. & S. 41, 124 R. R. 446). That case has to be very carefully considered. The facts were that the plaintiffs shipped at London for Bombay certain rails, 'freight for the said goods to be paid here, ship lost or not.' They paid the freight, and by a policy in the common form insured for the voyage the rails value at 4,500*l* 'warranted free from particular average, unless the ship be stranded, sunk or burned.' Soon after sailing the ship was, in consequence of damage by perils of the sea, compelled to put back into Plymouth in such a state as not to be worth repairing. The rails were landed and sent by the plaintiffs to London, and thence in other vessels to Bombay, the plaintiffs having to pay 825*l* as freight. It was held that this extra freight was particular average, and therefore within the warranty, and consequently was not recoverable from the underwriters, and further, that the plaintiffs could not recover the amount under the suing and laboring clause. Mr. Justice Blackburn, in giving the judgment of the court of Queen's Bench, said (30 L. J. Q. B. at p. 222, 1 B. & S. at p. 52): 'It was, however, further argued, by Mr. James, that the plaintiffs were entitled to recover under the clause which authorizes the insured to sue and labor for the preservation of the subject matter of the insurance. It is not necessary to decide whether an underwriter on a policy against total loss only is, under this clause, liable for expenses incurred by the assured for the purpose of rescuing the subject matter of an insurance from a state of peril which might have resulted in a total loss but did not. There are reasons both for and against this stated by Mr. Phillips in his Treatise on Insurance (5th ed.) sec. 1777; and the question seems never to have been actually decided. But in the present case it does not arise. The expenses here were incurred for the purpose of forwarding the subject matter of insurance to its destination, at a time when the iron was not in any peril of total loss, either actual or constructive. Had the insured chosen, in-

§ 2819. **Telegraph cable.**—An insurance upon the Atlantic telegraph cable to "cover and include the successful working of the cable when laid and all and every danger, accident, and risk that may be incurred on sea or on land in all and any boat, ship, and craft whatsoever and wheresoever until the final, complete, and successful laying" thereof from shore to shore, does not render the insurers liable for a loss not caused by any mechanical action of the sea, but by the chemical action of the sea water, owing to the copper wire being insufficiently protected, but does cover a loss of a portion thereof by a peril of the sea during an attempt to lay it. This in the former case may be ascribed to natural causes consequent upon inherent defects.[19] In another case, where the policy covered, "in addition to all perils and casualties specified," "every risk and contingency attending the conveyance and successful laying of the cable," it was held that it was the adventure, the successful laying of the cable, that was insured, and not merely the cable itself, and that insurers were responsible for the breaking of the cable during an attempt to remedy defective portions.[20]

§ 2820. **Tenant's liability to pay rent: release of insurer.**—If a company insures a tenant against loss from liability to pay rent

stead of paying this extra freight, to sell the rails in England, as he might have done if he pleased, he could have made no claim on the underwriters; for it would not have been a constructive total loss, according to Rosetto v. Gurney [1851] (20 L. J. C. P. 257, 11 C. B. 176, 15 Jur. 1177, 17 L. T. O. S. 242, 87 R. R. 629), unless the amount of the extra freight exceeded the value of the goods when forwarded, which is not the case here; and an actual total loss is out of the question. It seems to us that the plaintiffs here cannot in any way recover, unless we deprive the warranty of the effect which it was intended to have. We therefore give judgment for the defendant.' Counsel for the plaintiffs said that since Sanday's case (British & Foreign Marine Ins. Co. Ltd. v. Sanday, 85 L. J. K. B. 550, [1916] 1 A. C. 650, 114 L. T. 521, 21 Com. Cas. 154, 60 S. J. 253, 32 L. T. 266) that was no longer law. I do not think Sanday's case (85 L. J. K. B. 550, [1916] 1 A. C. 650) laid down new law at all, but merely enunciated what was the law long before the passing of the marine insurance act, 1906 (6 Edw. VII. c. 41)—namely, that what was insured in a policy of this kind on goods was their safe arrival at the port of destination. The unanimous judgment of the Court of Queen's Bench in Great Indian Peninsular Railway v. Saunders (30 L. J. Q. B. 218, 1 B. & S. 41) was affirmed by the Court of Exchequer Chamber (31 L. J. Q. B. 206, 2 B. & S. 266) and I cannot at Nisi Prius say that it was wrongly decided. In my opinion, however, it was clearly distinguishable. It was decided upon the ground that the loss was a particular average loss, and the policy contained a warranty that it was free from particular average. The policy in this case contains no such clause."

[19] Paterson v. Harris, 1 Best & S. 336, 30 L. R. Q. J. 361, 31 L. J. Q. B. 277, 7 Jur. (N. S.) 1276, 9 Jur. (N. S.) 173, 2 Best & S. 814.

[20] Wilson v. Jones, 36 L. J. Ex. 78, 4 Hurl. & C. 221, L. R. 2 Ex. 139, 15 L. T. 669, 15 W. R. 435, 13 Eng. Rul. Cas. 299.

while the building, owing to fire, remains uninhabitable, a re-entry of the landlord to rebuild after a fire, under an agreement that the tenant shall continue to pay rent, releases the insurer, for the right to collect rent ceases upon re-entry, and the company is not holden by any agreement to the contrary.[1] Insurance against loss by reason of having to pay rent for a building under a lease while it is untenantable by reason of fire, will cover the time during which the landlord is in possession for the purpose of rebuilding the burned building under an agreement with the tenant that such possession shall not effect the tenant's liability for rent under the lease until the completion of the new building.[2] An insurance company's letter stating that it could not, by reason of the landlord entering for the purpose of rebuilding, be discharged from liability on a policy insuring a tenant against liability for rent in case the leased buildings are burned, and that such defense would not be raised, will not estop the company from asserting its discharge from further liability by reason of an entry by the landlord under an agreement with the tenant to continue the payment of the rent.[3]

**§ 2821. Theft: fire risk: burglary or automobile risks.**—(a) *Theft: fire risk.*—If insured, owing to imminent danger to the goods from fire, is justified in their removal, and uses the caution which a prudent uninsured man would reasonably be expected to use under the circumstances, or if he uses his utmost exertions to protect and secure the property at, during, and after the fire, or if in compliance with the stipulations of the policy he labors for the protection and safety of the goods, loss by theft or larceny of the goods falls upon the insurers, even though the goods are stolen after the fire is extinguished, such theft being directly occasioned by the fire; the precise time when the theft occurred is not material.[4] But

[1] Royal Ins. Co. v. Heller, 133 Pa. St. 152, 7 L.R.A. 411, 19 Atl. 349, 47 Phila. Leg. Intel. 202.

[2] Heller v. Royal Ins. Co. 177 Pa. 262, 34 L.R.A. 600, 35 Atl. 726.

[3] Heller v. Royal Ins. Co. 133 Pa. 152, 7 L.R.A. 411, 19 Atl. 349.

[4] *Kentucky.*—Leiber v. Liverpool & London & Globe Ins. Co. 6 Bush (Ky.) 639, 99 Am. Dec. 695.

*Louisiana.*—Talaman v. Home Mutual Ins. Co. 16 La. Ann. 426.

*Maine.*—Witherell v. Maine Ins. Co. 49 Me. 200.

*Missouri.*—Newmark v. Liverpool-Lancashire Fire & Life Ins. Co. 30 Mo. 160, 77 Am. Dec. 608.

*Oklahoma.*—Farmers & Merchants Ins. Co. v. Cuff, 29 Okla. 106, 35 L.R.A.(N.S.) 892, 116 Pac. 435.

*Pennsylvania.*—Independent Mutual Ins. Co. v. Agnew, 34 Pa. St. 96, 75 Am. Dec. 638, aff'g 3 Phila. 195.

*England.*—Thompson v. Montreal Ins. Co. 6 U. C. Q. B. 319.

See also Tilton v. Hamilton Fire Ins. Co. 1 Bosw. (N. Y.) 367; Whithurst v. Fayetteville Mutual Ins. Co. 6 Jones L. 51 (N. C.) 352.

Thieves; marine risk, see § 2804 herein.

such loss by theft must result as one of the consequences of the fire.[5] So insurers are liable for stolen goods while being removed at the instance of the company's agent to avoid impending loss by fire.[6] But insurer is not liable for property stolen during its removal from a burning building merely because the fire warden advised its removal.[7] And if it is expressly stipulated that loss by theft is an excepted risk recovery is precluded in cases of the first mentioned character.[8]

(b) *Construction: burglary: theft, etc., automobile risk.*—The rule of construction against assurer is applied to a policy insuring against loss or damage caused by theft, robbery or pilferage of an automobile,[9] also to a policy covering loss by burglary,[10] or theft.[11] It is declared, however, that even though it may be conceded that where a policy is of doubtful tenor that interpretation which is more exacting should be applied against insurer, still where there is no ambiguity or uncertainty the courts may not make a new contract under the guise of construction; for when the parties to a contract adopt a provision which contravenes no principle of public policy, and contains no element of ambiguity, the courts have no right to relieve one of them from disadvantageous terms which he has actually made by a process of interpretation and this is asserted in connection with the construction of the clause "visible marks, actual force and violence" and the words "forcible and violent entrance" etc., in a burglary policy.[12] Nor will the rule of construction against insurer apply to a policy insuring against loss where the entry into a safe is made by the use of tools or explosives applied directly to the outside of a safe, so as to make it cover theft by the use of force to a cash box on the inside of said safe when there are no doubtful, conflicting or ambiguous terms in relation thereto, and there is therefore no room for construction.[13]

[5] Farmers & Merchants Ins. Co. v. Cuff, 29 Okla. 106, 35 L.R.A. (N.S.) 892, 116 Pac. 435.

[6] Leiber v. Liverpool & London & Globe Ins. Co. 6 Bush (Ky.) 639, 99 Am. Dec. 695.

[7] Fernandez v. Merchants' Ins. Co. 17 La. Ann. 131.

[8] Farmers' & Merchants' Ins. Co. v. Cuff, 29 Okla. 106, 35 L.R.A. (N.S.) 892, 116 Pac. 435.

Loss by theft: excepted risk, see § 2596 herein.

[9] Federal Ins. Co. v. Hiter, 164 Ky. 743, L.R.A.1915E, 575, 176 S. W. 210.

[10] First National Bank of Monrovia v. Maryland Casualty Co. 162 Cal. 61, Ann. Cas. 1913C, 1170, 121 Pac. 321.

[11] Duschenes v. National Surety Co. of N. Y. 139 N. Y. Supp. 881, 79 Misc. 232.

[12] Rosenthal v. American Bonding Co. 207 N. Y. 162, 46 L.R.A.(N.S.) 561, 100 N. E. 716, 42 Ins. L. J. 323, Hiscock, J., s. c. 128 N. Y. Supp. 553, 143 App. Div. 362, 40 Ins. L. J. 1301, s. c. 124 N. Y. Supp. 905, 39 Ins. L. J. 968. See also First National Bank of Monrovia v. Maryland Casualty Co. 162 Cal. 61, 69, Ann. Cas. 1913C, 1170, 121 Pac. 321.

[13] Frankel v. Massachusetts Bond-

(c) *Burglary generally.*—If the policy indemnifies against burglary from premises of the occupant of a fourth floor of a specified building the protection is limited thereby and does not extend to the entire building;[14] and this would also apply as to a loss dependent upon the requirement that a private watchman be kept within the premises.[15] And property in a safe which it is evident from the policy terms was intended to be covered as a risk will be held protected where the doubtful clause in this respect has reference only to the amount of insurance carried on the property in the safe and the premium rate thereon.[16] An insurer under a burglary policy is liable and no "change in the conditions and circumstances of the risk" is effected by the employment by assured of workmen in relaying floors and painting his house without insurer's written consent, where his servants remained in the house and assured himself or some member of his family slept therein except on Saturday or Sunday nights when they were in the country.[17]

(d) *Burglary: "forcible and violent entrance," etc., construed.*—The New York court of appeals in construing the words "forcible and violent entrance upon the premises or exit therefrom" in a policy insuring against direct loss by burglary of any merchandise, etc., declares that in thus specifying by the use of said words the particular manner in which the "burglary" must be committed the language of the policy should receive its ordinary and common meaning, and that in order to constitute burglary under this clause there must be an entrance or an exit upon or from the premises which is accompanied by such acts as would constitute force or violence in the ordinary acceptation of those terms rather than the somewhat technical force by breaking which would satisfy legal definitions; that is, that it is doubtful whether the meaning of said words "forcible and violent entrance," etc., is to be measured by reference to the meaning of such words as "break" and "forcibly break" as those terms have been construed in defining the crime

ing & Ins. Co. — Mo. App. —, 177 S. W. 775, 46 Ins. L. J. 392.

[14] Axe v. Fidelity & Casualty Co. 239 Pa. 569, 46 L.R.A.(N.S.) 574, 86 Atl. 1095. *Compare* Michaels v. Fidelity & Casualty Co. of N. Y. 128 Mo. App. 18, 105 S. W. 783, *considered* under § 1745 herein.

[15] Axe v. Fidelity & Casualty Co. 239 Pa. 569, 46 L.R.A.(N.S.) 574, 86 Atl. 1095. As to employment of watchman, see § 2112 herein.

[16] Casner v. New Amsterdam Casualty Co. 116 Mo. App. 354, 91 S. W. 1001.

[17] Graf v. National Surety Co. 131 N. Y. Supp. 548, 146 App. Div. 782, 41 Ins. L. J. 184.

As to alterations and repairs, see §§ 2191 et seq. 1708, herein.

of burglary, and which construction demanded only a very small degree of force in entering premises.

While the above statement is said by the court to be only important, if at all, as bearing upon another following clause which exempted assurer from liability unless there should be "visible marks upon the premises of actual force and violence used in making entry into said premises and exit therefrom," nevertheless said assertion is entitled to weight and it is accordingly presented as it stands having in view the discussion of this point in this same case in the lower courts, having also in view the distinction between real rather than technical force made by the court in applying the aforesaid words "actual force and violence" used in making entry into or exit from the premises words are thereby employed "whose meaning is not easily satisfied by that somewhat theoretical force which has been held to meet the demands of legal definitions of burglary, but which rather acquires substantial violence." This case turned upon the point of construction of this entire clause narrowed down to the determination of whether there were visible marks upon the premises of such force and violence and upon the evidence it was held that insurer was not liable.[18]

(e) *Burglary: what losses not covered.*—Where the loss is caused by the use of tools on a safe and not on an inner steel burglar proof chest which is opened by manipulating the combination, recovery is precluded under a policy provision that no recovery shall be had for a loss of money from such inner chest unless it shall have been abstracted therefrom after entry into both the safe and the chest by the use of tools or explosives directly thereupon.[19] So where the indemnity is for direct loss of money in current use, bullion securities, uncanceled United States government postoffice or revenue stamps, in consequence of the felonious abstraction of the same from the safe by any person who shall have "made entry into such safe or safes by the use of tools or explosives applied directly to the outside thereof," a loss is not covered where the contents of an inside cash box were taken without the tools or explosives being applied thereto until after the whole frame work of the interior of the safe had been removed to an upper floor where the

[18] Rosenthal v. American Bonding Co. of Balt. 207 N. Y. 162, 46 L.R.A. (N.S.) 561, 100 N. E. 716, 42 Ins. L. J. 323, rev'g judgment below (above text is substantially the language of Hiscock, J.) s. c. 128 N. Y. Supp. 553, 143 App. Div. 362, 40 Ins. L. J. 1301 (wherein Code secs. 498, 499, as to burglary and the meaning of "break" therein is fully discussed, as is also common law burglary), which affirms 124 N. Y. Supp. 905, 39 Ins. L. J. 968. See § 3794 herein.

[19] First National Bank of Monrovia v. Maryland Casualty Co. 162 Cal. 61, Ann. Cas. 1913C, 1170, 121 Pac. 321.

money box was broken into and no tools or explosives were applied to the outer doors having the combination lock and none were applied to the middle doors; nor in such case is assured aided by the use of the words "safe or safes" where the terms of the policy evidence that only one safe was intended to be covered by the clause as to the use of tools and explosives applied directly to the outside.[20] In another case the policy indemnified against all loss by burglary of money, bullion, bank notes, etc., in consequence of the felonious abstraction thereof from the safe or safes of a bank and also for all loss of said property feloniously or violently or forcibly taken from that part of the banking room partitioned off by suitable guard rails, etc., and provided for the exclusive use of the officers and clerks of the bank, etc., in the transaction of its business, but it is stipulated that insurer is not to be liable where there is an inner steel burglar proof chest unless the money is taken therefrom by an entry effected into it by the use of tools or explosives directly thereupon; nor for any loss by any robbery whatever not occasioned by forcible, violent, and felonious robbery commonly known as a "hold up," nor at all unless the regular working force is at work in the bank. It was held that insurer was not liable when after the money was put into the inner chest of the safe and after the bank's working force had left, there was a holdup at night of a bank officer who was required to open the bank and safe, and the money was abstracted therefrom; and the word "tools" as used in said policy means burglars tools and explosives.[1]

(f) *Burglary: when recovery limited.*—If there is a limitation of the amount for which insurers assume liability and in addition thereto there is an annexed special agreement excluding loss in excess of a specified sum on any one article, and this limitation is very much less than that stated in the policy, recovery will be excluded for loss in excess of the sum stipulated in such special agreement even though it is admitted that the property taken by a burglar was of a very much greater value.[2]

(g) *Theft, etc., of automobile: what losses covered.*—It constitutes a conversion, within a policy insuring against loss or theft, robbing or pilfering, of an automobile, if a person borrows it and

[20] Franckel v. Massachusetts Bonding & Ins. Co. — Mo. App. —, 177 S. W. 775, 46 Ins. L. J. 392.

[1] Maryland Casualty Co. v. Ballard County Bank, 134 Ky. 354, 120 S. W. 301, 38 Ins. L. J. 934. As to forcible entry by use of tools and explosives directly upon safe and on the outside, see also Britt v. Metropolitan Surety Co. 113 N. Y. Supp. 476, s. c. 115 N. Y. Supp. 1126, 130 App. Div. 901.

[2] Wormser v. General Accident Assurance Corp. Ltd. 87 N. Y. Supp. 974, 94 App. Div. 213.

fails to return it; and insurer is liable to the extent that such conversion and wrongful use diminishes the value of the property.[3]

(h) *Theft, etc., of automobile: what losses not covered.*—The taking of an automobile under a claim of ownership by a former owner is not within a policy against direct loss by burglary, theft or larceny.[4] Where the elements of what constitute a larceny of a car must be determined by common law principles, a felonious intent is included and must be shown in order to justify a recovery against insurer; and while such inference of felonious intent may be created by proof of taking by trick or device, still if insured merely resorted to a trick or device to obtain a car to the possession of which he honestly believes he is entitled the above inference will be rebutted and under such circumstances there can be no recovery notwithstanding insured has been thus wrongfully deprived of its possession, the felonious intent in taking not being proven.[5] So under another decision only intentional stealing is covered by a policy on an automobile indemnifying against theft, etc.[6] So, inasmuch as an intent to steal is an essential element to a conviction for theft, robbery, or pillage, recovery is precluded where a car is wrongfully taken with an intent merely to use and return the same and while so using it the taker wrecks, and abandons said machine where it is broken and wrecked.[7] And the taking of a machine after working hours for a joy ride by an employee of a shop where it had been left for repairs with intent to return it, and, returning it damaged, does not constitute larceny for which a recovery can be had under the policy for there must be a criminal intent to permanently deprive the owner of his property in order to constitute larceny and every essential of that crime must exist and be proven.[8] And where insured puts an automobile in the possession of a garage keeper in the expectation of receiving a certain amount therefor upon the sale thereof, he passes over the dominion of said car and if said garage keeper disposes of the car and appropriates the proceeds of the sale to his own use and benefit

[3] Federal Ins. Co. v. Hiter, 164 Ky. 743, L.R.A.1915E, 575, 176 S. W. 210.

[4] Bigus v. Pacific Coast Casualty Co. 145 Mo. App. 170, 129 S. W. 982.

[5] Rush v. Boston Ins. Co. 150 N. Y. Supp. 457, 45 Ins. L. J. 245.

[6] Staht v. Maryland Motor Car Ins. Co. 90 Wash. 576, 156 Pac. 557.

[7] Michigan Commercial Ins. Co. v. Wills, 57 Ind. App. 256, 106 N. E. 725 (Hottel, J., also said: "We find no decisions in our own state where this precise question has been decided," and quotes from Hartford Fire Ins. Co. v. Wimbish, 12 Ga. App. 712, 78 S. E. 265, as directly in point).

[8] Valley Mercantile Co. v. St. Paul Fire & Marine Ins. Co. 49 Mont. 430, L.R.A.1915B, 327, 143 Pac. 559.

there is not such a theft, larceny or pilferage as to render insurer liable.[9]

(i) *Burglary, larceny, etc.: pleading.*—The allegations of a complaint that the safe was broken into and robbed and that the burglars drilled into and damaged the safe worth a specified sum and that the contents, describing them as United States postage stamps, postal funds and money order funds, were feloniously taken therefrom is sufficient on demurrer to render insurer liable under a policy insuring against direct loss by burglary or larceny of such property "after entry into such safe by such burglars effected by the use of tools or explosives directly thereupon" and "for direct loss by damage caused to said" safe "by such burglarious entry or any attempt thereat;" and even if such petition were defective it is cured by issue raised by pleading over, a reply thereto, proper instructions to the jury and a finding as a fact that the safe was entered by means of tools and explosives, especially so where the evidence is sufficient to support such finding.[10] And where a person obtained from assured by misrepresentations jewelry which he never returned, an averment in an action on the policy is sufficient where it shows that during the term thereof jewelry of the value of over a specified amount was without assured's consent taken from her apartment by a certain person who had surreptitiously and fraudulently obtained access thereto and that the same had never been recovered.[11] But in an action to recover under a policy covering loss by burglary, larceny, or theft, an allegation that the property stolen was that covered by such policy is essential to the cause of action, the failure to make such averment is fatal.[12] Under a burglary policy, attempting to cheat and defraud insurer by exaggerating the amount of the claim is new matter which may be set up and if established by competent proof, will constitute a defense to an action to recover on the policy.[13]

**§ 2822. Title insurance: same, mortgagee: defects in mortgagor's title.**—As we have elsewhere stated contracts of title guaranty are

[9] Siegel v. Union Assur. Soc. of L. 153 N. Y. Supp. 662, 90 Misc. 550, 46 Ins. L. J. 228 (Personal Property L. consol. L. c. 41; L. 1909, c. 45, L. 1911, c. 571, sec. 100, as to goods delivered on sale or return construed).

[10] General Accident Fire & Life Assurance Corp. Ltd. v. Stratton, 165 Ky. 754, 178 S. W. 1060, 46 Ins. L. J. 767.

As to evidence: burglary insurance, see § 3794 herein.

[11] Smith v. National Surety Co. 77 Oreg. 17, 149 Pac. 1040.

[12] Kricki v. Ocean Accident & Guarantee Corp. Ltd. 143 N. Y. Supp. 750, 82 Misc. 400, 43 Ins. L. J. 153.

[13] Spingarn v. National Surety Co. of N. Y. 134 N. Y. Supp. 817, 76 Misc. 248, 41 Ins. L. J. 1125, s. c. 136 N. Y. Supp. 1148, 152 App. Div. 886, see 131 N. Y. Supp. 721.

those of insurance and of indemnity,[14] the sole object or purpose of which is to cover possibilities of loss through defects that may cloud or invalidate titles; to protect or save insured harmless from loss consequent upon defects, liens or encumbrances that may burden his title when it is taken:[15] but this protection does not relate to matters that may arise during a specified term commencing after the policy is issued, for the insurance or risks end where those under other kinds of insurance begin. There is therefore no liability as a general rule when insured obtains a good title for thereupon the covenant of insurer has been fulfilled and there exists no liability.[16]

Beyond what is above stated it is difficult in this class of insurance contracts to formulate any governing rule by reason of the various contingencies and policy conditions applicable thereto. What follows under this section is, therefore, necessarily confined to statements of points raised and issues determined under the policy stipulations and circumstances in particular cases.

Loss, within the meaning of a title insurance policy, occurs while one in possession, claiming a fee under a will, is subsequently deprived of a half interest in the property because the title under the will proves defective and the true title appears to be only a half interest by descent, even though insured never owned the title he supposed he did, and which was insured.[17]

Where the contract for a sale of lands required the vendee to accept the premises subject to any liens for assessments which should accrue subsequent to a specified day, and a title guaranty company which insured the title for the vendee in the enumeration of liens for which it would not be liable, did not include the lien of an assessment which accrued after the day set for the contract of sale for the assumption of liens by the vendee, the insurer is not liable for the moneys paid by the vendee to satisfy said lien, for under the circumstances the vendee suffered no loss but only met the obligations which he assumed under the contract of sale.[18] And if the vendee refuses to take title until certain assessments other than those specified in the policy are paid such assessments must be paid or the premises have been sold in enforcement of the same before insured can maintain suit upon the policy.[19] But where a policy by a schedule attached thereto shows what liens are not within its pro-

[14] See §§ 27i, 339g herein.

[15] See § 13 herein.

[16] Trenton Potteries Co. v. Title Guarantee & Trust Co. 176 N. Y. 65, 69, 68 N. E. 132.

[17] Foehrenbach v. German American Title & Trust Co. 217 Pa. 331, 12 L.R.A.(N.S.) 465, 118 Am. St. Rep. 916, 66 Atl. 561.

[18] Empire Development Co. v. Title Guarantee & Trust Co. 157 N. Y. Supp. 68, 171 App. Div. 116.

[19] Palliser v. Title Ins. Co. of New York, 115 N. Y. Supp. 545.

tection, that is those liens "which do or may now exist and against which the company does not agree to insure or indemnify," there is an inference therefrom that there was a willingness on assurer's part to assume the risk of any loss by reason of an omitted lien or encumbrance rather than the inference that because a lien was omitted it is practically non-existent.[20]

Encroachments upon the premises for several inches of parts of the adjoining property under a policy insuring the title of real estate against them and renders insurer liable in an amount equal to the difference between the value of the property when purchased with such encroachments and the value which the property would have had without them.[1]

A policy condition that no right of action shall accrue thereunder, "unless the insured has contracted to sell the estate or interest insured, and the title has been declared by a court of last resort of competent jurisdiction defective or unencumbered by reason of a defect or encumbrance for which the company would be liable under this policy," is not available to the insurance company, in an action on the policy, where the land was not only in the actual adverse possession of another at the time the policy issued, but has been absolutely lost by reason of a defect in the insured title.[2] So the fact that one surrenders the possession of property, the title to which has been insured, upon the rendition of an adverse decree, without waiting to be expelled from the property, does not deprive him of his rights of action against insurer.[3] Again, the clause "tenancy of the present occupants," used in the policy as a defect in the title not insured against, does not include the claim of one in actual adverse possession asserting ownership in fee against the insured title, but must be construed as meaning the tenancy which arises through the occupation or temporary possession of the premises by those who are "tenants" in the popular sense of that term.[4] Claims of "tenure" by present occupants excepted in the policy together with liens, encumbrances, etc., not shown by any public record do not include claims resting alone upon adverse possession but covers the record title only, for the word tenure covers any holding from mere possession to the owning of the inheritance

[20] Fidelity Ins. Trust & Safe Deposit Co. v. Earle, 23 Pa. Co. Ct. Rep. 449.

[1] Glyn v. Title Guaranty & Trust Co. 117 N. Y. Supp. 424.

[2] Place v. St. Paul Title Ins. & Trust Co. 67 Minn. 126, 64 Am. St. Rep. 404, 69 N. W. 706, 26 Ins. L. J. 809.

[3] Foehrenbach v. German American Title & Trust Co. 217 Pa. 331, 12 L.R.A.(N.S.) 465, 118 Am. St. Rep. 916, 66 Atl. 961.

[4] Place v. St. Paul Title Ins. & Trust Co. 67 Minn. 126, 64 Am. St. Rep. 404, 69 N. W. 706, 26 Ins. L. J. 809.

although it also signifies the mode by which one estate in land is held.[5]

Where a title insurance company covenanted to indemnify, keep harmless, and insure for a specified period the mortgagee from all loss or damage, not exceeding a certain sum, by reason of defects in the mortgagor's title in the real estate or interest mortgaged, or by reason of liens or encumbrances, and agreeing in case of suit to defend upon notice for and in the mortgagor's name, or pay the claim on which the suit was brought, or pay the insured the amount of liability stipulated, and the insurer undertakes to defend, he must protect the insured through all stages of the actions or proceedings, even after foreclosure sale, or else by timely notice place him in a position to protect himself, and provide him with the requisite information to enable him so to do, and if after notice the insurer defends, this operates as a withdrawal of notice.[6] And if one purchases a fraudulent and forged mortgage on notes on insured under a policy indemnifying it against all loss and damage by reason of defects in the title to the mortgage, said assured must it is held, sustain the loss although it is innocent in the transaction.[7] In a Federal case insurer agreed to indemnify, keep harmless and insure a mortgagee from all loss or damage not to exceed a specified sum, the amount of the mortgage debt, which he or his assigns might sustain by reason of defects in the title to the mortgaged premises, or by reason of liens and encumbrances thereon existing at the policy date. The property was sold to satisfy mechanics' liens upon the property at the date of the policy. Insurer refused to pay said liens or to pay insured the amount bid for the property at the foreclosure sale, which was the amount of the mortgage debt. Insured was compelled to redeem the property from the mechanics' lien sale as a necessary protection to his security and title. The property also provided that the satisfaction or discharge of the mortgage debt, except by foreclosure of the mortgage, should terminate and avoid the policy and release insurer from all liability thereunder. It was held that insurer was liable, and was obligated either to buy the property for the amount bid at the sale, or to redeem it from the sale under the liens and that insured was entitled to recover the amount paid by it for that purpose. The court also refused to sustain assurers' contention that the foreclosure of the

[5] Bothin v. California Title Ins. & Trust Co. 153 Cal. 718, Ann. Cas. 1914D, 634, 96 Pac. 500; Civ. Code § 1213, *construed.*

[6] Quigley v. St. Paul Title Ins. & Trust Co. 60 Minn. 275, 62 N. W. 287, aff'd 64 Minn. 149, 66 N. W. 364.

[7] Union Trust Co. v. Real Estate Title Ins. & Trust Co. 27 Pa. Co. Ct. Rep. 187.

mortgaged premises by the mortgagee for the full amount of the mortgage debt canceled said debt as completely as though it had been paid in cash, and that such satisfaction inured to insurer's benefit and absolved it from liability as fully as if the mortgage debt had been extinguished by a cash payment made by the mortgagor.[8]

Inasmuch as a title insurance is solely a contract of indemnity, an insured or plaintiff by declaring thereon is entitled to recover only his actual loss and cannot make said contract one of profit to him.[9] So recovery is limited to the actual damages sustained where the insurance is against all loss not exceeding a specified amount by reason of defects in title.[10] But under proper allegations such damage may be proven as are naturally and legally the consequences presumably resulting from the injury.[11] There must be a specific averment in a declaration upon a title insurance policy setting out that the loss was consequent upon one or more of certain causes, against loss from which the contract guarantees indemnity, where the policy conditions also provide as to the manner in which such losses shall be ascertained.[12] An eviction by a paramount title by due process of law or a disturbance of title or possession under a paramount title equivalent to an eviction must be set out in order to constitute a cause of action upon a covenant in a title insurance policy based upon assured's eviction from the land; it is not sufficient in such case to allege a claim of title or of eviction under an adverse title.[13]

**§ 2823. Warehouseman: storage of goods in which assured has no interest: limited liability.**—If the policy provides that goods in storage must be specifically and separately insured, and limits the liability of insurer to a loss affecting assured's interest, an assured warehouseman cannot sustain an action for the benefit of merchandise on storage in which assured has no interest, and which the depositors thereof have specifically and separately assured as their own, for the insurers are not liable to the warehouseman therefor, and there can be no contribution, there being no double insurance.[14]

[8] Minnesota Title Ins. & Trust Co. v. Drexel, 70 Fed. 194, 17 C. C. A. 56, 36 U. S. App. 50.

[9] Empire Development Co. v. Title Guarantee & Trust Co. 157 N. Y. Supp. 68, 171 App. Div. 116.

[10] Palliser v. Title Ins. Co. of New York, 115 N. Y. Supp. 545.

[11] Glyn v. Title Guarantee & Trust Co. 117 N. Y. Supp. 424.

[12] Taylor v. New Jersey Title Guarantee & Trust Co. 68 N. J. L. 74, 52 Atl. 281.

[13] Barton v. West Jersey Title & Guaranty Co. 64 N. J. L. 24, 44 Atl. 871.

[14] Home Ins. Co. v. Gwathmey, 82 Va. 923, 1 S. E. 209.

Carrier: liability of warehouseman, see § 2750 herein.

Goods on shore or in warehouses awaiting shipment; temporarily land-

A warehouseman will be liable to a carrier on goods to the extent that it has neglected to effect insurance thereon, where it agrees to receive said goods and to insure the same for the carrier's benefit.[15] But a defect in the warehouse where goods are stored will not render the warehouseman liable for a loss of the goods by fire which is not shown to have resulted from or been in any way connected with the exposure of the goods from such defect.[16]

If it is the custom of a warehouse company to insure oil at its own expense, and the purpose of its organization is to transport store, and insure petroleum, it may effect policies on said property and recover for a loss thereon, even though it is not an owner of the oil insured, there being no representation as to ownership made or required, and the insurers in such case are bound with a knowledge of assured's business and its nature.[17]

**§ 2824. Water used to extinguish fire and save property.**—The damage for which fire companies are liable is not confined to loss by actual burning and consuming, but they are liable for all losses which are the immediate consequences of fire or burning, or of all losses of which fire is the proximate cause.[18] So where water is

ed in government warehouses, etc., see § 1565 herein.

Warehousemen; insurable interest of, see §§ 828, 926 herein.

[15] Deming v. Merchants' Cotton Press & Storage Co. 90 Tenn. 306, 13 L.R.A. 518, 17 S. W. 89.

See S. E. Olson Co. v. Brady, 76 Minn. 8, 78 N. W. 864; Soule v. Lowenthal, 81 N. Y. Supp. 622, 40 Misc. 186.

[16] Lancaster Mills v. Cotton Press & Storage Co. 89 Tenn. 1, 25 Am. St. Rep. 586, 14 S. W. 317.

Liability of warehouseman for loss of property by fire; generally, see Gulf Compress Co. v. Harrington, 90 Ark. 256, 23 L.R.A.(N.S.) 1205n, 119 S. W. 249; Pope v. Farmers Union & Mill Co. 130 Cal. 139, 53 L.R.A. 673, 62 Pac. 384; Locke v. Wiley, 81 Kan. 443, 24 L.R.A.(N.S.) 1117, 105 Pac. 11; Moses v. Teetors, 64 Kan. 149, 57 L.R.A. 267, 67 Pac. 526; Fleischman v. Southern R. Co. 76 S. Car. 237, 9 L.R.A.(N.S.) 519, 56 N. E. 974; Same, burden of proof, see Yazoo & Mississippi Valley R. Co. v. Hughes, 94 Miss. 242, 22 L.R.A. (N.S.) 975n, 47 So. 662.

[17] Western & Atlantic Pipe Lines v. Home Ins. Co. 145 Pa. St. 346, 27 Am. St. Rep. 703, 21 Ins. L. J. 24, 22 Atl. 665.

[18] *Illinois.*—Case v. Hartford Fire Ins. Co. 13 Ill. 676, 680, per Turnbull, J.

*Michigan.*—Brady v. Northwestern Ins. Co. 11 Mich. 425.

*New York.*—City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258; Babcock v. Montgomery Ins. Co. 6 Barb. (N. Y.) 637, per Pratt, J.

*Pennsylvania.*—Hillier v. Allegheny Mutual Ins. Co. 3 Pa. St. 470, 45 Am. Dec. 656.

*England.*—White Cross Wire & Iron Co. v. Savill, L. R. 8 Q. B. D. 653, 51 L. J. Q. B. 426, 46 L. T. 643, 30 W. R. 588, 4 Asp. M. C. 431.

See next chapter herein, on proximate and remote cause, see also §§ 2811–2813 herein.

Exception of liability; duty of assured to preserve and save property, see § 2596a herein.

used to extinguish fire and save property, the insurers are liable for the damage and loss sustained; as in case where goods, which would have burned otherwise, were damaged by water used to extinguish a fire in the building in which the goods were contained, the insurers were held liable.[19] Cases of this character are analogous to those where a building is destroyed by explosion or otherwise to arrest the progress of a conflagration,[20] as well as to cases of removal of goods in imminent danger of destruction from fire.[1]

**§ 2824a. Water supply system useless.**—In the absence of express exceptions in the policy, a fire insurance company is not relieved from liability for loss by fire by the fact that, at the time of the fire, the water supply system of the municipality was useless because of bursted or disconnected pipes. And under a policy insuring property against destruction by fire, but providing that the insurer shall not be liable for loss caused directly or indirectly by order of any civil authority to prevent the spread of fire, or by explosion of any kind or from any cause, or earthquake, or hurricane, etc., insurer is liable for loss from fire caused by an earthquake and originating in the property or building insured, or spreading from its point of origin to such property or building, and when from the occurrence of the earthquake, the water mains and pipes were disconnected, and the prevention of the system of fire was thereby rendered impossible.[2]

[19] *Louisiana.*—Geisek v. Crescent Mutual Ins. Co. 19 La. Ann. 297.

*Maine.*—White v. Republic Fire Ins. Co. 57 Me. 91, 2 Am. Rep. 22, per Dickenson, J.; Witherell v. Maine Ins. Co. 49 Me. 200.

*Massachusetts.*—New York & Boston Despatch & Express Co. v. Traders' Ins. Co. 132 Mass. 377, 381, 42 Am. Rep. 440.

*North Carolina.*—Whitehurst v. Fayetteville Ins. Co. 6 Jones L. 51 (N. C.) 352.

*Pennsylvania.*—Independent Mutual Ins. Co. v. Agnew, 34 Pa. St. 96, 7 P. L. J. 113.

*England.*—Thompson v. Montreal Ins. Co. 6 U. C. Q. B. 319.

[20] City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258, per Bronson, J.

[1] White v. Republic Ins. Co. 57 Me. 91, 2 Am. Rep. 22, per Dickenson, J., exertions to protect property from fire, see §§ 2811–2813 herein.

[2] McEvoy v. Security Fire Ins. Co. 110 Md. 275, 22 L.R.A.(N.S) 964, 132 Am. St. Rep. 428, 73 Atl. 157, 38 Ins. L. J. 895 (see this case under § 2582g herein). See also Pacific Union Club v. Commercial Assur. Co. 12 Cal. App. 503, 107 Pac. 728, 39 Ins. L. J. 729, wherein the court *cites* and *considers* Commercial Union Assur. Co. v. Pacific Union Club, 169 Fed. 776, 95 C. C. A. 242 (between same parties); New York Express Co. v. Traders Ins. Co. 132 Mass. 377, 42 Am. Rep. 440 (where companies were held liable for fire losses for breach of their contract to have water available to extinguish fires. The vessel in which goods were lost met with a collision and was sunk, but the fire disabled the engines so that the pumps could not be operated). See notes

§ 2825. **Wind: tornado: hurricane.**—Insurance may be effected against the effect of wind and tornado.[3] If a building is weakened by the effect of fire, and the walls fall by reason of a gale of wind seven days after the fire, the insurers are not liable.[4] A high wind may be a "hurricane."[5] A severe storm may be shown to be a "tornado" by proof of its effects upon property in the vicinity,[6] and a loss by tornado may be covered by an insurance against lightning where there are electrical disturbances in the tornado presenting the usual characteristics of lightning.[7]

But a provision contained in a "lightning clause," attached as a rider to a fire policy, that the policy shall not cover loss or damage by cyclone, tornado, or wind storm, is limited to the rider, and does not apply to or vary the contract as contained in the policy.[8] And a policy against loss or damage by wind storms, cyclones, or tornadoes does not cover damage by hail, though accompanied by damage caused by wind, under a provision of the policy denying liability for damage "from hail or lightning, directly or indirectly, or by the blowing down of chimneys, loose clapboards, weather vanes, and shingles, unless other damage occur," since the words "unless other damage occur" are restricted to the last member of the sentence referring to damage by wind, and do not affect the clause as to damage from hail or lightning.[9]

Where a river overflowed and a high wind increasing in violence drove the water against certain buildings covered by the policy whereby their foundations became loosened and they were overthrown, but probably neither the overflow nor the high wind alone

21 L.R.A.(N.S.) 103; 132 Am. St. Rep. 442; 17 Am. & Eng. Ann. Cas. 1097.

As to excepted risks and losses: earthquake; proximate cause, see §§ 2582f, 2582g, 2586, 2833a herein.

[3] Sexton v. Hawkeye Ins. Co. 69 Iowa, 99, 28 N. W. 462; Poggensea v. Mutual Fire, Lightning & Tornado Ins. Co. 69 Iowa, 157, 58 Am. Rep. 215, 28 N. W. 485.

As to proximate and remote cause: loss by cyclones, windstorms and tornadoes, see § 2833, herein. (Near end of same.)

[4] Gaskarth v. Law Union Ins. Co. 6 Ins. L. J. 159, Civil Ct. Manchester (Eng.)

[5] Pelican Ins. Co. v. Troy Co-operative Assoc. 77 Tex. 225, 13 S. W. 980.

[6] Poggensea v. Mutual Fire, Lightning & Tornado Ins. Co. 69 Iowa, 157, 58 Am. Rep. 215, 28 N. W. 485.

For definitions of "tornado," "hurricane," "windstorm," "blizzard," see Jordan v. Iowa Mutual Tornado Ins. Co. 151 Iowa, 73, Ann. Cas. 1913A, 266, 130 N. W. 177, 40 Ins. L. J. 1065.

[7] Spensley v. Lancashire Ins. Co. 54 Wis. 433, 11 N. W. 894 (two judges dissenting).

[8] Russell v. German Fire Ins. Co. 100 Minn. 528, 10 L.R.A.(N.S.) 326, 111 N. W. 400, 36 Ins. L. J. 481. See § 2790 herein.

[9] Holmes v. Phenix Ins. Co. 98 Fed. 240, 39 C. C. A. 45, 47 L.R.A. 308. See Hartford Fire Ins. Co. v. Nelson, 64 Kan. 115, 67 Pac. 440.

would have caused the damage, it was held that recovery was precluded under an insurance against all direct loss or damage by tornado, wind storm or cyclone, but loss or damage occasioned directly or indirectly by high water or overflow was an excepted risk, for, if there had been no overflow the water would not have been blown against the building, and the flood was therefore held to be at least the indirect if not the direct cause of the loss.[10] So the fact that water is driven by the wind and destroys a dwelling house on the seashore nevertheless makes the loss one occasioned by water within an exception of liability for loss so caused.[11] But damage to insured property from a "sudden rise of the water" or a flood, is damage by accident within the meaning of an insurance policy indemnifying against loss from any accidental damage "excepting only damage by fire or lightning." [12]

§ 2825a. **Workmen's compensation: insurance risk.**—Where a policy agreed to assume and perform each and every obligation imposed by the Workmen's Compensation Act of Michigan, which was required of it to do and perform on account of personal injuries including death resulting therefrom, sustained by any employee or employees of assured while the policy was in force and arising out of and in the course of employment and in connection with and in the operation of the specified business, the liability is limited to cases of employment in connection with and in the operation of assured's business and does not extend to all injuries, etc., in any employment, and therefore does not include work whether done gratuitously or for a consideration which has no connection with the business specified in the policy, especially so where the character of the employment is particularly described therein.[13] In another case the proceeding was under the workmen's compensation act of Massachusetts and the question was whether a workman received his injury in the course of and arising out of his employment, and whether the conducting of a retail store was under said enactment. The policy was issued under said statute to a shoe manufacturer and the employee had been engaged in a position equivalent to a manager of one of insured's retail stores. At the time of the injury, said

[10] National Fire Ins. Co. v. Crutchfield, 160 Ky. 802, L.R.A.1915B, 1094, 170 S. W. 1087.

[11] Newark Trust Co. v. Agricultural Ins. Co. 237 Fed. 788, 150 C. C. A. 542.

[12] Hey v. Guarantor's Liability Indemnity Co. 181 Pa. St. 220, 59 Am. St. Rep. 644, 37 Atl. 402.

[13] Bayer v. Bayer, 191 Mich. 423, 158 N. W. 109. Acts No. 10. Public Acts, Mich. Extra Session 1912.

As to injury to employee causing insanity and consequent death by suicide; Workmen's Compensation, see note 17, p. 4466 herein.

As to Workmen's Compensation: insurance feature of Connecticut statute, see Wright v. Barnes, 1 Conn. Compensation Dec. 248.

employee was working overtime and was injured by falling down stairs in the evening while answering a telephone call from his daughter, and the evidence warranted the conclusion that it was his duty to answer telephone calls even outside of the usual business hours, and it did not appear that the time spent in this particular instance was longer than necessary in answering a call, accordingly the injury was held to be one sustained or received in the course of and arising out of his employment. It was also declared that the fact that the terms of the policy applied only to the factory at a certain place, was not of much importance so far as the employee was concerned; that the statute fixed the scope of the insurance so far as the rights of the employees were concerned; that if the employer became a "subscriber" under said enactment then the rights of the employee could not be narrowed down by contract between the employer and insurer. The court, per Rugg, C. J., said: "It may be that the terms of the contract of insurance might be so narrow as not to bring the employee within the act. But the present is not such a case. The obligation of the policy is 'to pay the compensation . . . provided for by the Workmen's Compensation Act . . . to any person . . . to whom such compensation . . . shall become due.' The insurer, therefore, has assumed an obligation as broad as the Act, and the employer was a subscriber. The proceeding does not relate to the rights and duties between the insurer and the employer." [13a]

In an English case a small farmer employing only one laborer, his son, took out a policy under the Workmen's Compensation Act of 1906 of England, and in the proposal he agreed to render at the end of each period of insurance a statement in the form required by the society of all wages actually paid and to pay premium on the wages in excess of the amount estimated in the contract; and there was also a provision requiring a wages book to be kept showing the name of every employee and the amount of wages, salary, and other earnings paid to him such wages book to be at all times subject to inspection by said society. The laborer met with an accident which would have entitled him to compensation under

[13a] Cox's Case, 225 Mass. 220, 114 N. E. 28 (the contract of insurance was to pay the compensation and to furnish the medical and hospital services and medicines provided for by the workmen's compensation act, viz.: Part II. of chapter 751 of the Massachusetts Acts & Resolutions of 1911, and amendments and additions thereto to any person or persons to whom such compensation or services shall become due and to indemnify the insured under provisions of section 22 of Part IV. of said Act, for or on account of personal injuries including death resulting at any time therefrom received or suffered by any employee or employees of the insured, etc.).

the above-stated statute the condition as to keeping a wages book was not complied with, but it was held that a recovery was not precluded thereby as the condition under the rule of construction in favor of the policyholder would be deemed to refer to the statement in the proposal which assured agreed to render at the end of each period of insurance and ought not to be regarded as a condition precedent and it was further declared that it would be unreasonable to hold that the society could escape all liability by reason of failure to comply with said condition.[14]

[14] Bradley & Essex & Suffolk Accident Indemnity Soc. Ltd. In re, 81 L. J. K. B. 523, [1912] 1 K. B. 415, 105 L. T. 919, 28 T. L. R. 175, [1912] W. C. Rep. 6; Fletcher Moulton, L. J. dissenting; Farwell, L. J., concurring said in conclusion: "The condition if it be one is to keep 'a proper wages book;' that must mean in my opinion, 'proper under the circumstances of the case, and for the business or trade of the insurer.' Take the case of a lodging house keeper with one maid. I think it would be absurd to lay it down as a matter of law, without evidence, that it is proper or usual for such a woman to keep a wages book; and I think the same observation applies to a small farmer (even though he also adds a carrier's business to his farming) who employs his son as his only servant," and he also assents: "I think it the duty of all insuring companies to state in clear and plain terms as conditions precedent, those provisions only which are such,—not to wrap them up in a number of clauses which are not conditions precedent at all; and I think, further, that it is their duty to call attention to such conditions in the forms of proposal, so as to make sure that the insurers understand their liabilities" the conditions were set out in small print in the policy.

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